REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Cause 654 of 2006

IN THE MATER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVCOATE AND CLIENT

BETWEEN

OCHEING ONYANGO, KIBET & OGAGA ……..APPLICANTS

AND

ADOPT A LIGHT LIMITED…….....…….RESPONDENT

RULING

On the 25th of September 2006 when the Bill of Costs for the Advocate namely, Messrs Ochieng Onyango Kibet & Ohaga Advocates came for taxation as against their former client that is Adopt a light Limited an objection was raised on behalf of the client. The objection was on the basis of section 45 [6] of the Advocates Act herein after called the Act. That section provides that where there is an agreement of advocate costs between the advocate and the client taxation cannot not proceed. It is important to note that that objection was raised before the taxing master. The objection was extensively argued with the client relying on two lengthy affidavits. At the hearing of that objection the taxing master on the 24th November 2006 delivered her ruling. The taxing master found that the preliminary objection was not made on a pure point of law since it relied on disputed facts and therefore she found that it was not properly brought before the court. She also found that the onus was on the client to prove the agreement on fees. She said that such agreement was not produced before the court and after a detailed ruling proceeded to dismiss the preliminary objection. Thereafter a date was taken for the taxation of the advocates cost but before that date could come the client fixed for hearing a chamber summons dated 1st December 2006. That Chamber Summons seeks the following prayers: -

(1) The respondent's objection to the decision of the taxing officer on the objection to the taxation raised pursuant to Section 45[6] of the Advocates Act be heard and decided.

(2) Pending the hearing and determination of this reference, thee be a stay of further proceedings including the taxation of the Advocate's bill of costs dated 6th April 2006.

When that chamber summons came for hearing the advocate raised preliminary objection as follows: -

(i) There is no valid objection as required by Rule 11 [1] of the Advocates (Remuneration) Order and consequently no proper application challenging the decision of the Taxing Officer can be urged on behalf of the Client/Respondent.

(ii) In the alternative, the decision of the Taxing Officer is not amenable to challenge under Rule 11 [2] of the Advocates (Remuneration) Order.

In support of that preliminary objection it was argued on behalf of the advocate that the application related to the objection to the decision of the taxing master which had been raised before her by the client on the basis of section 45 [6] of the Advocate Act. On behalf of the advocate it was argued that the court need not look any further than that application. It was further stated that the bill of cost dated 16th of April 2006 had not been taxed. That the present application is brought under paragraph 11 of the Advocate (Remuneration) Order. That that paragraph presupposes that taxation has taken place. The court was referred to the marginal notes next to paragraph 11. The marginal notes on the Act states "**objection to decision on taxation and appeal to the court of Appeal**". It was argued that marginal notes had been found by the court of appeal to be of utmost importance. In that regard the advocate relied on the case ***Sire – v – Thabiti Finance Co. [2002] 1 EA 279***. It was argued therefore that the paragraph in the Advocates (Remuneration) Order relied upon by the client application dealt with the review of a decision of the taxing master. That paragraph 11 would arise where taxation had taken place in accordance with paragraph 10. Paragraph 10 provides that taxation of the bill of cost under the Advocate's (Remuneration) Order should be undertaken by the Registrar or District or Deputy Registrar of the High Court or in the absence of a Registrar such other qualified officer that the Chief Justice may appoint in writing. The advocate therefore posed the question; what was the taxation that the client was seeking this court to review? The advocate sought to define taxation as follows: Stroud's Judicial Dictionary of Wards and Phrases, 6th Edition, page 2618;

"(a) **Taxation of costs as between solicitor and client distinguished for party and party costs.**

(b) Taxation as between solicitor and client denotes an inquiry as to the costs which a client ought property to pay to his own solicitor" and

Black's Law Dictionary, 8th Edition, page 1500

"**Taxation of costs. The process of fixing the amount of litigation – related expenses that a prevailing party is entitled to be awarded"**

