REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CAUSE NO 468 OF 2012

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS

KTK ADVOCATES…….…………ADVOCATE/RESPONDENT

VERSUS

FINA BANK LIMITED…………………CLIENT/APPLICANT

RULING

1. The Client's Chamber Summons application dated and filed on 19th November 2013 was brought pursuant to the provisions of the Advocates Act and the Advocates Remuneration Order, Rules 2, 11(4) and (5) (sic) and Sections 1A, 1B and 3A of the Civil Procedure Act. It sought the following orders:-

a. **THAT the ruling and order on taxation delivered herein on 10th May 2013 be varied and/or set aside.**
b. **THAT this Honourable Court be pleased to tax the Bills of Costs dated 27th July 2012 afresh and/or make directions as fresh taxation before a taxing master.**
c. **THAT the costs of the reference be provided for.**

THE CLIENT'S CASE

2. The Client instructed the Advocate to institute a recovery claim in **HCCC No 256 of 2002 Fina Bank Ltd v Macadam Quarry Limited & 2 Others.** The Advocate filed a Notice of Appointment on 14th September 2012. Subsequently, the Advocate filed a Bill of Costs dated 25th July 2012. The taxing master delivered a ruling on 10th May 2013 allowing the Bill of Costs at Kshs 4,898,847. She taxed off a sum of Kshs 7,108,876/-.
3. It was the client's contention that the Taxing Master erred in law and fact by enhancing the instructions fees under Item No 44 in the Bill of Costs from Kshs 885,065.40 to Kshs 2,000,000/=

as she failed to take into consideration that the matter never proceeded to trial. It said that this enhancement was manifestly high for a simple debt recovery. In addition, it averred that the said taxing master erred in law and fact by allowing a sum of Kshs 666,667/= under Item No 298 in the said Bill of Costs, being Getting up fees when the matter had never proceeded for hearing on any one day.

4. The application was supported by the Affidavits of Ndila Mulinge and George Mathui that were sworn on 18th November 2013 and 29th January 2013 respectively. Its written submissions were dated and filed on 20th March 2014.

THE ADVOCATE'S CASE

5. The Advocate filed its Grounds of Opposition dated 27th February 2014 on the same date. It contended that the application was immature, misconceived, defective and bad in law and ought to be dismissed.
6. Its case was that there was no justification for this court to interfere with the decision of the Taxing Master and the Client had not shown that injustice occurred to it.
7. Its written submissions were dated 28th May 2014 and filed on 29th May 2014.

LEGAL ANALYSIS

8. The issues for consideration by this court were as follows:-

a. **whether the Client's application was premature and thus incompetent;**
b. **whether the taxing master properly exercised her discretion in enhancing the instruction fees and;**
c. **whether the taxing master erred in principle in awarding getting up fees when the suit had never proceeded to trial.**

9. As regards the first issue, the Advocates submitted that the Client did not give notice to the Taxing Master of the items of taxation to which it was objecting to rendering the application premature. The Client brought to the attention of the court a copy of the said notice that was to be found at page 74 of its application. The court was satisfied that the letter dated 29th July 2013 was addressed to the Deputy Registrar pursuant to the provisions of Rule 11 of the Advocates Remuneration Rules.
10. Whereas the Client had sought reasons, it does appear that the Taxing Master had given the same in her ruling. It would seem that she would have added no value in any subsequent reasons to the Client pursuant to its said letter as she had stated as follows:-

"I have considered rival submissions with respect to Instruction fees and I have also considered the cited authorities. A taxing master has the discretion to increase instruction fees. This matter seems to have been of great importance to the parties, the amount involved is also huge. In my view instructions fees a sum (sic) of Ksh. 2,000,000/= as instructions fees is adequate. I will therefore increase instruction fees to Ksh. 2,000,000/=, Ksh. 1,033,000/= is taxed off."

