



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 52 OF 2017

IN THE MATTER OF: THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA

AND

IN THE MATTER OF: A REFERENCE AS UNDER REGULATION 11 (2)

OF THE ADVOCATES RENUMERATION ORDER 2009 FROM THE PARTY & PARTY BILL OF COSTS DATED 25TH MAY 2016

BETWEEN

SAMUEL VARGHESE.....APPLICANT/OBJECTOR

VERSUS

AMELI INYANGU & PARTNERS ADVOCATES.....RESPONDENT

RULING

The Application

1. By application the Chamber Summons herein dated 20th February, 2018 the Applicant prays for orders as follows:

- a) THAT this Honourable Court do review by setting aside the ruling on the taxation of the Respondent's costs delivered on 20th July, 2017 by the Taxing Master together with the Certificate of Costs dated 25th August, 2017 and be pleased to award such amounts as it deems just, reasonable and sustainable as per the Applicant's/Objector's submissions dated 27th November, 2013 and or;
- b) THAT in the alternative this Honourable Court remit the Respondent's bill of costs dated 21st June, 2013 for taxation before another taxing master.

2. The application is premised on grounds set out therein and is supported by affidavit of Samuel Varghese sworn on 20th February, 2018. The Applicant's case is that the Respondent filed her bill of costs dated 21st June, 2013 which was heard and taxed by the Taxing Master; that the Ruling on taxation was delivered on 20th July, 2017; that being dissatisfied with the Ruling of the Taxing Officer, the Applicant filed Notice of Objection on 3rd August, 2017 and sought reasons for the taxing officer's decision.; that the Applicant sought leave to file this objection out of time in Msa JR No. 52 of 2017 which leave was granted by the Hon. Justice Ogola; that the learned Taxing Master erred in so far as her decision of taxing the instruction fees at Kshs. 2,000,000/= far above the amount provided in the applicable Advocate Remuneration Order 2009; that the learned Taxing Officer erred in her Ruling in taxing the Bill of Costs only as against the Applicant when she knew very well that there were two plaintiffs who had instructed the Respondent in HCCC No. 85 of 2012 that is Donal International Trading Limited and the Applicant; that the learned Taxing Master erred in so far as her decision of taxing the instruction fees at Kshs. 2,000,000/= when the nature of the matter was not complex; that the learned Taxing Master erred in so far as the decision fails to show whether submissions dated 27th November, 2013 were considered in relation to the other taxed items; that the learned Taxing Master erred in so far as the Bill of Costs was taxed in its entirety; that it is in the interest of justice that the Bill of Costs dated 21st June, 2013 as taxed be set aside, reviewed or varied; that the Respondents has not deducted the fees of Kshs. 900,000/= deposit paid in proceedings; that the amounts involved herein are colossal and there is need for proper conscience application of judicial mind to it; that this Reference is made in utmost good faith.

The Response

3. The application is opposed vide a Replying Affidavit sworn by Fred Adhoch on 19th March, 2018. The Respondent's case is that in 2012 he received instructions from the Applicant/Objector to provide legal services in **Mombasa HCCC 95 of 2012, Samuel Vargheese and another vs. Eco Bank and Another**; that the Respondent failed to pay the advocates fee for the professional legal services rendered despite several calls and reminders, to file he then filed an Advocate-Client Bill of Cost dated 21/06/2013 before the Taxing Officer; that the Applicant/Objector appointed the firm of E. W. Njeru & Company Advocates who entered appearance via a notice of appointment dated 4th September, 2016 after serving the Bill of Cost to the Applicant herein on 30th August, 2013 but were later replaced by Ms. Matete & Company Advocates by consent order dated 3rd August, 2017; that the parties agreed to file submissions and after considering the submissions, the Taxing Officer delivered a Ruling dated 20th July, 2017 in which the Bill of Cost was taxed at 3,600,000/= taxing off a sum of Kshs. 4,868,733/= and issued a Certificate of Taxation dated 25th August, 2017. Thereafter, the Respondent filed an application dated 6th September, 2017 seeking Judgment against the Applicant for purposes of execution. On 3rd August, 2017, the Applicant herein filed an objection disputing items No. 1 and 66 and alleged that their submissions were not considered by Taxing Master in arriving at the Taxing Master's decision. In response to the Objector's application dated 20th February, 2017 and the Affidavit of Samuel Vargheese sworn on the same date, the Respondent states that the application lacks merit as it does not disclose any wrong doing as against the Taxing Officer and is only aimed at prolonging an otherwise simple matter. The same is an abuse of court process frivolous and rancorous and an afterthought.