The advocate also relied on the case of ***Oseko & Co. Advocates – Occidental Insurance Co. Ltd [2000] R 3909***. In this case the judge went into detail to explain the various steps of taxation. The advocate concluded on this point by saying that the decision made by the taxing master on section 45[6] of the Act cannot be deemed to be taxation as defined by the dictionaries or as set out in the authority herein before. He therefore stated that there is no valid reference before the court. The advocate was of the point of view that the client should have appeared before the High Court under paragraph 12 of the Advocate (Remuneration) Order for a case stated for the opinion of the High Court. The advocate further argued that even if the court was of the opinion that it has jurisdiction to entertain the clients chamber summons application that the same was incompetent for none compliance with paragraph 11[1]. That paragraph requires a party aggrieved by taxation to give notice to the taxing officer on the items that were the subject of their objection. On receiving that notice the taxing master is then required to forward the reasons for taxation of those items. It is only after then that an applicant could approach the High Court in chambers for the High Court to review the taxation. The advocate stated that the court is presently even more incapacitated since the decision of the taxing master had not been brought before the court in the present application. To support that argument the advocate relied on the case of ***Shah & Parekh – v – Apollo Insurance Co. Ltd [2005] e KLR***. The advocate stated that a decision on a pure point of law such as the one delivered by the taxing master cannot be regarded as taxation and therefore does not fall under consideration of paragraph 11. He ended by saying that the application is an abuse of the court process and should be struck out.

On behalf of the client that objection was opposed. Counsel began by saying that it cannot be disputed that section 45[6] of the Act is an absolute bar to taxation cost. He stated that that section does not stipulate how that objection to taxation ought to be raised. He argued that the taxing master had failed to follow the doctrine of precedent because she failed to take into account the Court of Appeal case referred to her namely ***Ibrahim v Sheikh Bros Investment Ltd [1973] EA***. The counsel for the client said that once the taxing master disagrees with the arguments of the client since the client did not wish for the taxation to proceed the client filed the present application since there is no procedure set out in the Act on how a party should move to challenge such a decision. He argued that when a statute is silent that does not take away the courts jurisdiction. To support that he relied on the case of ***Privy Council Olive Casey Jaundoo [1971]*** in that case it was held as follows:

"**(1) that the right to apply to the High Court for redress conferred by article 19 (1) was expressed to be subject to paragraph (6) of that articles, and since neither Parliament nor the rule making authority of the Supreme Court had exercised their power under article 19 960 to make provision with respect to practice and procedure the method was unqualified and the right wide enough to cover application by any form of procedure by which the High Court could be approached to invoked its powers, and an originating motion was one of the ways by which that could be done**."

Client's counsel stated that parliament by virtue of section 45[6] of the Act has stated that where there is a fee agreement taxation cannot proceed and yet the same Parliament does not state the procedure to be adopted to challenge taxation on that basis. Counsel was of the view that the client is entitled to take any avenue to challenge the decision of the taxing master before the High Court. He stated that it cannot be that Parliament makes a law then closes the door to which a party who is aggrieved can approach the court. In respect of the arguments by the advocate that the procedure used by the client was wrong and incompetent, the counsel of the client responded by saying that since there was no prejudice the application should be allowed. In that regard he relied on the case of ***Boyes v Gathure [1969] E.A***. In this case the applicant initiated action by chamber summons which is ordinarily used in interlocutory application. In an argument that the same was incompetent because it ought to have been by way of originating summons the Court of Appeal stated that indeed the correct procedure was by way of originating summons but proceeded to find that the use of the wrong procedure did not invalid the proceedings because it did not go to the jurisdiction and also because there was no prejudice to the other party. On behalf of the client it was also argued that the High Court as provided by section 65 of the Constitution has a supervisory role over all subordinate courts and therefore would have supervisory role over the taxing master. He stated that the High Court has jurisdiction to supervise such a taxing master for matters which are before her for taxation even before that taxation commences. Client's counsel also stated that under our Law unless there is an express prohibition, every wrong has a remedy. The advocate again placed reliance on the case of ***Boyes v Gathure [1969] E.A.*** (Supra**).** The client's counsel considering the objection raised by the advocate stated that if that was to be upheld the alternative to the client would be to file fresh suit to seek an injunction stopping the taxation. He however was of the opinion that since this suit is already in existence parties then can ventilate their position in this suit. In reference to order 50 rule 12 of the civil procedure Rules, the advocate stated that the court has jurisdiction to hear the client's application and that application cannot be defeated by the use of a wrong procedure. In his concluding remarks the counsel stated that the client is entitled to appeal against the ruling of the taxing master by way of a chamber summons.