11. Consequently, the Client's failure to attach the expected reasons from the Taxing Master would not have rendered its application incompetent as it had fulfilled its obligation under the said Rule and/or complied with the said Rule. This is an observation that was made in the case of **Kipkorir Tito & Kiara Advocates vs Deposit Protection Fund [2005] 1 KLR 528** where the Court of Appeal stated thus:-

"Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance…the absence of such reasons would not in itself preclude the objector from filing a competent reference."

12. For the foregoing reasons, the court was persuaded by the Client's submissions that the Client's

application was properly before the court and competent as parties had on 5th November 2013 consented to have the same filed out of time.

13. In respect of Issue No (b) hereinabove, the Client submitted that the Taxing Master exaggerated the importance of the suit matter without pinpointing with exactitude what made the matter important and disregarded its submissions that the matter related to a simple recovery of a debt. It urged this court to exercise its discretion and set aside the basic instruction fee that was assessed by the Taxing Master.
14. It referred the court to the case of **Kagwimi Kang'ethe & Company Advocates v O-lerai Nurseries Limited [2009] eKLR** in which Kimaru J cited the principles that were set out in the case of **Kipkorir Tito & Kiara Advocates vs Deposit Protection Fund**(Supra)in which the Court of Appeal held as follows:-

"… where there has been an error in principle, the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional circumstances. "

15. This was also the common thread in the cases of **First American Bank of Kenya v Shah & Others (2002) 1 EA 64**, **Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd (2014) eKLR**, **Thomas James Arthur v Nyeri Electricity Undertaking (1961) EA 49**2 and **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another (1972) EA 162**and **Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya & Another (2014) eKLR** that were relied upon by the Advocate.
16. The court perused the aforesaid Bill of Costs and noted that Item No 44 showed the value of the subject matter was Kshs 56,337,693.70. This was the debt the Client had instructed the Advocate to recover on its behalf. Although the Advocate had indicated that the said sum was accruing interest at the rate of thirty six (36%) percent per annum until payment, the Taxing Master correctly declined to consider the accruing interest in her assessment of the basic instruction fees. This is because the rate of interest on any sum would only be awarded at rates the court would determine.
17. On page 2 of her Ruling, the Taxing Master stated as follows:-

"The Instruction fees for the plaintiff's case are calculated as hereunder:-

For the 1st Ksh. 1,000,0000/=	**Ksh. 55,000.00/=**
1.5% x 55,337,693.70	**Ksh. 830,065.40/=**
Total	**Kshs.885,065.40/="**

18. The Instruction fee was thus correctly calculated on the sum of Kshs 56,337,693.70. It is also clear that under Paragraph 1 (a) of Schedule VI of the Advocates Remuneration Order, the Taxing Master has wide and unfettered discretion to increase the instructions fees after a consideration and review of the matter. The discretion must, however, be exercised judiciously failing which the court would intervene.
19. A perusal of Item Nos 53, 83, 87, 98, 105, 113, 124, 126, 131, 138, 149, 155, 163, 202, 232, 245, 258, 266, 299, 303, 316, 317, 320, 324, 330, 338, 344, 361, 369, 383, 391,416,422,428,438,442,448,464,470,471,477,487,494,504,507,518,523,525,528, 530 and 535 of the Bill of Costs show that the Advocate attended court to file court documents or to fix the matter for hearing and also attended court when matter had been fixed for hearing. It was, however, not clear why the matter never proceeded for hearing on all those dates. It is good practice to indicate under any item for court attendance the reason why a matter never proceeded for hearing. Failure to do so makes it difficult for the High Court to discern exactly what transpired without physically perusing the parent file in a taxation matter.
20. The numerous attendances to the court registry or at the court were demonstrative of the importance the Advocate attached to the matter and its diligence. The Taxing Master was well within her discretion to enhance the Instruction Fees based on the court attendances and amount of

work that was done by the Advocate. It was irrespective that the matter never proceeded for hearing. In view of the vagaries of litigation, it would be unjust to deny an advocate his costs where a matter had not proceeded due to no fault of his own.

