REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous 688 of 2008

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

ADIPO & CO. ADVOCATES …… ADVOCATE

VERSUS

KENYA PIPELINE CO. LTD.……..…….. CLIENT

R U L I N G

1. Before the Court are two applications for determination: the first application is a Notice of Motion application dated 23rd August, 2012 and filed on 27th August, 2012, in which the Advocate/Applicant seeks for orders *inter alia* for judgment against the Respondent. The application is brought under the auspices of **Order 5 Rule 1** of the *Civil Procedure Rules*, **Section 1A** of the *Civil Procedure Act* and **Section 51 (2)** of the *Advocates Act*. The grounds upon which the application is predicated and is analogous to the depositions in the supporting Affidavit of **Collins Odhiambo Adipo** sworn on 23rd August, 2012. These are that the Applicant, who had been retained by the Client/Respondent, acted on instructions from and on behalf of the Client to collect debts of Kshs. 2,547,036,540.59/-. This amount, as averred by the Applicant, was used to calculate the basic instruction fee contained in the Advocate's fee note/Bill of Costs, exhibited as **"COA-2"**, and which was taxed at Kshs. 38,426,998/. A Ruling on the same was issued by the taxing officer on 21st February, 2012.

2. The second application by the Client/Applicant is a Chamber Summons application dated 21st March, 2012 and filed on 27th August, 2012. In that application, brought under **Rule 11 (2)** of the *Advocates (Remuneration) Order*, the Applicant seeks for orders setting aside and/or striking out the Advocate/Client Bill of Costs dated 24th September, 2008. The grounds adduced in the application were that the taxing officer misapprehended the nature of the instructions in respect of the Bill of Costs dated 24th September, 2008, in that the Advocate had not been instructed to undertake any debt collection. Further, the Client/Applicant averred that the amount awarded by the taxing officer was manifestly high in the circumstances, as to justify reconsideration of the same.

3. In the Affidavit in support of that application by **Elias Juma Masika** sworn on 20th March, 2012, it was the deponent's averment that the claim as submitted was misconceived and should have been

dismissed. It was the Client/Applicant's contention that the taxing officer arrived at an erroneous decision as the Advocate had already been awarded the sum of Kshs. 118,071,935.75/- in **H.C Misc. Cause No. 686 of 2008 – Adipo & Co. Advocates v Kenya Pipeline Co. Ltd**.

4. Having perused the two applications, the affidavits therein and oral depositions of counsels for the parties, it was this Court's considered opinion that the Client's application should be considered first, as depending on the finding, such would/could determine the first (Advocate's) application. During the hearing of the application on 29th January, 2012, **Mr. Ohaga**, counsel for the Applicant, submitted that the taxing officer had erred in her Ruling on the Bill of Costs dated 24th September, 2008. It was also his contention that the alleged bill of costs raised by the Advocate was an attempt to seek double remuneration as the same had been settled in **H.C.Misc. Cause No. 688 of 2008**. Further, he submitted that the taxing officer did not investigate the issue of double remuneration despite the fact that the same had been brought to her attention.

5. In an attempt to allay the allegations raised by the Applicant, **Mr. Adipo** submitted that the reference was filed out of time and without leave of the Court. He submitted that the application was made in absence of reasons contemplated under Rule 11 of the Advocates (Remuneration) Order and thus incompetent and premature. He referred the Court to the ruling of Odunga, J in **Evans Thiga Gaturu Advocate v Kenya Commercial Bank Ltd H.C Misc. App No. 343 of 2011 (unreported)** in which the learned judge determined that a party would not be entitled to an indefinite period within which to file a reference.

6. Counsel further contended that the Client never refuted that he did indeed collect the money on its behalf and was not merely receiving and transmitting the monies. He submitted that Schedule V of the Advocates (Remuneration) Order made provisions to avoid the scenario of double remuneration, as alleged by the Client. He alleged that the Remuneration Order provided for contentious and non-contentious debt collection as different items, and the amounts collected were in the category of non-contentious debt collection, which were separate and distinguishable instructions.

7. As the Court sees it, two issues arise for determination: (1) whether the taxing officer gave reasons for her determination and (2) whether the application was competent and with merit. In the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004; (2005) eKLR**, the learned appellate judges held inter alia:

"On a reference to a Judge from the taxation by a taxing master, the judge will not normally interfere with the exercise of discretion by the taxing master unless the taxing master erred in principle in assessing the costs."

