



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
MISC CIVIL CASE NO 52 OF 2012

M/S LUBULELIAH & ASSOCIATES ADVOCATES..... APPLICANT

VERSUS

N.K BROTHERS LIMITED..... RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Chamber Summons application dated 28th January 2013 and filed on 4th February 2013 was brought under the provisions of Rule 11(2) of the Advocates (Remuneration) order. It sought the following orders:-
 1. **The Honourable Court be pleased to set aside the Taxing Officer's decision delivered on 26th October, 2012 to the extent that it related to the reasoning and determination pertaining to item No. 1 of the Advocate/Client Bill of Costs dated 30th January 2012.**
 2. **This Honourable Court be pleased to re-assess the fees due to items No. 1 of the Advocates in respect of the said Bill of costs and make a finding on the same.**
 3. **In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit item No. 1 of the Advocate/Client Bill of Costs dated 30th January 2012 for review and reconsideration with direction on the taxation.**
 4. **The costs of this application be provided for.**
2. The grounds on which the said application were based were as follows:-
 - a. **The Taxing Master applied two different principles in determining instruction fees on the claim and counterclaim leading to an inconsistent and absurd decision.**
 - b. **The Taxing Master erred in law by failing to award the correct amount on item No. 1 of the bill of costs while the same was based on a clear and pleaded liquidated claim.**
 - c. **The Taxing Master misdirected himself and acted contrary to established principles of taxation of Advocate/Client Bill of costs.**

AFFIDAVIT EVIDENCE

3. On 28th January 2013, Wilfred Akhonya Mutubwa a partner in the firm of M/S Lubullelah &

- Associates swore an affidavit in support of the said application.
4. He deponed that the Applicant filed a Bill of Costs dated 30th January 2012 whereupon the taxing master delivered the ruling on 26th October 2012 and that, on 27th November 2012, the taxing master delivered another ruling in which he corrected arithmetic errors that were contained in the initial ruling.
 5. It was the Applicant's contention that the taxing master erred in decision and hence fell into error in principle by:-
 - i. **applying two contrasting principles in the assessment of instruction fees on the claim and counterclaim when the subject matter was liquidated and manifestly clear from the pleadings;**
 - ii. **Failing to apply an objective test and by proceeding to compute fees on the basis of the success rate of the parties in the suit hence resulting in sanctioning of champerty, a practice expressly outlawed by Section 46(c) of the Advocates Act and breaching paragraph 3 of the Advocates Remuneration Order; and**
 - iii. **Failing to properly compute the fees due to the Advocates under the Remuneration Order with respect to item No. 1 of the Advocates Bill of costs.**
 6. In a Replying Affidavit sworn on its behalf by Pravin Mavji Khoda on 10th April 2013, the Respondent averred that the Applicant's said application was untenable in law as the same was filed in court on 4th February 2013, which was out of time, and without leave of the court as required under the provision of Rule 11 of the Advocates (Remuneration) Order.
 7. The Respondent stated that it did not attend the taxation of the Bill of Costs as Mr. Lubullelah, a senior partner in the Applicant law firm had given them an assurance that the said Bill would be withdrawn and the matter marked as settled.
 8. The Respondent also averred that the Bill was fully settled before the hearing before the taxing master and that in the circumstances, the Applicant was stopped by conduct and record from proceeding to tax the Bill.

LEGAL SUBMISSIONS BY THE APPLICANT

9. In response thereto, Wilson Akhonya Mutubwa swore a Supplementary Affidavit on 19th April 2013 in which he pointed out that there had been no fee agreement between the Applicant and the Respondent and that all the Applicant ever received were deposits which were duly credited by the Taxing Master.
10. In its written submissions dated 18th April 2013 and filed on 19th April 2013, the Applicant submitted that the taxing master erred in principle by failing to apply his mind to the formula provided under Schedule VI of Advocates (Remuneration) Order or giving due consideration to the relevant circumstances set out in proviso to part 1 of the said Schedule.
11. It relied on the case of **CA 220 of 2004 Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board** (unreported) where the Court of Appeal held that it would be an error of principle if a taxing master failed to apply the formula for assessing instruction fees or costs specified in Schedule VI.
12. It was the Applicant's submission that Rule 10(2) of the Arbitration Rules, 1997 provided that the applicable scale of fees in Arbitration was to be calculated in accordance with the scale fees applicable to the High Court and that the Taxing Master was under a duty to apply the formula under Schedule VI of the Advocates (Remuneration) Order.
13. It submitted that what constitutes the subject matter of a suit was defined by Muriithi J in **HCCC NO 529 of 2002 Rachel Njoki Wainaina vs NSSF**. The complete citation was not given and neither was a copy of the said case furnished as a result of which the court did not analyse the said case.
14. The Applicant argued that the primary reference of taxation was the pleadings and that the money claims were clearly set out in the Claim and Counter-Claim.
15. The argument was that the Claim and Counter-claim were largely in liquidated or monetary terms

