



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISC CIVIL APPLICATION NO 12 OF 2014

AMUGA & CO ADVOCATES.....ADVOCATE

VERSUS

JOYCE NZISA.....1ST CLIENT

MONICA NDUNGE MWONGELA.....2ND CLIENT

CONNIE MBITHE MUIA.....3RD CLIENT

MARY MUSUKI MUDACHI.....4TH CLIENT

JOSEPH LOMBA MWONGELA.....5TH CLIENT

RULING

1. The Advocates' Notice of Motion application dated 5th August 2014 and filed on 11th September 2014 was brought under the aegis of Section 51(2) of the Advocates Act, Cap 16 of the Laws of Kenya. It sought the following orders:-
 1. **THAT judgment be entered in favour of the Applicant against the Respondents jointly and severally for the sum of Kenya Shillings Eleven Million Eight Hundred and Ninety Four Thousand Nine Hundred and Twenty Six (Kshs 11,894,926/=) being the certified costs due to the Applicant as against the Respondents.**
 2. **THAT the Respondents do pay to the applicant (sic) interest on the certified costs at 14% per annum from 1st August 2014 until payment in full.**
 3. **THAT the Respondents do pay to the Applicant the costs of this application.**
 4. **THAT any other relief that this Honourable Court would deem fit to grant.**

2. On 17th October 2014, the Clients filed a Chamber Summons application of even date. The same was filed pursuant to the provisions of Rule 11 of the Advocates Remuneration Order and the inherent powers of the court. It sought the following orders **THAT**:-

1. **The decision of the taxing officer on the bill of costs dated 14th January 2014 and resultant certificate of taxation be set aside.**
2. **In the alternative the decision of the taxing officer on items 1 and 62, (sic) of the Advocate/Client's Bill of Costs be set aside.**
3. **The Bill of Costs be referred back for fresh taxation under a different taxing officer with appropriate directions.**
4. **The costs of this application be provided for.**

3. On 17th October 2014, the Clients also filed a Notice of Motion of the same date. The same was brought under the provisions of Sections (sic) 3A of the Civil Procedure Act and Order 40 Rules 1 and 2, Order 52 of the Civil Procedure Code (sic) Cap 21 Laws of Kenya and all other enabling provisions of the law. They had sought a stay of proceedings on the Advocate/ Respondents' Notice of Motion application dated 5th August 2014 and filed on 11th September 2014. The same was now spent.
4. When parties appeared before the court on 23rd October 2014, it was agreed that the Clients' Chambers Summons application dated and filed on 17th October 2014 would be deemed to be a response to the Advocate's Notice of Motion application that was dated 5th August 2014 and filed on 11th September 2014.

THE ADVOCATES' CASE

5. The application was premised on the grounds on the face of the application and further supported by the Affidavit of Paul Amuga that was sworn on 5th August 2014. On 1st December 2014, he also filed a Replying Affidavit in response to the Client's Chamber Summons application dated 17th October 2014. The same was sworn on 27th November 2014. Their Notice of Preliminary Objection to the Clients said application was also dated 27th November 2014 and filed on 1st December 2014. The Advocates' written submissions were also dated 27th November 2014 and filed on 1st December 2014.
6. The Advocates' case was that their costs had been taxed at Kshs 11,894,926/= following their instructions to act for the Respondents in **Succession Cause No 162 of 1979 In the matter of the Estate of George Zakayo Mwangela**. A Certificate of Taxation was issued to that effect.
7. They said that as the Clients' had refused, failed and/or neglected to settle the said sum, it was only fair that judgment be entered in their favour against the Clients jointly and severally with interest at fourteen (14%) per cent with effect from 1st August 2014 until payment in full.
8. It was their averment that the Clients' Chamber Summons application dated 17th October 2014 was filed after of the expiry of fourteen (14) days after taxation and delivery of the ruling giving reasons of the Taxing Master which was available to all parties on 30th July 2014 and ought therefore to be dismissed.