Further, the judges determined that;

"It is true that the taxing officer did not record the reasons of the decision on the items objected to after the receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling of taxation dated 24th February, 2004. That ruling at least indicated the formula that the taxing officer applied to access the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

8. In the ruling of the taxing officer, Njora, L.M dated 21st February, 2012, she made a determination in the following terms:

"Secondly, after delivering his opinion, the advocate then acted on this opinion and collected the monies. That too is work done. These to my mind, are two distinct and separate transactions."

To the Court's mind, these suffice as *"substantial compliance"* according and in following the court's determination in the **Kipkorir, Titoo Advocates** case (supra). Even though the taxing officer was not in complete compliance with the provisions of **Rule 11(2)** of the Order, she had substantially complied with the provisions. At page 3 of her Ruling, the taxing officer went ahead and gave a breakdown of how she arrived at the figure of **Kshs. 38,426,998**/-. It can therefore, be deduced (and following the Court of Appeal's finding in the **Kipkorir, Titoo** case aforementioned), that the taxing officer addressed the reasons, though not in strict compliance to **Order 11 (2)**, on how she arrived at her Ruling. The absence of reasons, (in following the determination of Odunga, J in **Evans Thiga Gaturu v Kenya Commercial Bank Ltd** (supra)), did not bar the Applicant from filing a competent reference. The learned judge considered the ruling of Ochieng, J on the issue of compliance in **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) [2006] 1 E.A 5** where he held *inter alia*:

"… where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub-rule (2) of rule 11 of the Advocates (Remuneration) Order demands so. The said rule was not meant to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."

In his said Ruling in the **Evans Gaturu** case (supra), Odunga, J observed that;

"However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons as it happened in the case of Kerandi Manduku & Co. Advocates v Gathecha Holdings Ltd Nairobi (Milimani) H.C Misc. App. No. 202 of 2005."

9. Having determined that there were reasons contained in the Taxing Officer's Ruling dated 21st February, 2012, the matter now for the Court's considerationis whether the Client's application is meritorious and competent. The Ruling, having been delivered on 21st February, 2012, the Client filed its objection on 22nd February, 2012, which was in compliance with **Rule 11 (1)** of the *Remuneration Order* in that regard, particularly as it disputed Items 1 to 32 in the Bill of Costs dated 24th September, 2008. In its reference, the Client also made a request to the Court (Deputy Registrar) for the reasons for its determination.

10. **Rule 11 (2)** of the *Advocates (Remuneration) Order* provides for the timeline within which an application of this nature has to be made. It provides that:

"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."

By filing the said application on 27th August, 2012, the Client/Applicant waited for 6 months after the taxing officer had "failed" to provide reasons for her ruling. The provisions of **Rule 11 (4)** are quite clear: the applicant shall to have applied for leave to file out of time. The rule provides:

4) The High Court shall have power in its discretion by order 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 days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired".

11. In reference to the said ruling of Odunga, J on the issue of time, the learned Judge determined in the matter of **Evans Thiga Gaturu Advocate** (supra) as follows:

"If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the taxing master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the taxing master to furnish him with the reasons which according to the decision of Kipkorir, Titoo & Kiara Advocates (ibid) is a ground for allowing a reference. However, a party would not be entitled to an indefinite time within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference the same reasons had not been furnished. I accordingly find that the client has filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted."

12. The applicant failed to adhere and comply with the timelines set out as under **Rule 11** of the *Advocate (Remuneration) Order*. In submitting on behalf of the Client, Mr. Ohaga referred the Court to Article 159 (2) of the Constitution, whereby the Court is empowered to act without undue regard to technicalities of procedure. He further submitted that the Court should give consideration to the application and determine it on its merits rather than dismiss and strike it out for being filed out of time. In as much as Article 159 (2) (d) gives the Court power to act without undue regard to technicality, this discretion should be exercised with caution. In **Hunker Trading Co. Ltd v Elf Oil Kenya Ltd (2010) eKLR**, Court of Appeal on the issue of the court exercising its powers held *inter alia*:

"It seems to us that in the exercise of our powers under the "O2 principle," what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are "O2" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "O2 principle" could easily become an unruly horse."

