China Qingjian International Group (Kenya) Limited v Howard & Nick Advocates (Miscellaneous Case E341 of 2023) [2024] KEHC 4754 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CASE E341 OF 2023

A MABEYA, J

APRIL 19, 2024

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA AND THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 1962) REV. 2017)

AND

IN THE MATTER OF TAXATION OF ADVOCATES AND CLIENT COSTS

BETWEEN

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CHINA QINGJIAN INTERNATIONAL GROUP (KENYA) LIMITED .... APPLICANT

AND

HOWARD & NICK ADVOCATES .... RESPONDENT

RULING

1. Before Court is an application dated 2/5/2023. It was brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 21 Rule 9A of the *Civil Procedure Rules* and Rule 11 of the *Advocates Remuneration Order*.

2. The pending prayers in the application sought that the ruling of the taxing officer delivered on 19/04/2023 be set aside and the Advocate-Client Bill of Costs dated 30/5/2023 be taxed afresh.

3. The grounds for the application were set out on the face of it and in the supporting affidavit of Qu Gaolei sworn on 2/5/2023. It was contended that the final assessment of Kshs. 2,500,000/= was manifestly excessive and based on a clear error of principle.

4. That the taxing master failed to consider the applicant's submissions dated 25/7/2022 and failed to consider that full instructions were never issued by the client to the respondent. That the applicant had not been issued with written reasons of formal ruling relating to the taxation decision despite making requests.

5. It was further contended that the assessment was a double taxation for same-work done by the advocate with respect to one contract that was already taxed at Kshs. 2,500,000/= in HCCOM. Misc. App. E442 of 2022 between the same parties. That the assessment also contravened Order 21 Rule 9A of the *Civil Procedure Rules* as the respondent's documents were not considered. The applicant thus prayed that the taxation be set aside.

6. The respondent opposed the application vide the replying affidavit of Okiror Bethwel Howard sworn on 3/6/2023. It was contended that the application did not demonstrate any need to interfere with the subject decision. That the applicant failed to file a response to the bill of costs dated 30/5/2023 and was attempting to frustrate the respondent's attempts to execute. That a certified copy of the ruling dated 19/4/2023 was supplied on 4/5/2023 and the bill of costs was taxed at Kshs. 2,521,099/=.

7. It was further contended that the applicant did not identify any specific principle that the taxing master had erred in and did not specify the items that were allegedly overlooked by the taxing master and instead made general allegations.

8. That the decision to assess instructions fees was based on the ARO which the taxing master had observed. That the applicant admitted that it had issued instructions to the respondent despite alleging that the instructions having not constituted full instructions.

9. The respondent further contended that the issue of lack of instructions was not raised during the taxation and was only being introduced through the back door at the point of the reference. That the issue of double-taxation did not arise as the respondent filed two separate Bill of Costs emanating from separate instances and the applicant engaged two different contractors on two different occasions. That the applicant had filed a separate reference in HCOOM E340 of 2023 and was dishonest in alleging double taxation. The respondent thus prayed that the reference be dismissed.

10. The application was canvassed by way of written submissions. The applicant's were dated 1/8/2023 whereas those of the respondent were dated 28/10/2023. Those submissions have been considered along-side the entire record.

11. The application was brought under Rule 11 of the *Advocates Remuneration Order*. The provision provides that an aggrieved party should file a notice of objection before the taxing master within 14 days of the decision.

12. This Court has carefully combed through its e-filing CTS portal as well as the court file and notes that there was no notice of objection on record. It is therefore not possible to ascertain whether the applicant followed the correct procedure before filing the instant reference. More-over, the subject ruling that was purportedly objected against was not attached to the application.

13. I have however considered the replying affidavit sworn and filed by the respondent and note that a copy of the ruling was attached therein. For the sake of dispensing justice on merit as opposed to technicalities, this Court finds it wise to consider the merit of the application since the ruling was produced by the respondent who never objected to the application on procedure but merit.

14. In *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, the court held that: -

> "I have considered the above submissions. 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. (See Steel & Petroleum (E.A) Ltd vs.Uganda Sugar Factory(Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates Remuneration Order* itself, some of the relevant factors to take into account include, the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see Nanyuki Esso Service v Touring Cars Ltd; Steel & Petroleum (E.A.) Ltd v Uganda Sugar Factory; Thomas James Arthur v Nyeri Electricity Undertakers And Joreth V Kigano & Associates)."

15. In the same case, the court held that a taxing officer had discretion to increase or reduce instructions fees. It stated: -

> "The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See Thomas James Arthur v Nyeri Electricity Undertakers). In that respect, I must reject the submission made on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes."

16. In the present case, the applicant's main contention was that the taxing officer failed to consider the its submissions dated 25/7/2022 and that full instructions were never issued by the client to the respondent. I have seen those submissions and note that the applicant submitted that it never issued instructions to the respondent.

