Sherman Nyongesa & Mutubia Advocates v Free Holiday Limited (Miscellaneous Civil Application 16 of 2020) [2023] KEHC 612 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 16 OF 2020

OA SEWE, J

FEBRUARY 10, 2023

BETWEEN

SHERMAN NYONGESA & MUTUBIA ADVOCATES ..... APPLICANT

AND

FREE HOLIDAY LIMITED ..... RESPONDENT

RULING

1.

(1) The Chamber Summons dated September 10, 2021 was filed herein on September 14, 2021 by the respondent, Free Holiday Limited. It was brought under Paragraph 11(1) and (2) of the *Advocates (Remuneration) Order* for orders that:

(a) The Ruling on Taxation delivered herein on September 1, 2021 be set aside and or varied and the Preliminary Objection be upheld;

(b) The Bill of Costs dated January 28, 2020 be taxed afresh either by the Court or before another taxing officer;

(c) Such orders as to costs be provided for in the application.

2.

(2) The application was premised on the grounds that the right of the respondent to be represented by an advocate of its own choice is fundamental; and that the taxing officer did not appreciate the gist of the respondent's Preliminary Objection, and therefore misdirected himself on the issues before him. The application was supported by the affidavit sworn on September 14, 2021 by one of the directors of the respondent, Mr Hananel Adini. In particular, Mr Adini deposed that the taxing officer erred by failing to address the issue of whether there existed advocate/client relationship for purposes of the taxation. He further averred that the ruling was totally

devoid of any reason for the decision of the taxing officer. Further, the respondent complained that the taxing officer utterly failed to address the issue of contract in restraint of trade as well as the other issues raised in the Preliminary Objection.

3. In a Replying Affidavit sworn on its behalf by Mr Wafula, Advocate, the applicant, Sherman Nyongesa & Mutubia Advocates, averred that it offered legal services to the respondent by preparing a Lease document between the respondent and the Mombasa Trade Centre Limited, which Lease had clear terms that the respondent was to bear the legal costs of preparing and registering the said Lease. Mr Wafula further averred that, despite offering the services as agreed, the respondent declined to pay for the said services; whereupon the applicant filed its Bill of Costs for taxation. In response, the respondent filed a Notice of Preliminary Objection denying that there was a retainer between it and the applicant.

4. According to Mr Wafula, the respondent's Preliminary Objection fell short of meeting the threshold for a preliminary objection and therefore the taxing officer dealt with it conclusively. He was of the view that it would be a total waste of judicial time to refer the Bill of Costs for re-taxation. He submitted that it is in the interest of justice that litigation has to come to an end.

5. The application was canvassed by way of written submissions, pursuant to the directions dated March 9, 2022. On behalf of the respondent, Mr Ambwere relied on his written submissions dated March 11, 2022 in which he set out each of the 6 grounds of objection raised in the respondent's Notice of Preliminary Objection dated November 18, 2020. He urged the Court to find that the Preliminary Objection raised purely issues of law which the taxing officer failed to address; particularly the arguments raised in connection with Section 45 of the *Advocates Act*.

6. Mr Ambwere relied on *Nairobi Civil Appeal No 165 of 2007: D Njogu & Co Advocates v National Bank Kenya Limited*; High Court *Civil Suit No E454 of 2019: Sheetal Kapila v Narriman Khan Brunlehner* and Thika *ELC Miscellaneous App No 15'A' of 2017: Muri Mwaniki & Wamiti Advocates v Wings Engineering Services* to buttress the submission that without an advocate/client relationship the taxing officer has no jurisdiction to tax a bill of costs. Accordingly, Mr Ambwere urged the Court to allow the appeal and strike out the applicant's Bill of Costs.

7. On his part, Mr Wafula relied on his written submissions filed on March 29, 2022. He drew the Court's attention to Clause 1.20 in the Lease Agreement as the clause obligating the respondent to pay the applicant's fees. He added that, since the respondent never raised the issue of the taxing master's jurisdiction, there is no basis for raising the issue by way of this reference. According to him no appeal or review was filed from the ruling of the taxing officer's decision; and therefore that the reference is unwarranted.