13. If I were to slavishly follow and adopt the finding of Ochieng, J in **Ahmednassir Abdikadir & Co. Advocate** (supra) and Odunga, J **Evan Thiga Gaturu Advocates** (supra), this application by the Client would stand dismissed as it has no prayer for leave to file out of time. However, the Court of Appeal's decision in the **Kipkorir, Titoo** case is binding upon this Court. What was recorded by the Court in that case makes similar reading to what transpired in this matter before me. In the Court of Appeal matter, the ruling on taxing was delivered on 23 February 2004. The next day, the respondent's advocate gave notice to the taxing officer of the items to which he was objecting and asked the taxing officer to furnish him with reasons for taxation of the objected items. The taxing officer then sent to the respondent's advocates a letter dated 3 June 2004 to the effect that the reasons were given in the taxation ruling. 4 days later, the respondent's advocates filed a Chamber Summons praying that the taxation of the bill of costs be quashed and the same be remitted to the taxing officer for taxation of afresh. At that stage, in the Court of Appeal matter, the reference was filed some 3 ½ months after the taxation ruling. In this case, the taxing officer did not respond to the Client's advocates at all and the reference was filed on 27th August 2012, some 6 months after the taxation Ruling of the Deputy Registrar of this Court. Did this period in time amount to inordinate delay on the part of the Client? In my opinion and as above, it would be, but one has to bear in mind the reasons for such delay. The Notice of Objection to the taxing officer's Ruling was filed by the Client's advocates on 23 February 2012 2 days after the delivery thereof. They followed up that Notice with a letter dated 2 March 2012 asking for a photocopy of the handwritten decision of the taxing officer. Then, on 14 June 2012, the Client's advocates wrote a reminder as to the provision of a copy of the Ruling and again on 30 July 2012 the said advocates wrote again to the Deputy Registrar in the following terms (*inter-alia*):

"Our court clerk responsible for the commercial division, Mr. Fred Wandera informs us that he has addressed the issue with the Executive Officer on several occasions and has been informed that the court file was still in Mrs. Njora's (the taxing officer) **Chambers. Please clarify this.**

We find this state of affairs highly unsatisfactory as it continues to cause considerable anxiety on the part of our client who wishes to exercise the right of challenge as set out as Rule 11 of the Advocate (Remuneration) Order.

Kindly therefore let us know the position with respect to the court file so that we can take the necessary steps to safeguard our client's position."

To that letter, the Senior Principal Deputy Registrar of this Court finally responded on 13 August 2012 detailing that the court file had been returned to the registry and that the advocates could now take their desired action in the matter. That "desired action" took the form of the Chamber Summons filed on the 27 August 2012 but dated 21 March 2012. It seems therefore, that the said advocates did the best that they could, in the circumstances, to get the reference before this Court.

14. Despite the lateness of the Application, the fundamental principle upon which this Court has to exercise its discretion, is whether the said Application is meritorious or otherwise. In his submissions before the taxing officer detailed on 28 November 2011, Mr. Masika for the Client took a preliminary objection to the effect that the Bill of Costs before court sought double remuneration as costs had already been allowed in an arbitration matter as between the Client and Kenol/Kobil. Mr. Okwach for the Advocate argued that the Bill of Costs for the taxation before the Court was completely separate from the arbitration process which advocate/client Bill of Costs had been taxed in *HC Misc No. 686 of 2008*. The two Bills of Costs before Court related to a legal opinion given by the Advocate in respect of debt collection (*HC Misc No. 687 of 2008*) and fees in relation to the collection of undisputed debts due to the Client from the said Kenol/Kobil (*HC Misc No. 688 of 2008*). It is the latter Bill of Costs which is disputed by the Client in this Application before Court. In any event, the taxing officer consider the preliminary objection and dismissed the same in finding that there were two distinct and separate transactions. The taxing officer then proceeded to tax the respective Bills under Schedule V part II paragraph 3 of the Advocates Remuneration Order 2006. I consider there must be some mistake in the taxing officer's Ruling in her reference to paragraph 3 in that the fees under Schedule V part II for debt collection come under paragraph 8 thereof. Subparagraph (f) reads:

"Where the amount of the debt exceeds Sh. 100,000…… 8,250 plus 1.5 per cent on the amount over 100,000."

