



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC MISC. APPLICATION NO. 69 OF 2018

IN THE MATTER OF THE ADVOCATE'S (REMUNERATION) (AMENDMENT) ORDER 2014

AND

IN THE MATTER OF TAXATION OF ADVOCATE/

CLIENT COSTS

RANSLEY MCVICKER & SHAW ADVOCATES....ADVOCATE/ RESPONDENT

VERSUS

REDSTONE MANAGEMENT LIMITED.....CLIENT/APPLICANT

(Being a Reference from the Ruling on Taxation of Advocate's Bill of Costs by the learned Taxing Officer, Honourable I.N. Barasa (D.R.) dated and delivered on 5th December 2019

RULING

1. The matter for determination by this court is a reference from the taxing officer's ruling dated 5th December 2019 on the Respondent's/ Advocates Bill of Costs dated 24th April 2018. The reference has been brought by way of a Chamber Summons dated 7th July 2021, filed pursuant to Rule 11(2) of the Advocates (Remuneration) Order, in which the applicants seek the following orders:-

a. That the Honorable Court be pleased to vacate and set aside in its entirety the ruling and reasoning of the learned Tax Master Hon. I.N. Barasa (DR) dated and delivered on 5th December, 2019 taxing the Advocate/Respondent's Bill of Costs dated 24th April 2018 at Kshs. 3,338,961.40/-

b. That this Honourable Court be pleased to re-assess Item No. 1, the quantum of total fees and Value Added Tax chargeable in the Advocate/ Respondent's Bill of Costs.

c. That in the alternative to prayer (2) above, the Honourable Court be pleased to remit the Bill of Costs dated 24th April 2018 for re-assessment of item 1, the quantum of fees and the Value Added Tax chargeable before the Taxing Master or a different Taxing Master with appropriate directions thereof.

2. This application is based on the grounds on the face of it and on the Supporting Affidavit sworn by the Applicant's Advocate, Purity Mwangi. She averred that the Taxing Master erred in respect to Item No. 1 in which she awarded instruction fees of Kshs. 2,875,000/- which were excessive and without a basis in law and fact, as the value of the subject matter could not be ascertained from any of the documents filed, that no valuation report was filed and that there was a valid fee agreement between the parties for Kshs. 3,500,000/-, which the Applicant had duly paid. Thus the Taxing Master arrived at the wrong instruction fees, and in the end the wrong quantum fees and Value Added Tax payable.

3. The Application was opposed by the Respondent vide a Replying Affidavit sworn by Virginia Wangui Shaw dated 16th July 2021, in which she denied all the allegations made by the Applicant. She averred that the Taxing officer correctly applied the general principles of taxation and took into consideration all relevant factors to determine instruction fees, the quantum of fees and the Value Added Tax payable to the Respondent. She deponed that these sums were not exorbitant or excessive but were instead minimal, commensurate and proper

considering the nature of transaction and interests of the parties.

4. It was argued for the Respondent that there was no valid fee agreement between the Client and Advocate. She avers that the acknowledgement of payment of fees by Philip Ransley which is annexed to the application was not presented to the taxing master, and the Applicant has not provided evidence to prove such payment.

5. The Respondent deponed that the Applicant had failed to prove any substantial loss that they would suffer if the Application is denied, and are instead avoiding to pay legal fees for work done more than five years ago, which unjustly prejudices the Respondent.

Submissions

6. The Applicant filed written submissions dated 7th July 2021 in which they reiterated their position as contained in their application and supporting affidavit. I have disregarded the submissions filed outside the timelines given by the court on 28.9.2021. The applicants have provided a brief background of the facts being that the parties were in an Advocate and Client relationship in which the Respondent/Advocates had acted for the Applicant in the transfer of the property L.R. No. 1160/1047 from the Applicant to Blackstone Properties Limited.

7. The Applicant submitted that **Section 45(1) and (6) of the Advocates Act-Cap 16** applies in this case as there was a fee agreement between the parties and the same has been settled and such payment acknowledged. They relied on the cases of **Mercy Nduta Mwangi T/A Mwangi Kengara & Company Advocates v Invesco Assurance Company Limited [2016] eKLR** and **Mastermind Tobacco (K) Ltd vs Ngatia & Associates Advocates [2013] eKLR** where it was held that:

“With regard to the second issue, section 45 (6) of the Advocates Act is clear that the costs of an advocate in any case where an agreement has been made by virtue of the said section shall not be subject to taxation. Therefore, the taxing master did not have jurisdiction to tax the advocate’s legal fees.”

8. The Applicant submitted that the Taxing Master fell into error of principle and fact in awarding instruction fees of Kshs. 2,875,000/- despite noting in her ruling that the value of the subject matter, which was claimed to be Kshs. 600,000,000/-, could not be ascertained from the copy of the filed transfer or any of the pleadings filed in taxation. She consequently arrived at wrong instruction fees, and in the end, wrong quantum of fees and Value Added Tax.

9. The Applicant relied on the case of **Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Civil Appeal No. 220 of 2004 [2005]1 KLR 528** where the Court of Appeal provided the rule for interference with the exercise of a Taxing Officer’s discretion:

“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... An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles .. or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D’Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji v Kanji Naran Patel (No. 2) (supra).”