THE CLIENTS' CASE

9. The Supporting Affidavit by Joyce Nzisa that was sworn on 17th October 2014 on her behalf and that of the other Respondents and filed on the same date was deemed to be a response to the Advocates' aforesaid application. Mary Musuki Mudachi, the 4th Client herein also swore a Supplementary Affidavit on 25th November 2014. The same was filed on the same date. The Clients' written submissions were dated and filed on 25th November 2014 and others were filed on 1st December 2014.
10. They opposed the assessment of Kshs 11,894,926/= that was made by the Taxing Master on 30th July 2014 on the ground that the value of L.R. No 6845/12 Embakasi (hereinafter referred to as "the subject property") was valued at Kshs 460,000,000/= whereas the same could not be ascertained as there was no credible valuation of the same. They averred that the said subject property had been invaded by squatters who had hived certain portions therefrom.
11. It was their contention that the Advocates' Bill of Costs as taxed by Taxing Master was manifestly

- excessive and unjust and that Advocates should only be remunerated for work done and was not intended to enrich them.
- 12.They averred that the said Taxing Master exercised her discretion improperly when she assessed the instruction fees at Kshs 8,000,000/= for the reason that they had instructed the Advocates to prepare Summons for Revocation of a Grant only and not the administration of the entire estate. They stated that consequently, the instructions fees ought to have been limited to the instructions that had been given to the said Advocates.
- 13.They stated that they received the certified reasons of the Ruling from the Taxing Master on 6th October 2014 and consequently their application had been filed within the stipulated fourteen (14) days period that was required by the law. They therefore urged the court to allow their application as prayed.

LEGAL ANALYSIS

- 14.From the submissions by the parties, the issues that appeared to be before the court for determination were:-
- a. **whether or not the Clients' Chamber Summons application dated 17th October 2014 was filed within the fourteen (14) days' period that was stipulated by the law; and**
 - b. **whether or not the Taxing Master had erred in principle and in law by improperly exercising her discretion when she taxed the Advocates' Bill of Costs at Kshs 11,894,926/=.**
- 15.As the first issue went into the root of the competence of the Clients' application, the court deemed it prudent to dispose of the same at the first instance.
- 16.The Advocates argued that the typed Taxing Master's decision was delivered on 30th July 2014 and the Clients were represented on the said date. They pointed out that it was the same Ruling that was annexed to the Clients' Chamber Summons application dated 17th October 2014 which meant that the Clients' said Reference ought to have been filed latest on 14th August 2014.
- 17.They therefore rejected the Clients' argument that they were only furnished with the reasons on 6th October 2014 and argued that the Clients' Reference was incompetent because it was filed on 17th October 2014 which was outside the fourteen (14) days period that was stipulated under Paragraph 11(1) and (2) of the Advocates Remuneration Order.
- 18.It was their submission that the Clients were required to file the said Reference within fourteen (14) days from the date the decision was made available. They contended that in any event, the Clients were also made aware of the Taxing Master's Ruling when they filed their Notice of Motion application dated 5th August 2014.
- 19.The Advocates referred the court to several cases where the common thread was that if the reasons were contained in a ruling, there was no need to seek the same just because Paragraph 11 (2) of the Advocates Remuneration Order provided for the same- **See Evans Thiga Gaturu vs Kenya Commercial Bank Limited [2011] eKLR** amongst others that had been cited in their written submissions. Unfortunately, the Clients did not address this issue in their written submissions despite the same having been a very critical issue regarding the competence of their application.
- 20.Paragraph 11 of the Advocates Remuneration Order provides as follows:-
1. **Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items to which he objects.**
 2. **The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of those reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**
- 21.The Clients filed a Notice of Objection to the decision on taxation and request for reasons on 12th August 2014. It was dated the same date. Save for Item Nos (65) and (66) which were Court fees on Summons for Revocation/Application for Grant and Commissioning of Affidavits, the Respondents objected to all items in the Advocates' Bill of Costs dated 14th January 2014 and

filed on 16th January 2014.

22. Notably, Mr Kago attended court at the time of the reading and delivery of the said Ruling by the Taxing Master. He must have therefore been aware of what the Taxing Master's reasons were. It was therefore not clear which other reasoned Ruling the Clients were expecting because they annexed the same Taxing Master's Ruling of 30th July 2014 as the basis of their Reference.
23. The court did not see any other reasons that would have been advanced by the said Taxing Master as she was categorical that the bill had been drawn to scale. In her Ruling of 30th July 2014, the Taxing Master had stated as follows:-

“I have carefully considered the bill and I have compared the same to Schedule X of the Advocates Remuneration Order. The bill is drawn to scale.”

24. Bearing in mind that the Notice of Objection to decision on taxation had sought reasons and the Clients annexed the same Ruling which had no additional reasons, the court was unable to comprehend the rationale of having awaited a certified copy of the Ruling. They did not at any one time contend that the said reasons were not sufficient for purposes of filing their Reference.
25. The purpose of obtaining reasons for a decision by a taxing master is merely intended to give the objector an indication as to whether or not the taxing master had erred in his or her assessment of costs with a view to filing a reference. It was not the intention that an objector could request for reasons for the sake of it and just because the same was provided for in Paragraph 11 of the Advocates Remuneration Order.
26. The court therefore associates itself with the holding in the case of Evans Gaturu Thiga vs Kenya Commercial Bank Limited (Supra) in which it was held as follows:-

“...Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent...”

27. The same position was held in the case of Ahmednasir Abdikadir & Co Advocates vs National Bank of Kenya Limited (2)[2006] EA 5 in which it was held:-

“... where the reason for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek further reasons simply because the unfortunate wording of sub rule (2) of rule 11 of the Advocates Remuneration Order demands so...”

28. As this very court held in the case of Twiga Motor Limited vs Hon Dalmas Otieno Anyango [2015] eKLR:-

“The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.”

29. It was therefore the finding and holding of this court that since the reasons were contained in the Taxing Master's Ruling, she was not required to furnish reasons unless, of course, there was need for her to have justified her decision further, and which was not the case herein. Indeed, providing the same ruling was merely a formality to comply with the provisions of Paragraph 11 (2) of the Advocates Remuneration Order.
30. The Clients therefore risked running out of time to file a reference by being adamant that reasons had to be provided. They had in fact filed their Reference herein out of the stipulated period of fourteen (14) days provided for in Paragraph 11(1) of the Advocates Remuneration Order. In this regard, the court wholly concurred with the Advocates' submissions in this regard. On this ground only, the Advocates' Notice of Motion would automatically succeed as it stood unopposed.
31. However, assuming the Clients' had filed their Reference within the prescribed time, the next issue would be to consider whether or not the said Taxing Master had erred in principle and in law in the manner she assessed the Advocates' costs.
32. The Clients argued that the Taxing Master erred in principle by applying the wrong Schedule or Paragraph of the Advocates Remuneration Order for the reason that the Advocates' instructions

- were limited to applying for Summons of Revocation of Grant and Rectification issued to the Public Trustee on 15th February 1982 and confirmed on 4th April 1997. They contended that save to mention that the Advocates were cross-examined, the Taxing Master did not consider that the Advocates' Valuation Report was not based on any concrete evidence as the title deed for the subject property did not exist.
33. The Clients referred the court to the case of **Jane Gathoni Kanyotu vs Abuodha & Omino Advocates [2013] eKLR** where it was held that the Advocates' instructions therein were supposed to be assessed under Paragraph 1 A (f) and Paragraph B (a). In the other case of **Kipkorir, Titoo & Kiara Advocates vs Jane Nduta Kinyua [2012] eKLR** the court differentiated between the instruction fees that were payable for applying for grant of probate and lodging an application to a grant of citation.
 34. The Clients took exception to the fact that the Taxing Master did not give any reasons that led her to agree with the Advocates that the instruction fees were chargeable under Paragraph 1 (a)(d) and (f) of Schedule X of the Advocates Remuneration Order.
 35. On their part, the Advocates submitted that the Clients had not demonstrated how the Taxing Master erred in principle as she had considered the value of the assets that had been given in Valuation Reports that were done under the Clients' instructions and the valuation was never challenged by the Clients. It was the Advocates' contention that they were even cross-examined. And as the subject property was awarded to the Clients, it was their argument that the Clients could not now aver that the property did not belong to the deceased's estate.
 36. The court took the liberty of perusing the proceedings of the cross-examination and submissions before the Taxing Master with a view to establishing whether or not the said Taxing Master had considered all the issues that had been raised before her for determination.
 37. Notably, the Clients relied on the same cases herein to support their submissions dated and filed on 10th February 2014 before the Taxing Master. There was no mention of valuation reports. However, the Advocates alluded to the said valuation and stated that the same had not been objected to. Although the said Paul Amuga was cross-examined on 24th March 2014, there did not appear to have been any further submissions that were filed by both the Advocates and the Clients.
 38. Evidently, the Advocates' evidence that was adduced during the cross-examination was not rebutted by the Clients. In fact, the Advocates who were acting for the Advocates herein did not re-examine him. In view of the fact that the Clients did not make any reference to the cross-examination in their written submissions before her, the Taxing Master could not have been faulted for having merely mentioned that the Applicant therein had been cross-examined as she could not make a determination on an issue that was not placed before her. She was therefore under no obligation to analyse evidence which did not appear to have been contested by the Clients.
 39. In their said written submissions dated and filed 10th February 2014, the Clients argued that the Advocates were only entitled to instruction fees in the sum of Kshs 1,394,000/= which had been computed as follows:-