The Advocate detailed that the amount collected from Kenol/Kobil, being uncontentious, was Shs. 2,547,036,540.59. Taking into account the provisions of subparagraph (f) as above such would amount to a figure of Shs. 38,204,048.10. Seemingly with the other items on the taxed Bill of Costs, the figure arrived at by the taxing officer of Shs. 38,426,998/-would seem reasonable on that basis. However, what the taxing officer does not seem to have taken into account is the proviso to paragraph 8 which reads:

"Provided that in any case where not more than one letter of demand has been written the scale shall be reduced by one-half, subject to a minimum fee of Sh. 225….."

15. The Replying Affidavit sworn by the Advocate on 11 October 2012 is instructive as regards to what should have been detailed in the Bill of Costs dated 18 September 2008 addressed to the Client. At paragraph 13 of the Replying Affidavit, the Advocate noted that the Client vide a letter dated 24 January 2006 forwarded to him details of the undisputed debt owed by Kobil Petroleum Ltd as at 19 January 2006. The Advocate then details that on 24 January 2006 he sent a letter to counsel for Kenya Oil Company Ltd & Kobil Petroleum Ltd giving details of the outstanding undisputed debt and seeking settlement of the same. At paragraph 25 of the Replying Affidavit the Advocate stated that beside sending letters of demand, he personally held several discussions with the counsel for the said two oil companies. Again, as per paragraph 27 the Advocate stated that he sent a further demand letter to the two oil companies. Paragraph 29 of the Replying Affidavit reads as follows:

"THAT as a consequence of the said demand letters and discussions my firm collected on a monthly basis non-contentious debt from Kenya Oil Company Ltd and Kobil Petroleum Ltd amounting to Kshs 2,547,036,540.59 on behalf on the Client".

To my mind, to justify a fee figure of Shs. 38,426,998/-, the Advocate must do far more by way of providing detail of the letters of demand sent and attendances upon counsel for the two oil companies, quite apart from correspondence entered into with the oil companies and the Client. I have perused the

Bill of Costs exhibited as "COA-2" annexed to the Supporting Affidavit of the Applicant's Notice of Motion dated 23 August 2012. It is skimpy to say the least.

16. Bearing in mind what I have said about the proviso to paragraph 8 of part II of Schedule V of the Advocates Remuneration Order, 2006 as above, I would wish to see a far more detailed Bill of Costs filed for further taxation in this matter.

17. This leaves me with the second application, dated 23rd August, 2012 and filed on 27th August, 2012, in which the Advocate applicant seeks for judgment be entered in its favour as against the Client. **Section 51(2)** of the *Advocates Act* reads:

"2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and 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."

The Court has been granted an unfettered power to determine what orders it deems fit and suitable to be made in the circumstances of the determination of a taxing officer's ruling. Ringera, J in **Misc. Appl. No. 400 of 2001 Hezekiah Ogao Abuya t/a Abuya & Co. Advocates v Kuguru Foods Complex Ltd** on the issue of instructions and retainer held as follows;

"An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute."

18. The Advocate also relied on the authorities of **Owino Okeyo & Co. Advocates v Mike Maina & Another [2005] eKLR** and **Misc. Appl. No. 463 of 2004 Nderitu & Partners Advocates v Mamuka Valuers (Management) Ltd [2006] eKLR** where Visram and Waweru, JJ held respectively on the issue of retainer and instructions. With respect, it is not the question of the retainer that is in issue here but what the amount of that retainer should be. I am not inclined to enter judgement as prayed in the said application for Shs. 38,426,998/-and would wish to see this figure reviewed by the taxing officer by way of a fully detailed Bill of Costs to be filed by the Applicant/advocate and taxed afresh. Accordingly, I dismiss the Advocate/ Applicant's Notice of Motion dated 23 August 2012. Further, utilising the power that I have under **section 51 (2)** of the *Advocates Act (Cap 16)* as above, I set aside the taxing officer's Ruling of 21 February 2012. I make no order as to costs in respect of both Applications.

DATED and delivered at Nairobi this 23rd day of May, 2013.

J. B. HAVELOCK
JUDGE