10. They also relied on the case of **Joreth Ltd v Kigano & Associates [2002] 1 EA 92** where the Court of Appeal stated the factors which should guide a Taxing Officer in exercising their discretion in assessing instruction fees:

“the value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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.”

11. They urged the court to tax off the VAT payable of KShs 460,546.40/- from the sum awarded by the Taxing Master, only as against the award that is wrongly charged on the sub total of instruction fees and the increase of fees thereto. They relied on **A.M. Kimani & Co. Advocates v. Kenindia Assurance Co. Ltd [2010] eKLR** where Koome J stated that:

“under the Value Added Tax, an advocate is entitled to charge VAT on instructions fees and also disbursements.”

12. The Respondent filed submissions dated 16th July 2021 in which they stated that the Taxing Officer correctly applied the general principles of taxation and took into consideration of all relevant factors to determine instruction fees payable to the Respondent. They relied on the case of **Tom Ojienda v County Government of Meru [2021] eKLR** which quoted the case of **In the Estate of Ogilvie: Ogilvie –vs Massey (1910) P 243** and South African case of **Visser vs Gubb 1981 (3) 753 (C)**, where the principles governing interference with the exercise of the taxing master’s discretion were stated as follows;

“the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

13. The Respondent also relied on **National Oil Corporation Limited v Real Energy Limited & Another [2016] eKLR** where the court reiterated the circumstances under which a judge may interfere with the discretion of a Taxing master.

14. That similarly, in **Keziah Gathoni Supeyo v Yano t/a Yano & Co Advocates [2019] eKLR** the court relied on the principles on taxation of costs set out in **Premchand Raichand Ltd & Ano. V Quarry Services of East Africa Ltd & others No. 3 (1972 EA 62)**, where it was stated that;

“(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

15. To this end, the Respondent also relied on the cases of; **Republic v Ministry of Agriculture & 2 Others Exparte Samuel Muchiri 2006 eKLR** and **B. Mbai & Associates Advocates v Clerk, Kiambu County Assembly & Ano. [2017] eKLR**.

16. They submitted that the awarded instruction fees of Kshs. 2,878,415/- could not be said to be exaggerated or excessive as the Bill of Costs dated 24th April 2018 sought instruction fees in the sum of Kshs 7,175,000/-, which the Taxing Master exercised her discretion in taxing the same. In addition, the Applicant had failed to bring evidence to show that the Taxing officer took into account irrelevant factors when taxing the Bill of Costs or committed an error that deserves the intervention by the Court.

17. The Respondent also submitted that there was no remuneration agreement between the parties for legal service provided by the Respondent. This matter was canvassed before the Taxing Master who found in her ruling that the handwritten letter availed as evidence of an agreement for fees did not meet the threshold of Section 45 of the Advocates Act and concluded that no agreement existed between the parties within the meaning of Section 45 of the Advocates Act.

18. The Respondent further submitted that the handwritten letter could not be binding between the parties as it was foreign to the Respondent and was not issued on its behalf as it was not on its letterhead. The purported oral agreement between the Applicant and a Mr. Philip Ransley (a partner of the Respondent Advocates then) could not be deemed as valid under Section 45(1) of the Advocates Act. They relied on **Kahari & Kiai Advocates v Kenya Safari Lodges and Hotels Ltd (2007) eKLR** where the court stated as follows;

“It is common ground that in the present case, there was not one single document signed by the Client or its agent duly authorized in that behalf constituting an agreement on fees. But there is clear evidence that the Advocates and the Client agreed that the Advocates would charge their fees based on the initial loan of Kshs. 65 million and not on the further loan of KShs. 108,503,204/00. The fee notes sent by the Advocates to the Client are unequivocal on this. They infer that there must have been oral discussions at which the Advocates agreed to charge their fees on the initial loan of KShs. 65 million. However, this agreement does not appear to have been confirmed by the Client in writing. The clear words of the statute (section 45 (1) of the Act) say that for an agreement on fees to be valid and binding on the parties it must be in writing and signed by the client or his agent duly authorised in that behalf.”

19. On the acknowledgement of payment annexed to the Applicant’s affidavit, the Respondent submitted that it was never presented as evidence before the taxing master and was an attempt to mislead the court. The Applicant had further not provided any evidence to support their argument that they had settled the Advocates’ fees.

20. With respect to payment of VAT, the Respondent urged the court to uphold the amount awarded as VAT. They relied on **A.M. Kimani & Co. Advocates v. Kenindia Assurance Co. Ltd** (supra) wherein the court held that VAT is applicable on the whole award and not just the instruction fees.

21. The Respondent submitted that this application should be dismissed with costs to the Respondent. They argued that the cost of this application should be borne by the Applicant as their application lacks merit. They relied on the Supreme Court’s decision in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2017] eKLR** where the court held that:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.”

Analysis and Determination

22. The issue for determination in this matter is whether this court should interfere with the decision of the taxing master delivered on 5.12.2019.