and that it was upon these two (2) elements that the instruction fees ought to have been based.

16. It also relied on the case of **D. Njogu & Co Advocates vs Panafcom Engineering Ltd (2006) eKLR** where Azangalala J quoted the Court of Appeal decision **of Joreth vs Kigano & Another EA 92** where it was stated as follows:-

“By the first ground thereof the Respondent states that instructions fees is an independent and static item. (sic) is charged once only and is not affected or determined by the stage of the suit has reached. In principle that is correct. (Underline original).

17. The Applicant distinguished the case of **D. N. Njogu & Co Advocates vs Panafcom Engineering Ltd** (Supra) where the Advocates had only filed a plaint unlike the present case where it had concluded a complex arbitration matter a fact, which it said, was acknowledged by the taxing master. It buttressed the fact that Azangalala J had correctly observed that instruction fees was a static item, chargeable only once, and that where a Plaintiff withdrew the suit after the Defendants advocates had instructions to defend the suit, such an advocate would be entitled to claim minimum instruction fees but he could not claim in respect of work he had not done.
18. It was the Applicants submission that the taxing master’s decision was inconsistent as he awarded full instruction fees on the counter claim and only a portion on the claim. It argued that to use the success on the one hand and the pleaded sum on the other was most inconsistent and unconscionable as it was champertous.
19. The Applicant submitted in detail that there was no fee agreement within the meaning of Section 45 of the Advocates Act Cap 16(Laws of Kenya).
20. On the issue of filing the present application, the Applicant was categorical that it filed the same within the stipulated period. It explained that the taxing master supplied reasons for the taxation on 8th November 2012 and that a second ruling with amended errors in the ruling was subsequently supplied on 21st January 2013 and that the reference was thus filed within the prescribed period of fourteen (14) days.
21. It argued that the obligation upon a party who was dissatisfied with a decision was to file the objection within fourteen (14) days of taxation and not the reference and which reference had to be filed upon receipt of reasons. It stated that the period within which to file a reference after receiving reasons was not prescribed but that the present reference was nonetheless filed within fourteen (14) days of receipt of the 2nd ruling amending the reason.
22. Its case was that the Respondent’s Replying Affidavit showed no opposition to the substance of its application and that in any event, Article 159 of the Constitution of Kenya, 2010 enjoined the court to do justice without undue regard to procedural technicalities. It prayed that the application be allowed as prayed.

LEGAL SUBMISSIONS BY THE RESPONDENT

23. On its part, the Respondent argued that the Applicant was challenging a decision that was not in existence submitted that the decision of 26th October 2012 was reviewed which made it non-binding and as such it could not be set aside. It averred that the decision of 27th November 2012 was the one that was now valid and that the court could not proceed to review the said decision without being moved to do so by the Applicant. It reiterated that there was an agreement for payment of legal fees.
24. Issues outlined for determination by the Respondent were as follows:-
- i. **Whether the decision delivered on 30th January 2012 could be set aside?**
 - ii. **Whether the fees due on item No 1 of the Advocates Bill of costs dated 30th January 2012 was capable of being re-assessed?**
 - iii. **Whether this court was capable of remitting the Advocates Bill of Costs for review and reconsideration?**

25. It was the Respondent’s averment that the High Court could not alter a fee allowed by the Taxing Master merely because in its opinion, the court would have given a higher or lower figure. It

argued that the taxing master correctly based the instruction fees on the award of Kshs 321,060,087/= where the instruction fee was Kshs 4,189,751 but the taxing master exercised its discretion and increased the basic instruction fee to Kshs 6,689,751/=.

