



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Miscellaneous Application 325 of 2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ARIMI KIMATHI & COMPANY ADVOCATE :::::::::::APPLICANT

VERSUS

BASELINE ARCHITECTS LIMITED :::::::::::RESPONDENT

R U L I N G

1. Before the Court are two applications. One is dated **11th February 2013** by the “Advocate” while the other is dated **22nd February 2013** by the “Client” under **Rule 11 (1)** of the **Advocates Remuneration Order**. Both are references brought by those parties. Both applications are for orders that the taxation order made on **26th October 2012** be set aside and that the taxation of the Bill of Costs be retaxed/or revised as the case maybe. Their reasons are different, though for the purposes of this Ruling I will combine both the applications and use them interchangeably as circumstances dictate, as both seek the same end result for different reasons.
2. The second application is based on the grounds stated in the application thereof and is supported by the affidavit of **David Njeru Nyaga** an Advocate of the High Court of Kenya, and sworn on **22nd February 2013**.
3. The second application is opposed vide the Replying Affidavit of **Patrick Kimathi Muchena**, an Advocate of the High Court and sworn on **6th March 2013**.
4. The brief background to both applications is that the Applicant (Advocate) was instructed by the Respondent (client) to oppose an application for review brought before the Public Procurement Administrative Review Board. The Respondent bid for a tender to offer consultancy services for Design, Documentation, Supervision and Contract Management of the proposed Ronald Ngala Utalii College in Kilifi County, which tender it won. The winner was challenged by one of the unsuccessful bidders. In the said review, the Respondent was not a party but was joined as an interested party as the dispute was between the unsuccessful bidder Gitutho Associates and Catering and Tourism Development Levy Trust, the procuring entity. The Respondent being the lead consultant was a client of Catering and Tourism Development Levy Trust and only entitled to be paid fees as spelt out in the Request for Proposal document. The Advocate/Applicant represented the Client/Respondent in the review. The challenge to the

award was eventually dismissed paving the way for the Respondent to proceed with the performance of the tender. Along the line, a dispute arose on the payment of fees to the Advocate, pursuant to which the Advocate filed his Bill of costs for taxation dated 4th June 2012 which was taxed at over Kshs.3,000,000/= by the taxing master on 26th October 2012. Both parties, for different reasons, being unsatisfied with the said taxation, have filed the above applications seeking to have the said taxation set aside, and the same be done afresh.

5. It is the Client's case that the reasons given by the taxing master for awarding costs on instruction fees item (1) was a clear and deliberate misdirection on her part constituting an error in principle and fact. It is averred on behalf of the Client that the amount of Kshs. 3,000,000/= awarded as instruction fees was rather exaggerated. It is also averred that the taxing master was correct in finding that the review at the Administrative Review Board was a simple straightforward matter but in proceeding to award Kshs. 3,000,000/= she misdirected herself.

6. It is further averred that the Client was not a party at the Administrative Review Board but only opted to enjoin itself as an interested party and only instructed the Applicant/Advocate to "watch brief". The Applicant/Advocate only filed the Notice of Appointment (2) folios and Memorandum of Response (2) folios.

7. It is also the Client's case that the taxing master awarded item (2) and item (14) which are not provided for under Schedule (v) of the Advocates Remuneration Order. According to the Client, item (2) was erroneously awarded since the Applicant/Advocate had admitted that he did not peruse the documents served on him. Further, it is the Client's position that going by the documents filed in support of the bill of costs, the folios of the documents and annexures to be perused were 116 and not 1007 as alleged by the Applicant.

8. As regards item (14) it is the Client's case that the same was erroneously awarded since under schedule (v) the same is only awarded in lieu of charges per item of work done. In this case it is averred on behalf of the Client that the Applicant/Advocate had based his bill per work done hence item (14) could not be awarded.

9. The Applicant (herein referred to as "**the Advocate**") who is the Respondent in the second application opposes the application and depones that the instruction fees of Kshs.3,000,000/= was not exaggerated. In fact, it is his deposition that he filed an application giving elaborate reasons why the said sum was dismally low in the circumstances.

10. The Advocate further deposes that his firm did not watch brief but they participated fully in the proceedings and are therefore entitled to the full instruction fees based on the value of the subject matter which was at Kshs. Two Billion. It is also deposed by the Advocate that they ascertained the figure of Kshs. Two Billion from the instructions they got and indicated the same in their Deposit Request Note to which the Client did not raise any objection at that stage.

11. It is the Advocate's case that the taxing master erred in principle by taxing the bill under the Architect's Act and not under the Advocates Remuneration Order.

12. The first application is filed by the Advocate/Respondent herein. The Application was praying for orders that the decision of the Taxing Officer awarding the sum of Kshs. 3,000,000/= as instruction fees in the taxation of the Bill of Costs dated 4th June 2012 be set aside. The grounds of the Application have essentially been captured in the Replying Affidavit of **Patrick Kimathi Muchena**, an Advocate of the High Court and sworn on **6th March 2013**.

13. I have carefully considered both applications and the submissions of the parties. It is now a general principle that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. See; **Steel Construction Petroleum Engineering (EA) Limited – vs - Uganda Sugar Factory [1970] EA 141**.