8. On whether there existed an advocate/client relationship, Mr Wafula submitted that that the respondent signed a valid binding Lease, without any objection. In his view, the Court cannot re-write the contract for the parties; and therefore that the respondent cannot distance itself from the responsibility of paying the applicant's costs as agreed. He relied on Section 45 of the *Advocates Act* and the case of *Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd [2007] eKLR* to support his submission that the participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. It was, thus, the submission of Mr Wafula that the instant reference is untenable and ought to be dismissed with costs.

9. I have given careful consideration to the subject application, its Supporting Affidavit as well as the written submissions made herein by learned counsel. I have likewise perused the record and the proceedings held herein, particularly the impugned decision of the taxing master, dated September 1, 2021. The genesis of the disputation was well captured in the affidavits filed, namely that the applicant

was approached to prepare and did prepare a Lease Agreement between the respondent and Mombasa Trade Centre Limited (the lessor). The Lease was duly signed by the parties, including the respondent; and among its provisions was Clause 1.20 by which the parties covenanted that the lessee had the obligation to:

> ' Pay all costs of the Lessor's advocates (other than those payable for the purposes of obtaining the consent of any charge) in connection with the preparation and completion of this Lease and a counterpart thereof together with VAT stamp duties Registration and other disbursements in connection with the registration of the Lease.'

10. Hence, upon failure by the respondent to pay the applicant's fees despite several demands, the applicant filed its Bill of Costs dated January 28, 2020 for taxation. While the Bill of Costs was pending taxation, the respondent filed a Notice of Preliminary Objection dated November 18, 2020 contending that:

    (a) The respondent did not at any time instruct the applicant to act for it; and that instructions must be explicit.

    (b) The respondent has never been a client to the applicant and any contract to the contrary is a nullity and void.

    (c) The purported agreement is very unfair, unconscionable and an abuse of the law.

    (d) The agreement if any is contrary to fair consumer practice and goes against the right of the respondent to representation by an advocate of his choice.

    (e) The agreement is unenforceable as it goes against the right of the respondent to engage an advocate of his choice.

    (f) The purported agreement is unenforceable as it goes against the spirit of the law and constitution and is therefore null and void.

11. The taxing officer, upon addressing his mind to the aforementioned grounds, dismissed the respondent's preliminary objection and held that:

> ' The P.O on record indicates that the respondent has never been a client to the Applicant. A look at the lease on record however shows that the Lease was prepared by the Applicant. The PO also questions whether the parties agreed to cater for the Applicant's costs, VAT and registration fees. These cannot form part of a PO which purely comprises of the law. I therefore see no merit in the said PO proceed to dismiss it.'

12. The taxing officer then proceeded to tax the applicant's Bill of Costs at Kshs 136,085.40 vide his ruling dated September 1, 2021. That is the decision that the applicant has sought to challenge by way of this Reference. Accordingly, the Court was approached pursuant to Paragraph 11(1) and (2) of the Advocates (Remuneration) Order, which states that:

    (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.'

13. It appears that no objection, as envisaged under Paragraph 11(1) aforestated, was filed and served by the respondent. It is plain therefore that the respondent did not give notice in writing to the taxing officer of the items of taxation to which it objected. In the premises, I take the view that the respondent has not challenged the applicant's Bill of Costs as taxed; and therefore that Prayer 2 in the Chamber Summons dated September 10, 2021 is untenable. Nevertheless, the taxing officer having rendered himself in connection with the preliminary objection, it was permissible for the respondent to challenge that decision by way of reference. Indeed, in *Wilfred N Konosi t/a Konosi & Company Advocates v Flamco Limited [2017] eKLR*, it was held that:

> ' As a judicial officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.'

