



**BS Advocates LLP v Makokha & 2 others (Miscellaneous Civil Application  
E038 of 2022) [2023] KEHC 2311 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2311 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS CIVIL APPLICATION E038 OF 2022**

**DK KEMEL, J  
MARCH 20, 2023**

**BETWEEN**

**BS ADVOCATES LLP ..... ADVOCATE**

**AND**

**EMMANUEL SIMIYU MAKOKHA ..... 1<sup>ST</sup> CLIENT**

**SAMUEL MAKOKHA ..... 2<sup>ND</sup> CLIENT**

**JOSHUA MAKOKHA ..... 3<sup>RD</sup> CLIENT**

**RULING**

1. The Applicant was retained by the Respondents to represent them in a Probate and Administration Cause No 132B of 2020 at Bungoma Chief Magistrates Court. During the matter, the Respondents withdrew instructions from the Applicant which prompted the Applicant to file its bill of costs in Court for taxation on April 1, 2022. Prior to the taxation by the Taxing Master, the Respondents raised an objection contending that the taxing master lacked jurisdiction to tax the Applicant's bill as there existed an agreement in writing between the Applicant and the Respondents on costs. The Taxing Master proceeded to hold that there indeed existed an agreement within the ambits of section 45 of the [Advocates Act](#) and that he had no jurisdiction to tax the bill. The same was struck out with no order as to costs.
2. Aggrieved by the said decision, the Applicant lodged this reference vide Chamber Summons dated September 12, 2022 and filed on even date, seeking an order that the said decision be vacated and set aside entirely; the matter be referred for re-consideration of the Applicants request for taxation and the costs be provided for. The summons were premised on the grounds that the Taxing Master declined jurisdiction to tax the Applicant's, Advocates/Clients bill of costs, on the premise that there was in existence an agreement between the Advocate and the Client on fees; that there existed no agreement between the parties as envisaged under the sections 45 and 46 of the [Advocates Act](#); that even if there



existed such an agreement, the Taxing Master misapprehended and failed to render a just interpretation of section 45 and 46 of the Advocates which prohibits undercutting; that the supposed agreement relied upon by the Taxing Master was not duly signed by the Clients/Respondents or his authorized agent as judicial authority decrees.

3. According to the supporting affidavit the Applicant was retained to represent the Clients/Respondents in Bungoma CMSC No 132B of 2020 but that the instructions were withdrawn. The Applicant proceeded to file its bill of costs for taxation before the Taxing Mater in Bungoma HCMISC. App. No 38 of 2022 and the clients opposed the same on the main ground that there existed a prior agreement on fees in which the Applicant pegged that fees at Kshs. 150,000/= . It was averred that the said letter was a mere expression of having a deposit, the actual fees in terms of disbursements and Court payments together with attendances could only be ascertained upon completion of the case and filing of a bill of costs in Court for taxation. It was averred that the Applicant's letter of November 3, 2020 was neither acknowledged nor responded to by the Clients/Respondents to constitute a meeting of minds nor was the same signed by the Clients/Respondents to amount to affirmation. It was averred that there was never any agreement reached between the Applicant and the Clients/Respondents on fees payable and that for a multi-million estate that was in contention an all-inclusive fee of Kshs. 150,000/= was undercutting and against the law.
4. No response to the Summons were filed by the Clients/Respondents.
5. The Summons were canvassed by way of written submissions. Only the Applicant's submissions are on the Court's record.
6. In support of the reference, the Applicant submitted that the jurisdiction of the Taxing Master can only be ousted where there is an unequivocal agreement on fees duly signed by the Client or his authorized agent. He relied on Section 45 and 46 of the *Advocates Act*. It was further submitted that the agreement in this particular reference will be invalid if the same allows an advocate to charge professional fees below the stipulated guidelines under the *Advocates Remuneration Order*.
7. It was submitted that the contents of the letter purported to have ousted the jurisdiction of the Taxing Master clearly showed that it was not signed by the Clients/Respondents and that it was one way of communication to the Clients/Respondents. It was submitted that the estate subject of the administration is nearly Kshs. 20M from the valuation reports and that the fess of Kshs. 150,000/= was below the prescribed amount to charge. Counsel relied on the cases of *Ali Mohamed Egai v Maina & Onsare Partners Advocates* Misc. Civil Application No 73 of 2019; *Abuodha & Amina Advocates v Kakuta Maimai Hamise* Misc. Civil Application No 46 of 2015 and *Kahari & Kiai Advocates v Kenya Safari Lodges Limited* Misc. Cause 385 of 2006. It was submitted that there was no agreement on fees, and that this Court should remit the matter to the Taxing Master for taxation of the bill with costs to the Applicant.
8. I have finally considered the submission by the Applicant and the authorities cited in support thereof. The issues arising for determination in this application is whether the taxing officer had jurisdiction to tax the Applicant's bill of costs and whether the ruling of the taxing officer delivered on September 5, 2020 should be set aside.
9. The principles which are to guide the Court in considering whether or not to allow a reference from taxation are well settled. The High Court will not interfere with the exercise of discretion by a taxing officer unless it is demonstrated that said taxing officer erred in law or in principle in assessing the costs. In the case of *Premchand Reichand -v Quarry Services Of E.a Ltd & others* [1972] E.A, 162 it was held as follows: -



