



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 434 of 2011

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

MASTERMIND TOBACCO (K) LTD.....APPLICANT

-AND-

NGATIA & ASSOCIATES ADVOCATES.....RESPONDENT

RULING

1. The Application before the Court is a **Chamber Summons** dated 17th May 2012 and filed in Court on even date. It is taken out under **Section 45 Rule 11** of the **Advocates (Remuneration) Order** as well as **Sections 3 and 3A** of the **Civil Procedure Act**.
2. The Application is seeking for the following orders:-
 - a) **The Taxing Master's finding and decision that there was no fees agreement between the Applicant and Respondent be set aside;**
 - b) **The Court do set aside the taxation ruling dated 16th May 2012 and order that the fees agreement between the Applicant and Respondent embodied in the letter dated 19th May 2008 is binding on the Respondent by virtue of Section 45 of the Advocates Act;**
 - c) **In the Alternative to a) and b) above, the Court do order that the decision by the Taxing Master made on 16th May 2012 awarding the sum of Kshs. 8,000,000 as instruction fees and Kshs. 2,666,667.00 as getting up fees in taxation of the Bill of Costs dated 5th October 2011 be reviewed and or set aside.**
 - d) **This Court do make an appropriately reduced award in place of the instruction and getting up fees in taxation of the Bill of costs dated 5th October 2011 or give appropriate directions as to the taxing of the said items by another Taxing Master.**
 - e) **Costs of this application be provided for.**

3. The Application is based on the grounds stated on the face thereof and is supported by the affidavit of **ROBERT M. MUTHUMA**, described as the Applicant's Company Secretary, sworn on **17th May 2012**.
4. The application is opposed. There is a Replying affidavit sworn on behalf of the Respondent by **Fred Ngatia**, Advocate dated **13th June 2012**.
5. Briefly, the Respondent was instructed by the Applicant sometime in 2006 to file a Petition to have some sections of the Tobacco Control Act, 2007 declared unconstitutional. Subsequently, the Respondent brought their Advocate-and-Client Bill of Costs for Kshs. 18,097,269.50 dated 5th October 2011. The Taxing Master delivered a Ruling dated 3rd May 2012 and taxed the Bill of Costs at kshs. 13,592,010. It is this ruling that prompted the Applicant to file the current application.
6. It is the Applicant's case that the Taxing Master erred in finding that there was no agreement on fees. It is averred on behalf of the Applicant that there was a discussion and agreement on the Fees with the Respondent's principal representative which was quoted and agreed at between Kshs 5 and 6 million. The Agreement was embodied in a letter dated 19th May 2008.
7. It is further the Applicant's case that the taxing master placed undue regard to the form in which the fees agreement was made instead of the intention of the parties. The taxing master failed to appreciate the fact that there was no proof of other commitments on the part of the Applicant, either in the letter of instruction or in any other form, which would be taken to qualify the contents of the letter of instruction which contained the fees agreement. It is the Applicant's case that the taxing master committed an error of principle in assessing the instruction fees by arriving at a finding that the Applicant committed itself to aid the Respondent in research of the case yet no evidence was produced by the Respondent to that effect.
8. It is also the Applicant's case that the taxing master erred in law in his assessment of the instruction/getting up fees thereby arriving at an inordinately high award. According to the Applicant, the Taxing master erred in not taxing the Bill of Costs as per the Advocates' Remuneration Order applicable at the time of filing the suit. The Applicant averred that the Ruling did not state which scale was applied.
9. In opposing the Application, it is the Respondent's contention that they had indicated prior to receipt of formal instructions that fees would be in the range of Kshs. 5-6 million. The said range was predicated on a representation made by the Applicant that they would be able to obtain relevant jurisprudence on the subject of other tobacco manufacturers who had challenged similar legislations in their countries.
10. It is the Respondent's case that the figure of Kshs. 5-6 million was not conclusive and was only a guide to the likely fees. It is also the Respondent's case that the agreement alluded to was limited to the basic instruction fees and since the Applicant had failed to provide the legal materials the foundation upon which the estimation was made became inoperative.
11. The Respondent contended that for there to be an agreement on fees, there has to be a written agreement which is clear and unequivocal. According to the Respondent, no such agreement exists in this case. It is further the Respondent's case that the principles used by the taxing master in assessing the instruction fees are correct and that the quantum awarded as instruction fees is fair and reasonable therefore it ought not be reviewed or set aside.
12. The Applicant filed its submissions on **10th July 2012** while the Respondent filed theirs on **23rd August 2012**.
13. The main issues for determination are as follows:-
 - a) **Whether there was an agreement for fees between the Applicant and the Respondent;**
 - b) **Whether the taxing master had the jurisdiction to tax the bill of costs dated 5th October 2011**

