



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISCELLANEOUS APPLICATION NO. 35 OF 2010

KILONZO & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

VIPUL PREMCHAND HARIA.....RESPONDENT/APPLICANT

R U L I N G

1. This ruling relates to the Respondent's Notice of Motion Application dated **31st October 2012** and filed in Court on **1st November 2012**. The application is brought under **Order 22 rule 52** of the **Civil Procedure Rules, sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Rule 11 (1) and (2)** of the **Advocates Remuneration Order**. For purposes of this ruling, the Respondent shall be referred to as the Applicant, having filed the current application while the Applicant (Kilonzo & Co. Advocates) shall be referred to as the Respondent.
2. The Application seeks the following orders:-
 1. *Spent.*
 2. *Spent.*
 3. *The decision of Hon. Senior Principal Registrar Mrs. Ngugi, given on 17th October 2012, be set aside.*
 4. *That the Honourable Court be pleased to grant such orders as it considers just and proper in the circumstances.*
 5. *Costs of the Application be provided for.*
3. The application is supported by the affidavit of the Applicant herein sworn on **31st October 2012** and is based on the grounds stated therein.
4. The application is opposed vide the Replying affidavit of **Mutula Kilonzo Junior** sworn on behalf of the Respondent on **27th November 2012**.
5. In summary, the Applicant appointed the Respondent to represent him in **Divorce Cause No. 69 of 2005** and **HCCC No. 21 of 2005** (a matrimonial property cause). The Applicant paid **Kshs. 5,700,000/=** as fees to the Respondent with regard to the said two matters. Despite paying the aforesaid fees, the Respondent failed to finalize the Divorce matter. The Applicant decided to act in person, having been dissatisfied with the Respondent's performance. Thereafter, he instructed the firm of Michael Owuor & Co. Advocates to act for him in the Divorce matter.
6. The Applicant avers that he requested the Respondent in writing, to deliver up the files with

respect to the two matters and requested them to retain **Kshs. 350,000/=** as fees for each case totalling to **Kshs. 700,000/=**. Subsequently, the Respondent filed its Bill of Costs on the **14th of April 2010**, in respect of **Divorce cause No. 69 of 2005**.

7. The Applicant objects to the authenticity of the instruction fees being taxed at **Kshs. 5,000,000/=** as referred to in item 1 of the Bill of costs, as he had already paid fees. Accordingly, the Applicant has filed a Notice of Objection to taxation and a request for reasons for taxation both dated **19th October 2012**. It is averred that the Deputy Registrar failed to take into account that the Applicant had already paid the said fees in **Divorce cause No. 69 of 2005**.
8. It is the Applicant's case that the Bill of costs being taxed at **Kshs. 7,831,247/=** is manifestly excessive and not commensurate with the work done by the Respondent, as it was inadequately done and not finalized.
9. The Application is controverted vide the Replying Affidavit of the Respondent sworn on **27th November 2012** by **Mutula Kilonzo Junior**. It is deponed that the Applicant has not met the requirements of **Order 22 rule 52** of the **Civil Procedure Rules** and that the Application contravenes the provisions of **Rule 11(2)** of the **Advocates (Remuneration) Order, 2009** as no reference has been filed by the applicant to warrant any audience in this matter. Therefore, the Application is incompetent, unprocedural and ought to be struck out with costs.
10. The deponent denies the averment that the Applicant paid **Kshs. 5, 700,000** and avers that the only amount paid was **Kshs. 300,500/=**. It is further averred that the Deputy Registrar indicated reasons for the taxed costs at page 3 of the Ruling dated **15th October 2012** and delivered on **17th October 2012**.
11. It is the Respondent's case that the Applicant has not satisfied the Court that his intended reference will be rendered nugatory unless stay of execution is granted by this Honourable Court. It is further the Respondent's case that the Applicant has not offered any security for the amount taxed to warrant a stay of execution, or the discretion of the Court.
12. The parties herein filed their written submissions which I have considered. The Applicant's submissions is dated 15th January 2013 and filed on 21st January 2013 while the Respondent's submissions is dated 23rd January 2013 and filed on even date.
13. It is submitted for the Applicant that the Bill as taxed and particularly the instruction fees being taxed at **Kshs. 5,000,000/=** is erroneous and the same should be set aside. It is the Applicant's submissions that a divorce matter which is specifically provided for under the provisions of **schedule VI B** of the **Advocates (Remuneration) (Amendment) Order 2009** prescribes the basic instruction fees as being about **Kshs. 40,000/=**. Therefore, according to the Applicant that being the basic instruction fees, the figure of **Kshs. 5,000,000/=** awarded is exorbitant, unconscionable and manifestly excessive.
14. Counsel for the Applicant also submitted that the Respondent did not complete the matter and that instruction fees is meant to cover the completion of the matter. In support of this proposition, Counsel referred to the case of **Best v. Wellcome Foundation Ltd. [1996] 3 L.R 378; [1996] 1 I.L.R.M 34**. It is further submitted that the Deputy registrar did not ascertain the value of the work done by the Respondent, the value and importance of the case and the time spent in researching into facts and law. Counsel made reference to the case of **Joreth vs. Kigano & Another [2002] 1 E.A 92**.
15. It is further submitted that the Deputy Registrar failed to consider that costs should not impede access to court, which is a fundamental right guaranteed under **Article 48** of the **Constitution of Kenya 2010**. On the substance of the Application, it is submitted that the Courts will interfere where the taxing officer's decision is based on an error of principle or where the sum awarded is manifestly excessive as to infer an error of principle. In support of this proposition Counsel referred to the cases of **Havelock, muiruki & Raval Advocates vs. Jayantilal Dharmashi Dosrani**

[2010] eKLR and First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64.