23. The procedure for objecting to a taxing officer's decision is set out in **Rule 11(1) and (2) of the Advocates (Remuneration)**

Order as **follows:**

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

24. The legal parameters in which a court may interfere with a taxing officer's decision are well settled. In *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64 at 69, Ringera J (as he then was) stated thus;

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was 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".

25. These principles had been upheld in the older Court of Appeal decisions in *Premchand Raichand Limited & another Vs Quarry Services of East Africa Limited* and another [1972] E.A 162 and *Arthur Vs Nyeri Electricity Undertaking* [1961] E.A 492. They were also re-affirmed by the Court of Appeal in *Joreth Limited Vs Kigano and Associates* [2002] 1 E.A 92 and most recently by *Odunga J in Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others* [2018] eKLR.

26. The Applicant has sought reference against the taxing officer's decision in awarding instruction fees of Kshs. 2,875,0000/-, a sum they found excessive, on the grounds that this figure was arrived out without a basis in law and fact, as the value of the subject matter could not be ascertained and exercised her discretion on grounds that were unclear and unreasonable. Further, a valid agreement of fees existed between the parties, which had been settled and acknowledged.

27. The Respondent denied the validity and existence of this fee agreement and the purported settlement of the same. They also challenged the lack of evidence of such payments and the validity of the acknowledgement of payment presented by the Applicant.

28. The determination of this matter thus hinges on whether a valid fee agreement existed under Section 45 of the Advocates Act, and whether the Taxing Officer justly exercised her discretion in assessing the instruction fees to be awarded. Section 45 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.

29. The requirement that a fee agreement must be in writing and signed by the client or his duly authorized agent has been reiterated severally by the court. See *-Ahmednasir Abdukadir & Co. Advocates v National Bank of Kenya Limited (2)* [2006] 1 EA 5 & *Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Electoral and Boundaries Commission and Returning Officer, Kajiado East Constituency* [2017] eKLR).

30. In *Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others* [2020] eKLR the court stated:

"An agreement for fees contemplated under section 45, is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise."

31. The courts have however held that a fee agreement may also be inferred from correspondence. In *Shiva Enterprises v Mwangi Njenga & Company Advocates* [2020] eKLR, Justice Munyao had this to say;

"I do not think that such agreement must be in one document titled "agreement for payment of legal fees." It is sufficient that there be a memorandum in writing, and this would include correspondences, so long as these reveal that they are aimed

at fixing the fee payable. Indeed, in the case of *D Njogu & Company Advocates vs National Bank of Kenya Limited*, Civil Appeal No. 165 of 2007 (2016) eKLR, where the Court of Appeal upheld an agreement between an advocate and client, the agreement was actually construed from a letter.”

32. In *Kakuta Maimai Hamise v Peris Pesu Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency* [2017] eKLR the Court stated:

“In my view for a document to be said to constitute a valid and binding agreement for the purposes of section 45 of the Advocates Act, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the Client. This was the position adopted by Tanui, J in *Rajni. K. Somaia vs. Cannon Assurance (K) Ltd Kisumu HCMA No. 289 of 2003*. In this case the documents relied upon I am afraid do not meet the threshold for a validly binding agreement so as to bar the Advocate from taxing his costs more so as there is no evidence that the Client accepted the proposal by the Advocate even if it were to be found that the letter dated 20th June, 2013 was a proposal on the final fee. An agreement must contain both an offer and acceptance and where one condition is not satisfied there is no binding agreement.”

33. In this matter, the taxing officer ruled that the handwritten letter written by a partner of the Respondent’s law firm availed by the Applicant did not meet the threshold set out under Section 45 of the Advocates Act. The Applicant had not tendered any other evidence of an agreement between themselves and the Respondent. In *Kahari & Kiai Advocates v Kenya Safari Lodges and Hotels Ltd (2007) eKLR* as quoted by the Respondent, even when there is an oral agreement, there is need for a client to indicate their acceptance in writing. As there was no proof of such acceptance in this matter nor was there proof of payment that was presented before the taxing master, this court finds that no agreement existed between the Applicant/Client and the Respondent/ Advocate.

34. As to whether the taxing officer justly exercised her discretion, Hon. Barasa indicates that in assessing the instruction fees, she considered the transaction itself, the work undertaken by the Respondent in ensuring that the transaction was successful as well as the interest of the respondent in the transaction. I therefore find that she exercised her discretion judiciously as she considered all the relevant factors.

35. Consequently, I find no good reasons to interfere with the taxing officer’s decision in this case and I proceed to give the following orders;

1. The Chamber Summons Application dated 7.7.2020 is dismissed with costs to the Respondent/ Advocates.

2. Judgment is hereby entered against REDSTONE MANAGEMENT LIMITED in favour of RANSLEY, McVICKER & SHAW ADVOCATES in terms of the decision of the taxing master dated 5.12.2019 and the Certificate of taxation issued thereof on 6.2.2020. for Ksh. 3, 338 961.40.

3. The Application dated 28.5.2020 is hereby marked as SPENT.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Elvayo holding brief for Sesulo for Advocate/Respondent

M/s Mwangi for Client/Applicant

Court Assistant: Edel Barasa