



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Civ Case 952 of 2006
IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

ALEX S. MASIKA.....ADVOCATE/APPLICANT

VERSUS

EPCO BUILDERS LIMITED.....CLIENT/RESPONDENT

RULING

This is a reference to this Court from a decision of the Taxing Master on the Advocate/Client Bill of Costs. The reference has been made by the Advocate under **rule 11(2)** of the **Advocate (Remuneration) Order, 1997**. The Advocate seeks to set aside the ruling of the Taxing Master dated 8th March 2007. The Advocate also prays that this Court be pleased to adjust the figures, re-assess the fees due or refer back the Bill to the Taxing Master with appropriate directions.

The Client in the Bill has also filed a reference in the form of an application dated 25th April 2007 in which the client seeks to set aside the ruling of the Taxing Master dated 8th March 2007. It also prays

that the court be pleased to adjust the figures, re-assess the fees due or refer back the Bill for taxation with appropriate instructions.

The Advocate was represented by **Mr. Wangila** Advocate, while the client was represented by **Mr. Ouma** Advocate. I have considered the submissions by each Counsel, the two applications and the authorities relied upon by both parties.

In my understanding of the complaint by both sides, it appears that the bone of contention is the instruction fees and whether the Taxing Master applied the correct principles in arriving at her decision.

The brief history of the matter is as follows:

The Client instructed the Advocate to prosecute an appeal for it before the Public Procurement Complaints, Review and Appeals Board which appeal was application No. 8 of 2006. The appeal was successful. A dispute then arose as to the fees payable. The client made a deposit of Kshs.100,000/- which it claims was the sum agreed between the parties as payable to the Advocate for the services rendered. The Advocate on the other hand basis his fees on the value of the subject matter which he quotes as 418,830,109/- being the amount quoted by the Client in its tender bidding for the construction of 678 housing units. The Advocate claimed Kshs.7,287,644/- in their fee note before filing a suit in which the same amount is claimed as fees for legal services rendered.

When the Advocate filed its Bill of Costs, it claimed Kshs.18,867,606/- being Instruction fees under Schedule V of the Advocate's Remuneration Order based on Kshs.418,830,109/-, being sum tendered for by the Client in the tender, the subject matter of the Review/Appeal.

In the Taxing Master's ruling, she observed that the parties had filed submissions opting to have the Bill of Costs taxed than to pursue an application for directions to prepare the suit for hearing. The Taxing Master observed that the Bill of Costs had been brought under Schedule V, which she observed "***The said Schedule does not specify instruction fees and leaves it to the discretion of the Court.***"

In regard to the issue whether the value of the property was an issue, the learned Taxing Master delivered herself as follows: -

"The court appreciates the fact that this was a complex matter. It must have led to anxiety by the parties involved particularly the respondent herein who was aggrieved. That being so, the applicants who did the work are entitled to a reasonable instruction fee. Is it to be pegged on the value however? With the applicant's assistance the respondent was able to reverse the tendering process. Even if the respondents herein did not get the tender after the process was reversed, the applicants would still have been entitled to their fees. This court is of the opinion that there are two distinctive processes here, i.e. reversing the tender which the applicants are responsible for doing and re-tendering which the respondents did on their own. This being the case, the court is of the opinion that rather than the value, what should be considered is the complexity of the matter and the research that was put in this was a matter that demanded a lot of work from the submissions."

The Taxing Master proceeded to tax the Bill at Kshs.1,000,000/- for the Instruction fees which was item 1 of the Bill. The Taxing Master then taxed item 13 at Shs.5,000/- and item 15 and 16 at Shs.750/- and Shs.375/- respectively. In regard to item 23, it was taxed off and item 24 taxed at Shs.2,000/-.

Both parties wholly disagree with the decision of the Taxing Master. **Mr. Wangila's** contention on behalf of the Advocate is that the Instruction fee was taxed at a figure manifestly low. **Mr. Wangila** submitted that the Taxing Master erred in principle when she failed to consider relevant factors such as the subject value of the dispute and the importance of the matter. He relied on the case of **First American Bank (Kenya) Ltd. vs. Gulab P. Shah and others, Milimani HCCC No. 2255/00** for the proposition that if there is an omission during the taxing of the Bill, then the Court should remit the Bill to

the Taxing Master with directions on what he/she should consider.

Mr. Ouma on his part started by challenging the Chamber Summons application by the Advocate arguing that in so far as it relied on paragraph 11(2) of **Advocates (Remuneration) Order** instead of Rules, the application was fatally defective. I do not agree with **Mr. Ouma**. The defect, if any, is that of form, which does not go to the substance of the application and cannot be used by Counsel to defeat the application.

Mr. Wangila on his part has challenged the client's application and has urged that the same was incompetent and defective since the Supporting Affidavit was sworn by an Advocate and not an officer authorized by the Limited Company to do so. He relied for this preposition on the case of **Elite Earth Movers Ltd. vs. Krisha Behat & Sons Milimani HCCC No. 474 of 2002.**

Mr. Ouma on his part urged the Court to find that the affidavit was competent as it was sworn by an advocate having conduct of the suit and dwelt on legal issues to which only the Advocate could depone.

In regard to the case of **Elite Earth Movers Limited**, supra, the affidavit in question was sworn by the General Manager of the defendant company who failed to state that he had authority to swear the affidavit. The issue before court was an application under certificate of urgency seeking stay of execution and setting aside of an ex parte judgment. It can easily be distinguished from this matter. I have looked at the affidavit in question. It is sworn by the Clients Advocate on record and states clearly that the deponent had instructions to swear the affidavit on behalf of his client.

I have perused the said affidavit and am satisfied that it depones to points of law and not contentious issues of fact. I see no reason to justify its striking out.

In regard to the issue that the Taxing Master failed to apply applicable principles, **Mr. Ouma** submitted that he was of the view that the Taxing Master failed to direct herself on important matters. **Mr. Ouma** submitted that the Taxing Master did not answer the issue raised by the Client whether the value of the subject matter was important to the taxation of the Bill and under which Schedule the Bill was to be taxed, whether V or VI.

Mr. Wangila submitted that Schedule V was the one applicable since the Advocate had signified to the Client his intention to charge under that Schedule. That Schedule was not included in earlier communication between the parties. The first time Schedule V featured is in the fee note dated 6th February, 2006.

I have considered the above submissions. It is trite that a Court cannot interfere with the Taxing Master's decision on taxation, unless it is shown that either the decision is 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 **First American Bank (Kenya) Ltd.**, Supra, and **Steel & Petroleum (EA) Ltd. vs. Uganda Sugar Factory 1970 EA 141.**

The issue of which Schedule applied in taxing the Bill was a pertinent one raised before the Taxing Master by the Client. On that issue the learned Taxing Master observed:

"In respect of issues not specifically provided for in any specific schedule the taxation will be done under schedule V..."

The learned counsel has come under schedule V. The said schedule does not specify instruction fees and leaves it to the discretion of the taxing master."

Paragraph 22(1) of the **Advocates (Remuneration) Order**, provides:

“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.”

The issue is whether the Advocate signified to the Client his election to base the calculation of the Instruction fees on **Schedule V** of the **Advocates Remuneration Order**. The letter written to the Client on 6th February 2006 said in part:

“We now forward our professional fee note calculated pursuant to Schedule V of the Advocate Remuneration Order, 1997 for your attention.”

From the foregoing it is quite clear that the Advocate did signify to the Client in clear terms his election to calculate the instruction fees under Schedule V long before he drew the Bill of Costs. The Advocate did signify the election to calculate the fees due under Schedule V in the first fee note sent to the Client. Even though the Taxing Master did not make a specific finding on that point, she was very clear in her mind that Schedule V was the applicable schedule.

Mr. Ouma raised issue with the Taxing Master’s observation that the Advocate represented the client in an appeal while, in his view, the matter was a review application.

I do not think that there is any significant difference on whether the matter was a review or an appeal. It is a matter of semantics. The Advocate argued an application for an appeal with a view to review the decision of the Tender Committee of the National Social Security Fund. That application was No. 6 of 2005 and was argued before the Public Procurement Complaints, Review and Appeals Board.

As to the issue whether the disparity between the amount sued for and amount charged was an issue, **Mr. Ouma** argued that the Taxing Master ought to have resolved that point since the client raised it in its submissions. No authorities were cited in support of that proposition and I am not aware of any dealing with that point. However, the Taxing Master must have considered that point and this is borne out in her observation thus:

“Even if the Court were to ensure that the Advocate does not undercut by charging less than that prescribed under the other schedules as was stipulated in the case of Muthoga & Gaturu Advocates –vs- Corporate Insurance, Misc. App. No. 433 of 2000 the finding will be as follows...”

It is clear from the foregoing that the amount charged by the Advocate was material to the Taxing Master. What concerned the Taxing Master was whether it was less than provided under the Schedules, the importance of which was to prevent undercutting by the Advocate. I do think that the duty of the Taxing Master is to tax the Bill as presented before them. In exercise of that power, the Taxing Master may reduce or increase the amount taxed for reasons to be given in the ruling.

Mr. Ouma also argued that the Bill should have been struck off for having been presented by one **Alex S. Masika** instead of the firm of Advocates who represented the client. No authorities were cited for that proposition.

In response to this issue, **Mr. Wangila** drew the court’s attention to a letter annexed in the Advocate’s submission before the Taxing Master. It is a letter dated 6th February 2006. It is addressed to **Alex Masika** (Advocate) and is from Epco Builders Limited which is the Client herein. It is a response to a letter by **Nchogu Omwanza & Nyasimi Advocates** to the Client, which is dated 6th February 2006 enclosing a fee note all of which are also enclosed. Counsel also submitted that **Waweru, J.** had ruled on

the matter in the suit and directed that the Advocate should proceed to tax his bill.

Mr. Ouma did not deny that **Waweru, J.** considered the issue of representation and directed that the Advocates Bill be taxed. That being the case my only observation is that the matter is moot and cannot be raised before a court of parallel jurisdiction.

Having considered all the issues raised by the Counsel regarding both references before me and the ruling of the Taxing Master, I am satisfied that the Taxing Master did not err. The learned Taxing Master applied the correct principles in assessing the bill. The Taxing Master was correct in my view, not to base the instruction fees on the value urged by the Advocate. As already stated the Advocate was instructed to represent the Client in the Public Procurement Board in which the subject matter was an appeal and application for review of the decision of the Tender Committee of N.S.S.F. The issue before the Board was the decision making process of the Committee and whether the Tender awarded was upholdable. The value of the Client's tender could not be applied to determine the Instruction fee payable to the Advocate, as it was not the value of the subject matter before the Board.

The learned Taxing Master was of the view that the subject matter was complex and placed a heavy responsibility on the Advocate and was important to the client. Contrary to **Mr. Wangila's** submission, whether the appeal was successful or not was immaterial to the instruction fee item and so was the actual amount quoted by the Client in its bid for the Tender. I agree with the Taxing Master's view on that point.

In regard to the actual amounts taxed, on the Instruction fee, I find that the correct principles were applied in assessing this item. The amount allowed is neither excessively high nor manifestly low as to justify a finding that the wrong principles were applied. Nothing turns on this point.

On item 13 for receiving and perusing documents, it was for perusal of 1000 documents. The Schedule provides for Shs.36/-. The award of Shs.5,000/- is fair having regard to the fact that a component of perusal of documents is also covered under part II paragraph 1 of Schedule V.

In regard to item 15 and 16 for attendances, these were single attendances and Shs.375/- for each is the sum that should have been allowed. Shs.750/- allowed for item 15 is double the amount allowed and is therefore an error on the Taxing Master's part. In that regard I tax off Shs.375/- from this item.

In regard to item 24 for postage, telephone and sundries, this item is not provided for under the schedule and therefore the Taxing Master was in error to allow it. I tax off the entire Shs.2,000/- allowed under that item. The rest of the items were correctly handled and I find no reason to interfere with them.

Save for the corrections made to the Bill, both applications by the parties to the Bill are dismissed.

Each party should bear their own costs.

Dated at Nairobi this 8th day of February, 2008.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

Ms. Kamende holding brief Mr. Wangila Advocate for Applicant

Mr. Ouma Advocate for Respondent

LESIT, J.

JUDGE