16. The Respondent submits that the provisions relating to the procedure to challenge a Ruling of a taxing master are contained in **Rule 11 (1), 11(2) and 11(3)** of the **Advocates Remuneration Order 2009**. It is the Respondent's case that the Applicant's Notice of Motion application contravenes **Rule 11 (2)** of the **Advocates Remuneration Order, 2009** as no reference has been filed by the Applicant within the 14 days as required.
17. The Respondent further submits that under the **Advocates Remuneration Order**, the taxing master is vested with discretion to tax any Bills of costs after considering the circumstances of the case. In support to this proposition counsel referred to the case of **Joreth Ltd vs. Kigano & Associates [2002] 1 E.A 92**.
18. It is also the Respondent's submission that, this Court has no jurisdiction to hear the matter and that the current application is aimed at involving the judge in a taxation dispute while the judge's role in such matters is limited to a reference. Counsel made reference to the cases of **Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 530 Housing finance Company of Kenya Ltd. V. Embakasi Youth Development Project [2004] 2 KLR, 548**.

ANALYSIS

19. I have carefully considered the pleadings herein.
20. The Respondent herein has challenged the current Application in terms of procedure as well as substance.
21. In terms of procedure, it is the Respondent's case that the Applicant should have filed a reference in order to seek the audience of this Court and the same should have been done by way of Chamber summons. The Applicant has filed a Notice of Motion and has cited **Rule 11(2)** of the Advocates Remuneration Order. In my view, the Applicant has duly filed a reference. The issue of not having filed a Chamber summons is a technicality as the same does not affect the substance of the application.
22. On the substantive part, it is the Applicant's case that the the Bill as taxed and particularly the instruction fees being taxed at **Kshs. 5,000,000/=** is erroneous. According to the Applicant, the Respondent did not complete the matter and instruction fee is meant to cover the completion of the matter. The Applicant has also averred that he paid **Kshs. 5,700,000/=** as fees to the Respondent with regard to the said two matters. It is further averred by the Applicant that the Deputy Registrar failed to take into account that he had already paid the said fees in **Divorce cause No. 69 of 2005**.
23. On the other hand, it is the Respondent's case that the taxing master has discretion to tax bill of costs after considering the circumstances of the case. The Respondent denies the averment that the Applicant paid **Kshs. 5, 700,000** and avers that the only amount paid was **Kshs. 300,500/=**.
24. It is now well settled that Instruction fee is an independent and static item not affected by the stage a suit has reached. See **Joreth Ltd vs. Kigano & Associates [2002] 1 E.A 88**. Therefore, the Applicant's argument that instruction fees is meant to cover the completion of the matter does not lie.
25. It is also well settled that a Court cannot interfere with a Taxing Officer's decision unless the decision is based on an error of principle or the fee awarded is so manifestly excessive as to justify an inference that it was based on an error of principle. See **Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (1970) EA 141**.
26. In **Arthur vs Nyeri Electricity Undertaking (1961) E.A 497** the Court 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 case.”

27. It is worthy to note that the Applicant has not disputed the fact that he was informed that the Respondent would charge fees under **Schedule V** arising out of **Rule 22** of the **Advocates (Remuneration) Order**. The Respondent's argument is that there was no agreement to the same effect. **Rule 22** of the **Advocates (Remuneration) Order** provides that:-

“In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

From the said provision there is no indication that there should be a written agreement. There is also no proof to substantiate the Applicant's averment that **Kshs. 5,700,000/=** was paid to the Respondent as fees.

28. In the instant case, the value of the subject matter of the suit (s) could not be ascertained at the time of taxation. In such a case the taxing master has discretion to assess such instruction fees as he considers just, taking into account, amongst other matters, the nature and importance of the matter

29. The argument put forth by the Respondent in justification of the instruction fees of Kshs. 5,000,000/= was that the Applicant had been informed that he would not be charged to scale but under schedule V arising out of Rule 22. The Respondent also urged the taxing master to take into consideration the number, complexity and importance of the documents prepared by the Respondent in the Divorce case. To this end, I have perused the Court file and I cannot place my hands on any documents prepared by the Respondent in the two matters. Therefore, I am unable to comment on the complexity and importance of the matter.

30. That notwithstanding, in her ruling, the taxing master gave due consideration to the fact that the Respondent herein had signified to the client, the Applicant herein, that fees would be charged under Schedule V. From the foregoing, I am of the view that there was no error of principle on the part of the taxing master.

31. The upshot is that the Applicant's Notice of Motion dated **31st October 2012** and filed in Court on **1st November 2012** is hereby dismissed with costs.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

Kethi Kilonzo for the Plaintiff

Khesian for the Defendant

Teresia – Court clerk