17. In her decision, the taxing officer observed from paragraph 3 that: -

> "The respondent submitted that they did not instruct the applicant to act for them. The applicant had drafted 2 sub-contractor Agreements without getting instructions."

18. Evidently, the taxing master considered the applicant's submissions and applied herself in detail towards the issue raised therein. Indeed, the bulk of the ruling concerned itself with the issue of whether or not instructions were issued to the respondent. It cannot therefore be said that the applicant's submissions were not considered only because the decision was unfavorable to the applicant. That ground cannot succeed.

19. On whether the taxing master's determination on the issue of instructions was based on an erroneous principle, I note that the taxing master considered the letters and agreement that were filed before her and found that there was evidence that the applicant had retained the respondent's services.

20. The taxing master then relied on the Court of Appeal decision in *Tollo Advocates v Mount Holdings Limited* [2016] Eklr and on the case of Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited and found that there was evidence of a retainer which amounted to instructions. She also found that the respondents did the work that they were instructed to do.

21. Was that finding based on an error of principle? I think not. I begin by noting that this Court is bound by the Court of Appeal's decision quoted above. In that decision, the Court of Appeal held that a retainer encompassed instructions given to an advocate as well as fees payable thereunder, and that a retainer did not need to be written and could be oral or inferred from the conduct of the parties.

22. In *Nyauke t/a Nyauke & Co Advocates v Trustees of Archdiocese of Kisumu* (Misc. CA. No. 211 of 2018) [2023] EHC 2851 (KLR) (29 March 2023) (Ruling), it was held that:

> "It is trite law that a retainer need not only be in writing but that the same could be implied from the conduct of the parties. In this regard, this court was guided by the case of Ohaga v Akiba Bank Limited [2008] 1 EA 300, where it was held that a retainer could be implied where the client acquiesced in and adopted the proceedings or that the client had by his conduct performed part of the contract or that the client had consented to a consolidation order and that the client was estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer."

23. In the present case, the taxing master considered the documentary evidence before her to find that a retainer existed. Consequently, I find that the taxing master did not base her decision on an erroneous principle in her final finding that there was evidence of instructions owing to the existence of the retainer.

24. Interestingly, the applicant appeared to have abandoned the ground of existence of instructions or advocate-client relationship between the parties in its submissions before this Court. In this regard, I find no justification to interfere with the taxing master's decision.

25. The applicant also contended that the final assessment of Kshs. 2,500,000/= was manifestly excessive. The applicant submitted that the taxing master misdirected herself in finding that the value of the subject matter was Kshs. 500,000,000/=.

26. I note that the applicant admitted in its submissions that the work done by the respondent was drafting a sub-contractor agreement dated 31/12/2020 between the applicant and Sambuca Contractors limited. The applicant also submitted that no consideration value was allocated as the subject matter.

27. In her decision, the taxing master identified the value of the tender as the value of the subject matter which was Kshs. 500,000,000/=.

28. On identifying instruction fees, in J*oreth Limited v Kigano & Associates* [2002] eKLR, it was held that: -

> "We would at this stage, point out that 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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances."

29. In the absence of an ascertained value in the contract as admittedly noted by the applicant, the taxation master correctly relied upon the value of the tender which gave rise to the sub-contract. I find that the decision was not based on an erroneous principle so as to justify interference by this Court.

30. From the foregoing, the conclusion to be made is that the taxing master correctly identified the value of the subject matter from the value of the tender and correctly tabulated the instruction fees.

31. The other substantive ground in the application was that the taxing master's decision amounted to double taxation as the respondent had been awarded Kshs. 2,500,000/= for similar work in HCCOM. Misc. App. E442 of 2022 which was also between the same parties as those in the instant suit.

32. On the other hand, the respondent contended that the issue of double-taxation did not arise as the respondent filed two separate bills of costs emanating from separate transactions and the applicant engaged two different contractors in respect of those transactions.

33. Unfortunately, the proceedings in that suit were not annexed to the application or to the replying affidavit to enable this Court to consider that ground on merit.

34. It was upon the applicant to satisfactorily proof its allegations. The burden of proof, like in any other suit, lay with the applicant who alleged that the decision amounted to double-taxation. There was nothing to show this Court that the instructions given and work done in the other proceeding was similar to the present proceedings so as to amount to double-taxation. See section 107 of the *Evidence Act*.

35. The applicant did not discharge that burden of proof and that ground holds no water.

36. From the foregoing, the upshot is that the reference dated 2/5/2023 is found to be unmeritorious and is hereby dismissed with costs to the respondent assessed at Kshs. 20,000/-.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

A. MABEYA, FCI ARB

JUDGE