Submissions

4. Parties made oral submissions in court which I have carefully considered. The issues I raise for determination are as follows:

- (i) Whether this court can interfere with the decision of the Tax Master delivered on 20th July, 2018;
- (ii) Whether the fees can be taxed against only one party where parties are sued jointly and severally;
- (iii) Whether there was part payment of fees of Kshs. 900,000/= or 200,000/=

5. On the issue as to whether this court can interfere with the decision of the Tax Master, the law is clear that where a Tax Master explains how she or he exercised her/his discretion in determining the amount due, the High Court should not interfere unless the Tax Master erred in law or in principle. The Applicant alleged that the Tax Master had ignored his submissions totally and this caused the Tax Master to reach a wrong decision. The Ruling of the Tax Master on the Bill of Cost dated 25th May, 2016 was delivered on 20th July, 2017. At paragraph 2 of the said Ruling the Tax Master stated that:

“Both parties put in written submissions which I shall consider.”

6. It is not shown how the Tax Master failed to consider submissions, but the Ruling of the Tax Master is reasoned and not capricious. This means that the Tax Master must have considered the party's submissions.

7. The Applicant also submitted that the Tax Master had no basis for putting the instruction fee to Kshs. 2,000,000/=. However, the Tax Master in that regard had this to say:

“Item 1

The value of the subject matter is Kshs. 74,000,000/=. Therefore ...the tax fee is Kshs. 1,041,108.50/=. Save for interlocutory applications the matter was not complex... Save for voluminous documentation there is no basis for increasing the instruction fee as charged. I therefore considering the voluminous documentation increase the basic fee to Kshs. 2,000,000/=. I tax off 4,250,000/=.”

8. It is clear that the Tax Master provided justification for arriving at instruction fees of Kshs. 2,000,000/=. It is not enough that this court would probably reach a different figure. The test is whether the sum reached by the Tax Master is not excessive enough to amount to either an error of law or principle. It cannot be an error of law since the Tax master correctly established that the amount due as instruction fees was Kshs. 1,041,108.50/= and then justified its increase to Kshs. 2,000,000/=. It also cannot be an error of principle since the Tax Master applied the common principle in taxation. Since the instruction fee was the main substratum of this reference, it is the finding of this court that the finding of the Tax Master was correct and cannot be upset by this court.

9. The second issue is whether the fees can be taxed against only one of the joint and several parties. The law is clear in this regard that where parties sue or are sued jointly a Bill of Cost can be taxed against either of them or all of them. This issue needs no further elaboration. It is the finding hereof that the taxation of the Bill of Costs against the Applicant only was in order.

10. The last issue is whether the Applicant had paid a deposit of Kshs. 900,000/= as alleged by the Applicant, or only Kshs. 200,000/= as admitted by Mr. Adhoch for the Respondent in his submissions. The general rule on proof of claims is that whoever alleges the existence of a certain set of facts must prove the same. Merely asserting the existence of such facts is not enough. The only evidence before the court is a payslip from the Respondent advocate admitting receipt of Kshs. 200,000/= on 2nd November, 2012. This amount, however, was not accounted for in the taxed Bill of Costs. It is the finding of this court that this amount was paid and should be deducted from the final fee due.

Disposition

11. From the foregoing paragraphs of this Ruling it is the finding of this court that the application by way of a Reference before the court lacks merit and is accordingly dismissed.

12. Further orders are made as follows:

(a) The Certificate of Costs herein shall be rectified to accommodate the reduction of Kshs. 200,000/= which was paid as deposit to the Respondent.

(b) Parties shall bear own costs of this application.

Orders accordingly

Dated, Signed and Delivered in Mombasa this 20th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Non Appearance of Parties