Arthur Ingutya & Co Advocates v Patel & another (Miscellaneous Application 231 & 232 of 2022 (Consolidated)) [2024] KEELC 5176 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5176 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION 231 & 232 OF 2022 (CONSOLIDATED)

J OMANGE, J

JULY 3, 2024

BETWEEN

ARTHUR INGUTYA & CO ADVOCATES ..... CLIENT

AND

KIRITKUMAR RAMBHAI PATEL ..... 1ST RESPONDENT

S & H INVESTMENTS LTD ..... 2ND RESPONDENT

RULING

1. The facts leading to this reference is that the Client/ Applicant (hereinafter referred to as the Applicant) together with Jesus is Alive Ministries, S & H Investments and Soma Properties instructed the Advocate/ Respondent (hereinafter referred to as the Respondent) to represent them in Nairobi ELC Case No. E146 of 2020, *Jesus is Alive Ministries Registered Trustees and 3 Others Vs Kenya Railways Corporation and 2 Others*.

2. The Applicant contends that there was an agreement as to the fees payable which the Applicant complied with.

   That notwithstanding this agreement the Respondent filed an advocate-client bill of costs dated 18th October, 2022 which was taxed at Kshs. 4,553,240 vide a Ruling delivered on 6th April, 2023. The taxed amount included an amount of Kshs 1,500,000 instruction fees for Misc. E 232 of 2022.

3. The applicant has filed a reference to the bill *vide* the chamber summons application dated 19th April 2023 which seeks to review /set aside the ruling dated 6th April 2023.

4. The application is premised on grounds on the face of the application and on the applicant's supporting affidavit sworn by Daniel Wandera. He avers that the applicant is aggrieved by the ruling of the Taxing Officer on the following grounds;

a. the taxing officer erred in law and fact when she held that the agreement as between the parties as enshrined in the fee note dated 24th September 2020 was not executed by the applicant as required by section 45(1) of the *Advocates Act* despite the same having been clearly executed by the applicant.

b. the taxing officer erred in law by awarding an amount that was grossly disproportionate, unreasonable, exaggerated, excessive and gratuitous without any basis in law.

c. Taxing officer contrary to well settled principles of law misdirected herself on the principles of law applicable when she failed to hold that the fee note dated 24th September 2020 constituted an agreement between parties in respect of legal fees pursuant to section 45(1) of the *advocates Act*.

d. That the taxing officer erred in both law and in fact by dismissing the application seeking to strike out the bill and proceeding to tax the bill despite there, having been an agreement between parties in respect of legal fees payable.

5. The Respondent in response filed grounds of opposition and a replying affidavit dated 6th and 7th July 2023 respectively and averred that the application is defective as the Applicant has not cited any principle ignored by the taxing officer to warrant setting aside of the ruling and that the fee note being relied upon by the Respondent does not fit the description of a fee note agreement as provided by Section 45(1) of the *Advocates Act*.

6. The Applicant filed a further affidavit dated 16th February 2024 in response to the replying affidavit and reiterated the contents of the application and further averred that the Applicant together with 3 Others had instructed the Respondent to Act for them in Nairobi ELC cause No E146 of 2020. That it was agreed that fees payable by all parties would be Ksh 800,00/- collectively and Ksh 200,000/= for each party. That the Respondent ratified the agreement by sending a fee note for Ksh 800,000/= which was to be shared pro rata. That the applicant received the fee note and acknowledged by paying a deposit of Ksh 100,000/ vide a cheque which payment was accepted by the Respondent vide a letter dated 1st October 2020 leaving a balance of Ksh 100, 000/=.

7. That despite this agreement the Respondent filed a bill of costs which was taxed at Ksh 4, 553,240/ =. The Respondent insist that payment of the partial amount amounted to acceptance of the terms of the agreement. The Applicant contend that the letter by the Respondent dated 18th August, 2022 implies that there was a binding agreement.

