Kithi & Company Advocates v Bhanji (Miscellaneous Application E015 of 2022) [2024] KEHC 5386 (KLR) (Commercial and Tax) (17 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5386 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E015 OF 2022

FG MUGAMBI, J

MAY 17, 2024

BETWEEN

KITHI & COMPANY ADVOCATES ..... APPLICANT

AND

MOYEZ BHANJI ..... RESPONDENT

RULING

Background

1. Before the court is a reference brought by application dated 12th May 2023. It is brought under rules 11(2), 13A and 74 of the Advocates Remuneration Order (the ARO). It seeks to set aside the decision of the taxing officer delivered on the 28th April, 2023 and for the advocate/client bill of costs dated 10th March, 2020 to be remitted back to a different taxing officer for re-taxation.

2. The application is premised on the grounds on the face of it as well as the supporting affidavit sworn by GEORGE KITHI, an advocate in the applicant firm of advocates, dated 12th May 2023. The application is opposed vide a replying affidavit sworn by MOYEZ BHANJI, the respondent, on 4th July 2023 and further canvased by way of written submissions dated 13th March 2023.

Analysis

3. The applicant challenged the taxation of the bill of costs on several accounts. Before delving into this, it is important to note that the principles of varying or setting aside a taxing master's decision are well crystalized.

4. In First American Bank of Kenya V Shah & Others, (2002) EA 64 and Joreth Ltd V Kigano and Associates, (2002) 1 EA 92, it was held that a taxing master's judicial discretion can only be interfered with on account of an error of principle, or where the fee awarded is manifestly excessive based on an

error of principle and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.

5. The Court of Appeal in Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board, [2005] eKLR held that,

> " 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."

6. As to what constitutes an error of principle, this Court aligns with the finding in Republic V Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna (2006) eKLR Ojwang, J (as he then was) expressed himself as follows:

> " 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 case 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. ...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved..."

7. It is against this background that I now proceed to consider the issues raised by the applicant in this reference.

On instruction fees:

8. The applicant contends that the taxing master did not exercise her discretion properly as she failed to consider the complexity of the matter, the bulky documents that required to be studied and the research involved in the matter.

9. The question once again turns to whether the taxing master addressed herself to the right legal principles and exercised her discretion judiciously.

10. Judicial pronouncements including the Court of Appeal decision in Joreth Limited V Kigano & Associates [2002] eKLR and Peter Muthoka & Another V Ochieng & 3 Others, [2019] eKLR, cement the fact that instruction fees are principally based on the value of the subject matter. The value of the subject matter should be ascertained from the pleadings, judgment or any settlement, depending on the stage at which the fees are being taxed.

11. I have looked at paragraph 7 of the ruling by the taxing master where she addresses herself to the proper way to determine the value of the subject matter for purposes of taxation. The Learned taxing master correctly observes that the value of the subject matter for purposes of taxation in this instance is Kshs. 21,213,000/= based on the judgment.

12. The taxing master is not bound to consider external factors as opined by the applicant especially where instruction fees are easily ascertainable. I therefore find that the failure by the taxing master to consider the weight and complexity of the matter does not in any way reflect on the need for this Court to interfere with the exercise of discretion. Neither does the fact that this Court would have been inclined to award a higher amount in instruction fees.

Evidence of drawings and service of letters to client, perusals and attendances to clients and disbursements:

13. The applicant's contention is that rather than tax off the amounts that were taxed of for want of proof, the taxing master ought to have called for proof of the same. The applicant opines that the taxing master ought to have exercised the powers given powers by Rules 1 A and 74 of the ARO. The respondent vehemently opposes this ground and instead submits that the duty to provide evidence as required lay primarily on the applicant.

14. Turning to the ruling, taxing master notes that the applicant did not challenge the objections that were raised by the respondent (regarding lack of sufficient evidence) in respect of the drawings. I find this to reflect a lack of diligence on the part of the applicant. Rule 74 of the ARO does not replace the well-known principle that he who alleges must prove.

15. In this regard I align myself to the finding in Muthoga Gaturu & Co. Advocates V Naciti Engineers Limited, Misc. Case No. 51 of 2001, where Mwera J (as he then was) stated thus:

> " The inability to produce proof rests completely at the advocate's door, as she did not have evidence to support the disbursements claimed."

16. Moreover, this Court also noted in Ngatia & Associates Advocates V Interactive Gaming & Lotteries Limited [2017] eKLR, that disbursements are a refund for expenses which an advocate spends towards the preparation and in the course of representation of the client. For an advocate to receive the reimbursement, evidence of expenditure must be provided to the taxing officer by way of receipts.

17. Based on this reasoning I again find no reason to interfere with the taxing master's findings on account of unsupported items.

On the relationship between the bill of costs in HCCMISC 12 of 2022 vis-à-vis HCMISC 11 of 2022:

18. The applicant has not disputed the context and background of the dispute as laid out by the respondent. The respondent confirms that the two bill of costs arise from a suit being HCCC No. 539 of 2008 (the parent suit). The 1st defendant, a director of the 2nd defendant was initially sued alone.

19. Subsequently the 2nd defendant was enjoined in the suit. It is not disputed that consequently, both filed a joint Amended Defence dated 23rd October 2009 and that the advocate filed similar pleadings and attended court on behalf of both clients. The applicant in the end filed two bill of costs being HCCMISC 12 of 2022 and HCMISC 11 of 2022.

20. In dismissing the second bill of costs the taxing master referred to the reasoning in Nguruman Limited [supra]. The Learned Judge pointed to the provisions of Rule 62(2) of the ARO which requires the taxing officer to disallow costs unnecessarily or improperly incurred when the same advocate is employed for two or more defendants and separate pleadings are delivered. That is not the case here as I have said, joint pleadings were filed on behalf of both defendants.

21. It is also a settled principle in taxation that when an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee as was held in D. Njogu & Company Advocates V Panafcon Engineering Limited, (2006) eKLR. In Nguruman Limited, [supra], the Court agreed with the reasoning in Mayers and Another V Hamilton and Others, (1975) E.A at page 16 to the extent that an advocate was entitled to charge separate instruction fees for separate instructions received by different parties even if they were parties in the same suit.

22. This is principally because the parties are two distinct persons. In the instant parent suit, the 1st defendant was sued as a director of the 2nd defendant which was joined to the suit as a separate legal entity. Both parties were sued in different capacities, justifying the need for separate instructions to protect their separate interests.

23. I am satisfied that the taxing master was well aware of the principles emanating from these decisions as well as the principle espoused in Rule 62 of the ARO 2009 against unjust enrichment as demonstrated in her ruling where she stated that:

> " In line with the reasoning in Nguruman Limited V Kenya Civil Aviation and 3 Others, High Court Petition No. 143 of 2011 (2014) eKLR, the only item taxable in favor of the applicant in this particular Bill of Cost is the instruction fee which I hereby tax at Kshs. 400,000. The rest of the items including getting up fees, attendances, drawings, copies, perusals and service costs have been catered for HCC MISC 11 of 2022."

24. In my view, this was a sound interpretation of the law in this regard.

Disposition

25. For these reasons the application dated 12th May 2023 is devoid of merit. The same is dismissed and I uphold the award by the taxing master. As for costs, each party bear its own costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE