



CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Moikobu) (Miscellaneous Cause E171 of 2021) [2024] KEELC 4198 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CAUSE E171 OF 2021**

J OMANGE, J

MAY 2, 2024

BETWEEN

CM ADVOCATES LLP APPLICANT

AND

ANDREW OMANDI COLE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE ELEANOR MOIKOBU) RESPONDENT

RULING

1. The Applicant herein filed an advocate -client bill of costs dated 10th December 2021 in respect of legal services offered to the Respondent. The learned Taxing Master *vide* a Ruling dated 22nd November 2022 taxed the bill at Ksh.202, 062.80/=.
2. The Applicant filed a reference to the bill *vide* the chamber summons application dated 16th December 2022 which is coming up for determination today. The application seeks a review /setting aside of the ruling dated 10th December 2022.
3. The application is premised on grounds on the face of the application and on the Applicant's supporting affidavit sworn by Caroline Kendi Kithinji.

She avers that the Applicant is aggrieved by the ruling of the Taxing Officer for the following reasons;

- a. the taxing officer erred in law by awarding ksh Ksh.202, 062.80/=as instruction fees without considering value of subject matter as per the valuation report.
- b. the taxing officer erred in law by awarding an amount that was grossly disproportionate to the work done by the advocates and the disbursements payable by failing to consider the list of documents dated 9th May 2022.
- c. The Taxing officer misdirected herself in finding the value of the subject matter was unascertainable despite contrary evidence.



4. The Respondent filed a Replying affidavit dated 7th July 2023 in which he averred that the application was defective as the Applicant is not entitled to any fees as they had entered into a retainer agreement, which agreement required the Applicant to be paid a standard fee of Ksh 5,000, 000/= for representing the interests of the Respondent in ELC 2013 of 2019(OS). The agreed fees were paid hence the Applicant is not entitled to any fees.
5. Both parties filed submissions. The Applicant in their submissions state that, whether they had entered into a retainer agreement or not, did not take away from the fact that the Taxing Master had taxed the bill in accordance to the Advocates Act and the Advocates Remuneration Order.
The issue of the retainer agreement was never brought up before the Deputy Registrar and hence should not be raised during the reference.
6. Counsel cited the case of Showcase Property Limited v Mugambi and company Advocates [2020] eKLR. In any event, the Applicants argue that the retainer agreement is not enforceable as the Respondent had not executed the same as required by Section 45 (1) of the Advocates Act. Consequently, they had not accepted the terms of the said retainer agreement and further that the alleged agreement failed to mention the subject suit that is ELC 213 of 2019(OS) hence cannot be said to be an agreement for services relating to the specific suit.
7. To buttress this point, counsel cited the case of Kakuta Maimai Hamise v Persis Pesi Tobiko & 3 others [2015]. Lastly, the Applicant submitted that the decision of the Taxing Master was based on an error in principle in failing to consider the valuation report to ascertain the value of the subject matter as has been done in other cases. One such decision relied upon, was Sammy Some Kosgei v Grace Jelei Boit [2014] eKLR.
8. Counsel for the Respondent filed submissions and reiterated the contents of the Replying Affidavit and supporting affidavit that the advocates had been engaged on a retainer. Counsel insisted that notwithstanding non execution, the conduct of the parties implied that both parties intended to be bound and relied on the case of G.percy Trentham Ltd v Archital Luxfer Ltd[1993] 1Lloyds Rep .
It was their submission that, should the court not allow their arguments on the issue of a retainer then the decision of the Taxing Master should be varied as it was way in excess as the Applicant only filed a miscellaneous application that was withdrawn.
9. Having considered the pleadings, and submissions by both parties the court identifies the following issues for determination; Whether the issue of retainer which was not raised at the taxation is one which the court can consider now. Whether the Taxing Master erred in principle in taxing the bill.
10. On the first issue, it is not in dispute that the Advocate/Applicant's Bill of Costs dated 10th December 2021 was taxed as between the Advocate/Applicant and Client/Respondent in the sum of Ksh. 202, 062.80/=. It is also not in dispute that the Client/Respondent's advocate participated in the said taxation proceeding and filed submissions dated 21st July 2022. The issue of the retainer was not raised at all.
11. It is an issue which if raised should have been dealt with first by the Deputy Registrar in line with the guidance given in the case of Wilfred Konosi t/a Konosi & Co Advocates v Flamco Limited [2017] eKLR. This court cannot now delve into this issue at the reference stage. In the case of Wanga & Co. Advocates the court stated that, allowing a party to introduce new evidence at the appellate level is not only prejudicial to the opposing party but also against public policy and the law.
12. On the second issue of whether the Taxing Master erred in finding that the value of the subject matter was unascertainable, I note that the findings of the Taxing Master on this were drawn from the



principles in Joreth Limited in which the court held that the value of the subject matter should be assessed as contained in the pleadings on record, judgement or settlement.

13. Counsel for the Applicant argues that Schedule VI under which the bill was taxed required that the Taxing Master consider the value of the subject matter which the Taxing Master did not. It is common ground that the value of the subject matter was not contained in the pleadings but was contained in a valuation report submitted with the Applicant's documents. Some courts of concurrent jurisdiction have found that a valuation report can be considered even if the figure was not indicated in the pleadings, settlement or Judgement. I respectfully disagree.

A party who does not indicate the value of the subject matter in pleadings and who consequently, pays a lower court filing fees should not thereafter bring in other documents to justify higher fees.

14. I find that the Taxing Master was correct in finding that the value of the subject matter was unascertainable. The Taxing Master thereafter outlines various principles and concludes that;

“..... I will exercise my discretion and grant Kshs 100,000. The reason for the exercise of this discretion is stated further as

I have considered the importance of the matter to the parties and the length of time the matter has been in court...”

15. I find that, I am unable to discern any error of principle that would justify interference with the Taxing Masters exercise of discretion. As such I find that the application has no merit, and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS ON 2ND MAY, 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

No Appearance by the Parties

Court Clerk: Steve