   As such under Section 45 of the *Advocates Act* the Respondent is estopped from filing a bill of costs. On this issue the court was referred to the case of *Majanja Luseno & Company Advocates Vs Leo Investments Limited & Another* (2017) eKLR.

8. On the issue of the instruction fees, the applicant submitted that the value of the subject matter was not pleaded in the plaint in Nairobi ELC cause No E146 of 2020. As such the value of the subject matter was not ascertainable to warrant the instruction fees given by the taxing master.

   That the Taxing Master should have considered the factors as laid down in the court of appeal case of *Joreth Limited Vs Kigano & Associates* (2002) eKLR.

9. Further that the plaint sought for declaratory orders and did not require complex and technical expertise to justify the instruction fees. On this point the court was referred to the case of *Republic Vs Minister for Agriculture & 2 others Ex parte Samuel Muchiri W Njuguna & 6 others* (2006) eKLR.

10. The Respondent filed submissions and reiterated the contents of its replying affidavit that the Applicant had not demonstrated any error of principle and consequently the court was urged not to interfere with the taxing master's decision. Counsel cited the case of *Republic Vs Minister for Agriculture & 2 others Ex parte Samuel Muchiri W Njuguna & 6 others* (2006) eKLR.

11. It was the Respondents contention that the taxing master exercised her decision judiciously on the findings on the agreement and considered the correct principles in taxing the bill.

12. Having considered the pleadings, the submissions by both parties and cited case law the issues for determination are:-

    i. whether indeed there was a valid agreement between the parties.

    ii. Whether the taxing master erred in law in awarding instruction fees of Ksh 1,500,000.

13. On the first issue, Section 45 of the *Advocates Act* provides:

    "(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

        (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

        (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

        (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee-

        for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf

        .....

    (6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48."

14. Sub Section (6) is clear that taxation of costs will not take place in instances where parties had an entered into an agreement in respect of costs.

    The question of the definition of an agreement was given legal interpretation by Ochieng, J in *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5 in which the learned Judge held that a reading of Section 45(1) of the *Advocates Act* reveals that agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorized in that behalf.

    The Court proceeded to hold that an agreement that provides for fees, which was less than the fees provided for in the *Remuneration Order* was illegal.

15. In this case, the Client contends that the agreement is the fee note dated 24th September 2020 issued to them by the Respondent. In the said fee note it was stated inter alia as follows:

    Deposit Request note

> "Detail of services: Preparing and filing suit over LR N0s 209/16778,209/1253, 209/1254 and 209/1077 enjoining Kenya railways Nairobi metropolitan services including applying for interlocutory reliefs under certificate of urgency.
>
> a. legal fee per individual /company (property owner) Ksh 200,000/=
>
> b. Total legal fee for the entire matter to be shared pro frata Ksh 800,000/=
>
> Please make cheque payments to Arthur Ingutya & Co Advocates....."
>
> The Applicant alleges that payment of the Kshs. 100,000 amounted to acceptance of the terms. After considering the circumstances of the case the learned Taxing Master found that there was no agreement and in particular noted that the applicant has not made any effort several years down the line to remit the balance of the fees which they allege they had agreed to.

16. A valid and binding agreement should have an offer which is in clear terms and there must be an offer which if not express should be so clear as to not have any vagueness. In this instance the offer made by the Respondent is titled Fee Deposit Request. This implies that there was a final fee note expected.

    The details of the services also appear to only speak to the filing of the interlocutory application. It is not clear in the body of the deposit request note how the total fees referred to relates to the rest of the document.

    However more importantly, I agree with the Learned Taxing Masters finding that there was no written acceptance by the applicant. The payment of Ksh. 100,000 does not on its own amount to an acceptance of the terms of the agreement.

17. I would therefore adopt the position of Tanui, J in *Rajni. K. Somaia vs. Cannon Assurance (K) Ltd Kisumu* HCMA No. 289 of 2003 where he stated that there being no validly binding agreement as contemplated by the law, the Advocate was perfectly entitled to file his bill for taxation.

18. On the second issue which was on the question of whether the Taxing Master erred in law in awarding instruction fees in the sum of Ksh 1, 500, 000/=.