26. The Respondent therefore submitted that this court could not interfere with the discretion of the taxing master and that there was nothing to review, the decision having been reviewed on 27th November 2012. It therefore prayed for dismissal of the Applicant's application for being unmeritorious and for being filed out of time. It pointed out none of the authorities cited by the Applicant were relevant and urged the court to disregard the same.

LEGAL ANALYSIS

27. It does appear to this court that the following are really the issues for determination:-

- a. **Whether or not the Applicant filed the application herein out of time?**
- b. **Whether there was a fee agreement between the Applicant and Respondent?**
- c. **Whether or not this court can interfere with the decision of the taxing master given on 26th October 2012 and if so whether this court should:-**
 - i. **Remit the Advocates Bill of Costs dated 30th January 2012 for fresh determination of item No 1 by the taxing master; or**
 - ii. **Re-assess item No 1 of the Advocates Bill of Costs.**

28. As the question of whether the application herein was filed within the time prescribed in the Advocates (Remuneration) Order is a preliminary issue, it will be dealt with first.

Compliance in filing the application dated 28th January 2013 and filed on 4th February 2013

29. 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 of taxation 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 the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection. (Emphasis by the court)**

30. Exhibit "WAM 3" annexed to the Applicant's Supporting Affidavit is a ruling of the taxing master. It was delivered on 26th October 2012. It follows that if the Applicant was objecting to any item, it was required to give notice to the taxing master of the items it was objecting to within fourteen (14) days from the date of the decision i.e. by 9th November 2012.

31. From the contents of Exhibit "WAM 4", which is the taxing master's ruling delivered on 27th November 2012, it made reference to documents on pp 117-118 and page 119 which were marked as Exhibit "WAM 5". Document on page 119 was the notice of item objected to as envisaged in Paragraph 11 (1) of the Advocates (Remuneration) Order. This notice was brought on 26th October 2012 and was well within the stipulated period of fourteen (14) days stipulated in the said paragraph.

32. The taxing master's letter dated 8th November 2012 alluded to in the Applicant's letter of 14th November 2012 was enclosed in the Applicant's Supplementary Affidavit. It was a response to the Applicant's letter of 26th October 2012. The Applicant's letter of 14th November 2012 sought certain rectifications or clarifications.

33. Upon receipt of Exhibit "WAM 4" being the Taxing Master's ruling of 27th November 2012, the Applicant was required to apply to a judge by way of Chamber Summons setting out the ground of his objections within fourteen (14) days of receipt of the reasons. The Applicant was thus required

- to apply to a judge as provided in Paragraph 11(2) of the Advocates (Remuneration) Order by 11th December 2012.
34. In its submissions, the Applicant pointed out that a second ruling amending errors in the reasons for the taxation on 8th November 2012 was supplied on 21st January 2013. It was then that it filed the reference on 4th February 2013 which was within fourteen (14) days prescribed by the Advocates (Remuneration) Order.
35. The Applicant had argued that the reference was to be filed upon receipt of reasons and that although no period upon receipt of reasons was prescribed for filing of the reference, the said reference was nonetheless filed within fourteen (14) days of receipt of the 2nd ruling amending the reason.
36. This is not the correct position as Paragraph 11(2) of the Advocates (Remuneration) Order specifically provides that the reference is to be filed within fourteen (14) days of the receipt of the reasons.
37. Whereas the Applicant has urged this court to bear in mind Article 159 of the Constitution of Kenya, which provides that in administering justice, the court should not have regard to technicalities, the court cannot ignore the timelines given in any legislation.
38. Where there is a delay in taking a step, nothing stops a party from applying to the court to enlarge time to enable it take that step. Paragraph 11(4) of the Advocates (Remuneration) Order is clear on that point. It provides as follows:-

"The High Court shall have power in its discretion to enlarge the time fixed by subparagraph (1) or subparagraph 2 for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may be so made notwithstanding that the time sought to be extended has expired."

39. This court has carefully perused the Applicant's Supporting and Supplementary Affidavits and has not seen the second ruling amending the reasons which was said to have been supplied on 21st January 2013. It cannot be introduced at the submission stage. If there was any, it ought to have been annexed to either the Supporting or Supplementary Affidavits.
40. In the absence of any documentary proof that the taxing master issued other reasons on 21st January 2013, the court finds that the latest the Applicant should have filed a reference in respect of the taxing master's decision was on 11th December 2012 and that if it was late in filing the same, it ought to have applied to the court to enlarge time to enable it do the same.
41. Bearing all the facts of this case, the court finds itself more persuaded by the Respondent's submissions that the present application was filed out of time and without orders of the court to enlarge time to allow its filing.
42. On this ground, the court finds that the Applicant would not succeed in this reference. However, if the court were to be found to have been wrong on this point, it has deemed it necessary to address the other issues it identified for determination for a conclusive resolution of the matter. This is to avoid the issue of a technicality being the issue that would lock out the Applicant from succeeding in a reference to the High Court.