14. In this instance, the taxing officer did not delve into the depth of the issues raised in the Notice of Preliminary Objection dated November 18, 2020 for the reason that they entailed issues of fact. Hence, although Mr Wafula took the view that it was improper for the respondent to now raise the issue of jurisdiction by way of reference, and that the respondent neither appealed the ruling of the taxing master nor sought a review thereof, it is trite that the decision of a taxing master, whether on specific items of taxation, or on preliminary points, can only be appealed by way of a reference such as this. Thus, in *Machira and Co. Advocates v Magugu [2002] 2 EA 428* at page 433, it was held that:

> ' Any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order.'

15. Consequently, I proceed on the basis that the reference is indeed an appeal against the decision of the taxing officer in respect of the respondent's Notice of Preliminary Objection dated November 18, 2020. Needless therefore to add that the issue of jurisdiction can be raised at any stage of the proceedings, including on appeal. The Court of Appeal was explicit in this regard in *Kenya Ports Authority v Modern Holding [EA] Limited [2017] eKLR*, thus:

> ' We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.'

16. That said, the central issue that emerges from the grounds set out in the respondent's Notice of Preliminary Objection dated November 18, 2020 is whether there was a retainer between the applicant and the respondent. As has been pointed out hereinabove, Mr Ambwere's contention was that, at no time did the respondent appoint the applicant as its advocates. According to him, the Lease did not create an advocate/client relationship to warrant the filing of a Bill of Costs; and that if anything, the applicant ought to have filed a suit to recover any fees due to it.

17. I have considered that argument from the backdrop of Clause 1.20 and Section 45 of the *Advocates Act*, which was relied on by Mr Wafula as the basis for filing their Bill of Costs herein. Section 45(1) provides

for agreements with respect to remuneration; and in particular it provides for agreements fixing the amount of remuneration payable. Accordingly, Section 45(2) of the *Advocates Act* goes on to state that:

> ' A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on such application the Court, whose decision shall be final, shall have power to order—
>
> a. That the agreement be upheld; or
>
> b. That the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
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> c. That the agreement be set aside; or
>
> d. That the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.'

18. It is evident therefore that the facts of the instant application do not, strictly speaking, fall within the ambit of the aforestated provision, and that the grounds 3 to 6 of the respondent's Preliminary Objection were misplaced. Thus, the taxing officer was within his remit in holding that he had the jurisdiction to tax the applicant's Bill of Costs as presented for purposes of Section 48 of the *Advocates Act* and Paragraph 10 of the Advocates Remuneration Order.

19. The parties, in their wisdom and on an arm's length basis, agreed that the costs of drawing the Lease as well as costs for the related tasks, such as costs in connection with the completion of the Lease, together with VAT, stamp duty, registration and other disbursements would be paid by the respondent. To my mind therefore, no retainer agreement was necessary in the circumstances as a condition for the applicant to file its Bill of Costs for taxation. In this regard, I am in agreement with the position taken by Hon Warsame, J (as he then was) in Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd (supra) that:

> ' It is not the law that an Advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an Advocate in a matter can be implied or discerned from the conduct of the client.'

20. In the instant case, the respondent signed a valid and binding Lease prepared by the applicant without protesting the purport of Clause 1.20 thereof. And, although served with the applicant's Bill of Costs on 31 January 2020, it opted to not challenge Clause 1.20 in the manner provided for in Section 45(2) of the *Advocates Act*. Instead, it waited until November 18, 2020 to belatedly file a Notice of Preliminary Objection contending that the purported agreement is unfair, unconscionable and goes against the spirit of the *Constitution*.

21. It is a cardinal principle that parties to an arm's length agreement cannot be heard to complain when it turns out that theirs was a bad bargain. In *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112*, the point was made by the Court of Appeal thus:

> ' A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

> ' It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain'.

22. I therefore find no merit in the Reference. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF FEBRUARY, 2023

OLGA SEWE

JUDGE