21. As was held in **Kipkorir Tito & Kiara Advocates vs Deposit Protection Fund**

(Supra), the court will not interfere on questions of quantum if a taxing master has proceeded on the correct principles of assessing the quantum of instruction fees.

22. Bearing in mind the several court attendances and the value of the monies' that were to be recovered, the court is not inclined to interfere with the discretion of the Taxing Master for having enhanced the Instruction fees from Kshs 885,065.40 to Kshs 2,000,000/=.It is the finding of this court that the Instruction fees were not manifestly excessive so as to justify interference of the same by this court. In this regard, the court was more persuaded by the Advocate's submissions that the Taxing Master proceeded on the correct principles.
23. Turning to Issue No (c) hereinabove, it is evident from Item Nos 53, 70 and 98 of the aforesaid Bill of Costs that pleadings had closed and from the Items mentioned hereinabove, parties were geared for hearing. It is unlikely that an advocate would have fixed a matter for hearing when he had not prepared for trial. As stated hereinabove, this court did not have the benefit of ascertaining why the matter did not proceed for hearing. What would be of concern to it is whether parties had prepared to go for trial and of which, it found ample evidence.
24. As was correctly submitted by the Client, Getting Up Fees would only be payable if parties prepared for trial. It referred the court to the cases of **Ouru Power Limited v Intertrek International Limited & 2 Others [2012] eKLR** and **Mbugua & Mbugua Advocates v Kenindia Assurance Company Limited [2009] eKLR** in this regard.
25. Under Paragraph 2 of Schedule VI of the Advocates Remuneration Order it is stated as follows:-

"ii. no fee under this paragraph is chargeable until the matter has been confirmed for hearing…

iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial (emphasis court) **under this paragraph."**

26. The substantive suit **HCCC 256 of 2002 Fina Bank Limited vs Macadam Quarry Limited & 2 Others** was filed in 2002. Although the holdings in the cases of **Ouru Power Limited v Intertrek International Limited & 2 Others** (Supra)and **Mbugua & Mbugua Advocates v Kenindia Assurance Company Limited** (Supra) were to the effect that Getting Up Fees would not be payable if the matter had not been confirmed for hearing, in the absence of any evidence to the contrary, this court finds it difficult to make a definite finding that the Taxing Master was not satisfied that the case had been prepared for trial as she had the benefit of seeing the court file of the substantive suit.
27. Indeed, prior to the enactment of the Civil Procedure Rules, 2010, no matter could be listed for hearing if the same had not been confirmed during the call over. In view of the fact that this court did not have the benefit of seeing the substantive file, this court can only make an assumption that she ascertained that fact as she was required to do under Paragraph 2 of the Advocates Remuneration Order.
28. However, as the Taxing Master did not give her reasons in this respect, it would be fair if this issue is remitted back to her to ascertain the correct position on whether the Advocate has prepared for trial. There are no other Deputy Registrars in the High Court of Kenya Commercial & Admiralty Division leaving this court with no option but to remit the matter back to her.
29. Having perused and considered the pleadings herein, the affidavit evidence, written submissions and case law in support of the respective parties' cases, this court finds and holds that the Taxing Master applied the correct principles in taxing the Advocate's basic Instruction Fees and this court has no basis for interfering in her assessment.

DISPOSITION

30. Accordingly, the upshot of this court's ruling is that the Client's Chamber Summons application

dated and filed on 19th November 2013 was partly merited and the same is hereby allowed in the following terms:-

a. The ruling and order on taxation delivered on 10th May 2013 is hereby varied as follows:-

i. The instruction fees in the sum of Kshs 2,000,000/= will remain unchanged.
ii. The part of the said ruling touching on the Getting up Fees is hereby remitted to the Taxing Master to re-look and consider the court's observations in paragraph 28 herein above.

b. As both the Advocate and Client were each successful in part, they will each bear their own costs.

31. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 9TH day of DECEMBER, 2014

J. KAMAU

JUDGE