14. The first and common ground for reference between the parties is the award of Kshs.3,000,000/= as instruction fees. It is the Client's case that the said fee is exaggerated while it is the Advocate's case that the same is dismally low in the circumstances. According to the Advocate, the Taxing officer should have taken into account the value of the subject matter which was at Kshs. Two Billion in coming up with the instruction fees.

15. From the records, it is not ascertainable that the value of the tender was indeed worth Kshs. Two Billion. In the case of **Joreth Limited – vs - Kigano & Associates [2002] 1 EA** the Court stated that:-

“where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.”

In the current matter, the value of the subject matter was not ascertainable and therefore the taxing officer had to follow the above course in exercising her discretion.

16. The Advocate has contended that the services rendered were of a complex nature which required greater diligence and skill and which skill and diligence should be reflected in the award. In the case of **Premchand Raichand Limited & Another – vs - Quarry Services of East Africa Ltd & Others (1972) EA 162**, the Court stated that there was no formula to dictate a particular mode of taxing the instruction fees. Spry, V.P (at P.164) had this to say-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of a taxing officer, and particularly where he is an officer of great experience merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

The issue here then is whether or not the services rendered by the Advocate before the Public Procurement Administrative Board were complex in nature and of utmost importance and of high interest to both parties as the value of the subject matter was said to be approximately Kenya Shillings Two Billion. The complexity of the matter would then be reflected on how the taxing master made an award regarding the instruction fees.

17. It should further be noted that the submission by the Advocate that the value of the subject matter was over Kshs. 2 Billion is not correct. The value of the subject matter cannot be based on the value of the tender to the Client. However, it would be based on the fees the Client would derive from performing the tender. Nobody knows that fees except the Client and so, I think with the decision of **Joreth Limited – Vs - Kigano & Associates (ibid)** in mind, the Taxing Master ought not to have referred to the Architect’s Act, but to restrict herself to a reasonable discretion.

18. However, with regard to the instruction fees, it is plain that the Advocate only filed two documents in relation to the matter before the Public Procurement Administrative Board. That is, the Memorandum of Response which was two (2) pages and a Notice of Appointment which was one (1) page. I have perused the documents and in particular the Memorandum of Response. It is also not in dispute that the matter before the Board was heard and concluded in a day. These facts caused the Taxing Officer to conclude that the review at the Administrative Review Board was a simple straightforward matter.

19. However, I do not agree with the Taxing Master’s description of the services rendered by the Advocate as *“simple and straightforward”*. A legal advice cannot be described in measurable terms which can then allow the description of *“simple and straightforward”*. It is not measurable, for example in the same way as it can be said that it took the Applicant 10 minutes to read the 3 folios or that it took an athlete 30 seconds to complete a 200 metre race. A legal service by its very nature involves the employment by the Advocate of the massive legal resources that may be in his mind or his library, an entire labyrinth of intellectual property which only the Advocate knows how to apply. It may as well be that the matter became simple and straight forward because the advocate made it so. Indeed, the Advocate’s intellectual energy need not be expressed verbally. Once the same is documented and filed, it does not matter how long the advocate takes to highlight the same. He needs not even highlight them. If he chooses to rely entirely on the same it cannot be said that the Advocate spent very little time on the matter and is therefore not entitled to a good fee. It may be that the time spent reflects the level of efficiency of the advocate. I therefore reject the finding by the Taxing Master that the matter was simple and straight forward. The Taxing Master ought to have considered the weight of the subject matter or the facts leading to these proceedings. While I agree that the suit value was not the alleged Kshs.2 billion, the tender value was agreed to be of Kshs.2 billion and therefore the process to which the advocate was invited to oversee was of great importance, of high value and of serious economic consequences. This realisation should be reflected on the final award.

It is my belief that despite referring to the matter as “*simple and straight forward*”, the Taxing Officer has indeed by awarding instructions fee at Kshs.3,000,000/= upheld this principle to some extent. However, in my view, the instructions fee awarded should be enhanced by its half.

20. The second ground for reference according to the Client was that item (2) was erroneously awarded since the Advocate had admitted that he did not peruse the documents served on him. I have perused the proceedings at the Public Procurement Administrative Review Board. I have seen that the Advocate indicated he had not had the opportunity to look at the list of documents that had just been served upon him. The Advocate was given an opportunity to look at the documents by the chair of the said Board as the proceedings continued. This Court does not have the privilege of knowing whether the Advocate did so or not. However, the Advocate was given a chance to do so and there is no reason to doubt that he complied. I therefore dismiss this ground for the reference.

21. It is also the Client’s position that going by the documents filed in support of the bill of costs, the folios of the documents and annexures to be perused were 116 and not 1007 as alleged by the Advocate. I have perused the said documents and it is my view that the folios of the documents and annexures to be perused cannot reach 1007 folios. This declaration will however not affect the award under item 2.

22. It is also the Client’s case that item (14) was erroneously awarded since under schedule V the same is only awarded in lieu of charges per item of work done. With regard to that, it is my understanding that the Advocate is entitled to charge fees for attendance which is also provided for under the said Schedule V of the Advocates Act.

23. In view of the foregoing, I hereby direct the Taxing Master to increase the instructions fees awarded by its half. The matter shall be mentioned before the Taxing Officer on 6th June 2013 for that purpose.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Kimathi for the Applicant

Wambugu holding brief for Njagi for the Respondent

Teresia – Court Clerk