Fee Agreement

43. The question of whether or not there was a Fee Agreement is one that ought to have been resolved before the Advocates Bill of Costs was taxed. In any event, this is a reference filed by the Applicant on items that it objected to in the taxation and entering into a discourse of whether or not there was a Fee Agreement would clearly be outside the jurisdiction of this court at this juncture. Accordingly, the court hereby disregards the said submission by the Respondent and will say no more about it.

Re-Assessing and remitting of the Advocates Bill of Costs

44. It is trite law that the High Court should not upset a taxation by the taxing master merely because

- it would have awarded a higher or lower amount unless the taxing master's decision was based on an error of principle.
45. Whereas as it was rightly argued by the Applicant that the instruction fee is an independent and static item and take up a matter by his client, it is determined from the **pleadings, judgment or settlement between the parties** as contemplated under Schedule VI 1 (iii) (a) of the Advocates (Remuneration) Order.
46. It cannot and should not be determined solely from the pleadings. The Applicant's proposition that the primary reference for determining the subject matter so as to determine the instruction fee is the pleading does not therefore find any favour with this court. The court does, however, agree with the Applicant that the applicable scale is that of the High Court as provided for by Rule 10(2) of the Arbitration Rules, 1997. Since this is not a contested issue, the court does not find it necessary to delve into the same.
47. The court has carefully considered the rulings of the taxing master issued on 26th October 2012 and 27th October 2012 and notes that he correctly adopted the value of the subject matter as he deduced from the Arbitration Award. He also considered the nature of pleadings and issues framed by the arbitrators, the nature and importance of the matter, the level and conduct of evidence adduced, the complexity of matter, the legal research and the time taken to peruse, draw and attend to meetings. He did not consider the interest on delayed payments, non-mitigation of losses, compound interest, administrative charges and financial charges as the same were disallowed by the arbitrators.
48. From the Applicant's submissions, it is evident that it sought to have the value of the subject matter based on amounts claimed for liquidated pecuniary claim, declaration for breach of contract of the said sum and compound interest. This cannot form the basis of the subject matter as they could be allowed or disallowed. They are merely figures that a party claims in its pleadings and they can only be determined after hearing the case on merit.
49. If the position of calculating the subject matter was to be based on sums claimed in a pleading, nothing would stop any rogue advocate from plucking figures from the air because he would know that his instruction fees would be based on figures indicated in the pleadings, despite knowing very well that he would not succeed in such a claim at the end of the day. This would be a travesty and miscarriage of justice.
50. The court therefore finds that the taxing master did not make an error on principle. He was correct when he based the instruction fee on the value of the final Arbitration Award. This court does not deem it within its mandate in this reference to consider whether or not the taxing master was correct in assessing item No. 2 of the Advocates Bill of Costs as the same was not in issue in this reference.
51. Having carefully considered the pleadings, the affidavits in support and against the reference herein, the oral and written submission by counsel for both the Applicant and the Respondent and the case law, the court is not satisfied that the Applicant was able to demonstrate that the taxing master used different principles in assessing the fees on the claim and Counter-claim in the arbitral proceedings, that the taxing master computed fees on the basis of success rate of the parties thus championing champerty contrary to Section 46(c) of the Advocates Act Cap 16 (Laws of Kenya) or that he failed to compute instruction fees under the Advocates (Remuneration) Order.
52. This court is not persuaded that this is a case where it should interfere with the discretion of the taxing officer as he did not err on principle and that the item No 1 was properly computed as provided for in the Advocates (Remuneration) Order.

DISPOSITION

53. For the foregoing reasons, the court finds that the Applicant's Chamber Summons application dated 28th January 2013 and filed on 4th February 2013 is unmeritorious and the same is hereby dismissed with costs to the Respondent.
54. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of January 2014

J. KAMAU

JUDGE