Bill as drawn	Kshs 12,044,926/=
Amount Taxed off	Kshs 10,500,926/=
Less amount paid	<u>Kshs 150,000/=</u>
	<u>Kshs 1,394,000/=</u>

40. The Clients relied on its two (2) cases to support of their case that the Taxing Master award what they termed as **“a reasonable figure”** but not exceeding a sum of Kshs 1,000,000/=. They did not justify why the Advocates were entitled to this fee only.
41. On the other hand, the Advocates argued that it was trite law that the decision of a taxing master could not be interfered with by the court unless it had been shown that the said taxing master had arrived at a wrong assessment of costs payable and that it was not enough to allege that the amount awarded was too large, a position that this court wholly concurred with.
42. In the case of **Kipkorir Tito & Kiara Advocates vs Deposit Protection Fund [2005] 1 KLR**

Kshs 8,000,000/= as basic instruction fees.

46. In this regard, the court was more persuaded by the Advocates' submissions that the Taxing Master proceeded on the correct principles and that she exercised her discretion to award the sum of Kshs 8,000,000/= judiciously.

47. Having said so, once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or a reference has not been successful, no other action would be required save for entry of judgment by the court.

48. Indeed, Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya) provides that:-

“the certificate of costs shall be final as to the amount of costs and that the court may make such order in relation thereto as it thinks fit including in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

49. This court thus has jurisdiction under Section 51(2) of the Advocates Act to make any order that it deems fit. Entry of judgment and award of interest at court rates is within the ambit of what this court can do. However, an advocate would have to convince the court that it is entitled to interest at a rate other than the court rate.

50. Paragraph 7 of the Advocates Remuneration Order provides as follows:-

“ An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

51. It is clear that the said Paragraph 7 deals with interest charged by an advocate of its claim for disbursements and costs which is chargeable from the expiration of one (1) month from the date of his delivery of its bill to its client. This interest is distinguishable from the interest that this court can award. However, an applicant forfeits interest as provided for under Paragraph 7 of the Advocates Remuneration Order if the same was not raised in the Bill of Costs.

52. A perusal of the Advocates' Bill of Costs showed that they did not demand for interest. The Advocates did not also furnish the court with any documentation to show that it had informed that the rate of interest on their Bill of Costs would start accruing at the rate of fourteen (14%) per cent from the date of service of that Bill upon the Clients until payment in full. They would not therefore be entitled to the interest at the rate of fourteen (14%) per cent on the amount in the Certificate of Costs.

53. Accordingly, having considered the pleadings, affidavit evidence, written submissions and case law in support of the respective parties' cases, the court found and held that the Clients did not demonstrate that they were entitled to the prayers they had sought in their Chamber Summons application dated and filed on 17th October 2014.

54. On the other hand, the court was satisfied that the Advocates had established that they were entitled to entry of judgment in the sum of Kshs 11,894,926/=. Indeed, clients ought not to disadvantage their advocates once they have enjoyed the services of an advocate by failing, refusing and/or neglecting to pay advocates' fees.

DISPOSITION

55. Accordingly, the upshot of this court's ruling is as follows:-

- a. **the Clients' Chamber Summons application dated and filed on 17th October 2014 was not merited and the same is hereby dismissed with costs to the Advocates.**
- b. **The Advocates' Notice of Motion application dated 5th August 2014 and filed on 11th September 2014 was merited and the same is hereby allowed in terms of prayer Nos (1) and (3) therein.**
- c. **Interest shall accrue on the sum of Kshs 11,894,926/= at court rates from the date of**

this ruling until payment in full.

56.It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of February 2015

J. KAMAU

JUDGE