- (a) That costs be not allowed to rise to such a level as to confine access to the Courts to the wealthy.
  - (b) That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur.
  - (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and
  - (d) That so far as practicable there should be consistency in the awards made.
  - (ii) 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:
  - (iii) In considering bills taxed in comparable cases allowance may be made for the fall in value of money.”
10. Similarly, in *Steel Constructions Petroleum Engineering Ea Ltd v Uganda Sugar Factory* [1970] EA 141 it was held: -
- “...Although a judge undoubtedly has jurisdiction to re-tax a bill himself he should as a matter of practice do so only to make corrections which follow from his decision and that general rule is that where a fee has to be reassessed on difference principles, the proper course is to remit to the same to another taxing officer. I would agree that, as a general statement, that is correct adding only that it is a matter of juridical discretion.”
11. The Client/Respondent’s objection during taxation of the Advocates/Clients bill of costs is that there was a fee agreement which ousted the jurisdiction of the taxing master in taxing the Advocate/Applicant’s advocate/client Bill of Costs. The provisions of section 45(6) of the [Advocates Act](#) in this regard provide that the costs of an advocate shall not be subjected to taxation, where an agreement has been made by the advocate and client fixing the advocate’s remuneration. Sections 45 and 46 of the [Act](#) detail the circumstances in which such agreements are considered valid and invalid.
12. The Advocate/Applicant on their part, argued that there was no agreement for fees between them and the Clients/Respondents and therefore, the matter did not fall under section 45 of the [Act](#). It was their case that there being no agreement for fees, the taxing officer ought not to have downed his tools due to lack of jurisdiction.
13. Section 45 broadly 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.



14. From the depositions in the Advocates/Applicant's affidavit and submission, there is disagreement on whether or not there was a legal fees agreement. Whereas the Applicant argued that there was no agreement, the Clients/Respondents maintained that there was an agreement and the same was well established vide the letter dated November 3, 2022. The Clients/Respondents argued that the agreement for fees could be deduced from letter dated November 3, 2022, sent to them by the Advocates/Applicant on the payment of their fees in respect to their cause given the value of the property, subject matter, the issues involved and the time it will take to determine the same.
15. Section 45 (1) (c) is clear that an 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. The agreement for fees must not only be in writing, it must be signed by the client or by his authorized agent.
16. I have perused the record placed before this Court. No agreement signed by the parties to this application was exhibited by the Clients/Respondents to support their argument that they entered into an agreement for fees. The Clients/Respondents extensively referred to a letter dated November 3, 2020, arguing that it constituted an agreement between him and the Advocate/Applicant. That letter referred to their fees in respect to the succession matter indicating that the same shall be Kshs. 150,000.00/= given the value of the property, subject matter, the issues involved and the time it will take to determine the same. The letter further noted that the Clients/Respondents had already made a payment of Kshs.30,000/= but urged them to make haste and pay the balance. It did not refer to any agreement previously entered into between the parties rather an approximation of the fees subject to Advocate/Applicant's perusal of the matter. The Clients/Respondents did not attach a response to that letter pointing out to any existing agreement on fees between him and the Advocates/Respondents. It is therefore difficult to agree with the Client/Respondents that the letter in question could be construed to amount to an agreement for fees.
17. Prior decisions of this Court including *Abmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2)* [2006] 1 EA5; [2007] eKLR reiterated that the proviso to section 45 (1) require any agreement on fees to be in writing and signed by the client or his authorized agent.
18. In *Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency* [2017] eKLR, the Court stated:
 

“ [30] To constitute a valid and binding agreement for the purpose of section 45 of the *Advocates Act*, it expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case, both the two letters are not signed by the client. Whereas an agreement may be formed by a series of correspondences, the client not exhibited any document by which he signaled his acceptance of the proposed fees by the advocate. In my view, for a document to be said to constitute a valid and binding agreement for 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 *Raini K Somaia v Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003*”
19. As also pointed out in *Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others* [2020] eKLR:
 

“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.”

20. A scrutiny of the letter dated November 3, 2020, written by the Advocate/Applicant to the Clients/ Respondents did not reveal any agreement capable of being read in terms of section 45 of the Advocates Act. I am therefore unable to agree with the taxing officer’s decision that he had no jurisdiction to tax the advocate-client bill of costs given that there was no agreement on legal fees.
21. Having determined that there was no agreement for fees between the parties, I find it imperative to interfere with the decision of the taxing master. In the circumstances of this case, and for the reasons I have given above, I find merit in the Applicant’s application dated September 12, 2022. The same is allowed in the following terms:
  - a. The ruling of the Taxing Master delivered on September 5, 2022 is hereby vacated and set aside.
  - b. The Applicant’s Advocate/Client Bill of costs dated April 1, 2022 is remitted back to the taxing officer for taxation on the basis of Bungoma CMSC No 132B of 2020. The parties shall be at liberty to address the taxing officer during the reassessment of the instruction fees.
  - c. Each party shall bear their own costs.

**DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH, 2023**

**D. KEMEI,**

**JUDGE.**

**In the presence of:**

Tawai for Kapten for Advocate/Applicant

No appearance Omeri for Clients/Respondents

Kizito Court Assistant