    In *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal distilled the principle this court should follow in dealing with a reference as follows:

> "On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.
>
> In Arthur vs Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: "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 cases".

19. As such this courts main preoccupation is whether in awarding Kshs. 1,500,000 the Taxing Master erred in principle. The principles that ought to guide a court in assessing instruction fees are well settled.

20. In *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR the Court of Appeal outlined the principles as follows: -

> "We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

21. Beyond any argument, it is evident that if the value of the subject matter is not evident from the either the pleadings, Judgement or Settlement then the Taxing Master is to exercise discretion based on the factors clearly spelled out in the *Remuneration Order* 22. In the case of *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W. Njuguna & 6 Others* [2006] eKLR Ojwang J had occasion to expound at length on the question of exercise of discretion.

22. "It is appreciated that the law under which the bill of costs was taxed grants discretion to the taxing officer. As already stated, factors to be considered in exercising that discretion are listed as the "nature and importance of the application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate. The only way to demonstrate that discretion has been exercised judiciously is by giving plausible reasons for reaching the decision. It is not enough to state the principles guiding the exercise of discretion. It must be demonstrated in the decision that those principles were indeed applied."

23. In the instant case the taxing master in her ruling indicated that she had considered the prayers sought in the plaint by the applicant, location of the suit properties, that is they were located in the central business district being commercial properties, the measurement of the properties, the interest of parties in the pleadings, documents and proceedings in the court file and labour employed by counsel in the prosecution.

24. While restricting myself strictly to the principles the taxing master considered, I have had great difficulty with the Taxing Masters assessment of the suit properties value based on the location and even the size. The r*emuneration order* is clear that value should only be gleaned from the pleadings, Judgement or settlement. There is no provision for apparent value.

    It is my humble view that in the absence of value from the pleadings, Judgement or settlement the taxing master should refrain from use of value as a consideration. The Taxing Master should instead rely on any of the other factors outlined in the *Remuneration Order*.

25. In this instance the Taxing Master states that another factor is interest of the parties from pleadings, documents and proceedings without illustrating on what basis the importance was assessed.

    Importance would be illustrated by for instance qualifying that from the plaint specific averments pleaded that lead to the finding of the Taxing Master on the importance of the matter to the parties.

26. The second factor the taxing master relies on is care and labour. This could be demonstrated by making specific reference to the aspects that led the Taxing Master to this conclusion. The *Remuneration Order* provides for several other factors which the Taxing Master after evaluating the circumstance of the case can use to exercise discretion to enhance instruction fees. The taxing master can rely on any one or as many as are proved so long as the criteria is related to the circumstances of the specific case.

27. I find it useful to reproduce the timeless words of Ojwang J in *Republic v Ministry of Agriculture & 2 Others Supra*; "The Learned Judge stated interalia the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel."

28. The requirement that clear reasons be given for exercise of discretion flow from our *Constitution*. Article 10 and Article 232 (f) emphasize provision of information as one of the values that public and Judicial officers must live up to.

29. I therefore find that the Taxing Master erred in principle by not giving adequate reasons for exercise of discretion. I therefore allow the reference partially and direct that matter be taxed afresh by a different taxing master who is to consider the issues highlighted in this Ruling.

30. In the end the Reference is partially allowed in the following terms;

    a. The taxation dated 6th April, 2023 is hereby set aside in so far as it relates to the instruction fees awarded in respect of Misc 231 of 2022 and Misc 232 of 2022.

    b. TheBill of Costs is to be taxed by a different taxing master who is to consider the principles highlighted in this Ruling.

    c. Each party to bear their own costs for the Reference.

RULING, DATED, SIGNED AND DELIVERED ON 3RD DAY OF JULY, 2024 VIA MICROSOFT TEAMS.

JUDY OMANGE

JUDGE

In the Presence of: -

-Mr. Gisemba for the Client/Applicant

-Mr. Mwangi for the Respondent/Defendant

-Court Assistant: Steve Musyoki