As can be seen hereinbefore the client chose the forum of the taxing master to raise an objection to taxation by virtue of an existing fee agreement and by virtue of the provisions of section 45 [6] of the Act. The clients counsel was heard to argue that that section fails to provide the procedure by which a taxation can be challenged. There I beg to differ with him. The Advocate Act in the definition section clearly provides that the court herein refers to the High Court. It is only in the Advocates (Remuneration) Order paragraph 10 that a provision is made for the taxing of bill of cost to be entertained by the Registrar or the Deputy Registrars. Since section 45[6] of the Act does not state that it can be entertained by a Deputy Registrar it therefore can be taken that that section can only be entertained by the court, that is the High Court. I am in agreement with the client that the use of the wrong procedure does not necessarily mean that an application should be defeated. I am however of the opinion that each objection raised on the basis of the wrong procedure used has to be looked at on the facts of each case. I am also in

agreement with the advocate that since no taxation has been undertaken the client was no right to invoke paragraph 11[1] of the Advocate (Remuneration) Order but the use of that paragraph is not fatal. The client having argued that the preliminary objection before the taxing master I would say that even though it was before the wrong forum they are indeed '*stuck*' with the decision of the taxing master. What I mean is that there is on record a detailed ruling delivered by the taxing master and unless that ruling is appealed from or set aside the same remains binding even upon this court. It is important to pay attention to the prayers that have been brought by the client by its chambers summons dated 1st December 2006 to ascertain what the client seeks from this court. Looking at prayer NO. 1 it is obvious that the client is asking this court to hear its objection to taxation by virtue of the provisions of section 45[6] of the Act. The client seeks the hearing of its objection by this court as court of first instance. That prayer is not seeking an appeal against the Deputy Registrar's decision. Indeed as I consider that first prayer I find that it is not at all at tandem with the grounds, the grounds seem more akin to grounds of an appeal. I find that that is one of the greatest failings on the client's application and on that basis alone the application would be defeated. The client has also failed to attach a copy of the taxing masters ruling which is being appealed from if indeed what is before court is an appeal. If it had it not been for the prayer of the chamber summons which seems to ask this court to act as the court of first instance I am of the view that the clients application would not have been defeated. In that regard I am in agreement with the client that there cannot be a wrong without a remedy unless there is an express prohibition by statute or otherwise. But the client is seeking that remedy has faulted in the drafting of the chamber summons and in failing to attach the ruling appealed from. The client did raise a very interesting point relating to section 65 of the Constitution. That section provides:

(1)Parliament may establish courts subordinate to the High Court and courts-marital, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts".

I am in agreement with the client that the Constitution has bestowed upon the High court supervisory powers over the subordinate courts. However in considering that power I am guided by section 82[9] of the Constitution which section protects the exercise of discretion of any court whether civil or criminal in the institution conduct or discontinuance of any case before it. That section provides as follows:

"**Nothing in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of Civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law**".

Having read the handwritten ruling of the taxing master I find that in reaching the decision that she did, she was exercising her discretion in accordance with the evidence that was brought before her. Accordingly, the only way that the client can challenge that decision is by appealing before a judge in the High Court which to my mind the client has not done by the present application. In my final conclusion, I would find that I am in agreement with the client that an appeal since no procedure has been provided in Act can be by any means or application that is available to but I do find that the client by the prayer in the chamber summons seeks a rehearing of its preliminary objection which was first raised before the taxing master. That in my mind is not an appeal and I do find that indeed it makes the application be misconceived and accordingly liable to be struck out. The order of the court is that the chamber summons dated 1st of December 2006 is hereby struck out with costs to the advocate for being incompetent in the prayer it seeks. Orders accordingly

MARY KASANGO

JUDGE

Dated and delivered on 14th day of February 2007.

MARY KASANGO

JUDGE