subject to Section 45 of the Advocates Act; and

c) **Whether the Court should review or set aside the Taxing Master's decision made on 3rd May 2012 awarding the sum of Kshs. 8,000,000 as instruction fees and Kshs. 2,666,667.00 as getting up fees in taxation of the Bill of Costs dated 5th October 2011.**

14. With regard to the first issue, it is the Applicant's contention that there was an agreement for fees. The Applicant relies on the letter dated 19th May 2008 which states in part;

"We undertake to pay your fees hereon which we understand to range between Kshs. 5 million and Kshs. 6 million."

15. Section 45 (1) of the Advocates Act provides that:-

"Subject to Section 46 and whether or not an order is in force under section 44, an advocate and his client may-

1.

2.

3.

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

16. In my view, the said letter and in particular the above quoted part amounts to an agreement on fees between the Applicant and the Respondent and is therefore in compliance with the section 45 (1) of the Advocates Act. The Respondent does not dispute that the sum within the range of Kshs. 5 to 6 million had been discussed and agreed upon between the parties' representatives. It is the respondent's contention that the said fee was predicated on the Applicant supplying relevant jurisprudence on the subject of litigation. However, the said contention is not captured in any correspondence and the same cannot be proved in Court. In any case, if that was the position, this court is of the view that it is the responsibility of the Advocate to do legal research in representing a client and the fact that a client is willing to supply some materials to assist in the same cannot be a factor in determining fees.

17. As much as the Respondent contends that they did not respond to that letter, they acquiesced to the terms therein, including the proposed fees by taking up the instructions. The Respondent went ahead and requested the Applicant to remit a sum of Kshs. 2.5 million towards filing fees, disbursements and a deposit of legal fees.

18. With regard to the second issue, **section 45 (6) of the Advocates Act** is clear that the costs of an advocate in any case where an agreement has been made by virtue of the said section shall not be subject to taxation. Therefore, the taxing master did not have jurisdiction to tax the advocate's legal fees.

19. The third issue deals with the jurisdiction of the Court to alter the taxing master's decision. The court is allowed to interfere with a decision of a taxing master if the same was based on an error of principle or if the fees awarded was manifestly high as to justify an inference that it was based on an error of principle. **See; Wanga & Co. Advocates vs Busia Sugar Company Limited [2004] 1 KLR 506 ; Geoffrey Matoke -vs- Moraa Masare & Others (2010) eKLR.**

20. As regards the taxing master's decision on the fees, it is apparent that the Taxing Master erred in finding that there was no agreement on fees. The instruction fees taxed at Kshs.8,000,000/- was a departure from the Agreement on fees. The legal fees of the advocate should range between Kshs.5 million-6million as was contemplated in the letter dated 19th May 2008. The Parties should agree on the

exact sum failure to which I have the liberty and the discretion to fix it at Kshs.5,500,000/=.

21. In conclusion, the Applicant's **Chamber Summons** dated **17th May 2012** is hereby allowed in terms of prayers **(a) and (b)**.

DATED, READ AND DELIVERED AT NAIROBI

THIS 16TH DAY OF APRIL 2013

E. K. O. OGOLA
JUDGE

Present

Machera holding brief for Ngatia for Respondent

Ondati holding brief for Mwangi for Defendant

Teresia – Court Clerk