James Aggrey Mwamu t/a Mwamu & Co. Advocates v Odongo (Miscellaneous Application 130 of 2017) [2023] KEHC 3156 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS APPLICATION 130 OF 2017

RE ABURILI, J

APRIL 12, 2023

BETWEEN

JAMES AGGREY MWAMU T/A MWAMU & CO. ADVOCATES ...... APPLICANT

AND

ALFRED OKEYO ODONGO .... RESPONDENT

RULING

1. This ruling determines a Reference by way of an application dated 14th October, 2021 brought under the provisions of sections 45 and 46 of the *Advocates Act*, Rule 11 (2) & 13 of the Advocates Remuneration Order, Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules.
2. The applicant seeks the following orders:
   a. That the court be pleased to set aside the ruling dated 10/08/2018 striking out the applicants Bill of Costs.
   b. That the High Court be pleased to tax the Bill as was drawn to scale or in the alternative refer to another Deputy Registrar for taxation.
   c. That the respondent be condemned to pay the costs of this application.
3. The application is supported by the grounds on its face as well as the supporting affidavit of James Aggrey Mwamu Advocate.
4. It is the applicant's case that the ruling on taxation was not in accordance with the law and that the Deputy Registrar's ruling was against the principles of law in assessing bills of costs and further that the Honourable Deputy Registrar failed to properly appreciate section 45 of the *Advocates Act*.

5. The applicant further deposed that the Deputy Registrar failed to discern that this was a matter not to fix for preliminary objection and that the ruling failed to take into account that there were different matters in different courts.

6. It was the applicant's case that he never entered into any agreement with the late Thomas Adongo Onuko with respect to legal fees concerning any matter and that the defendant was put to strict proof thereof. The applicant further deposed that the Kshs. 100,000 was part payment of their legal fees for handling Kisumu HCC No. 110 of 1996 and not full payment for all the matters they handled for the deceased.

7. It was the applicant's case that it was not possible that his legal fees could have been Kshs. 100,000 when the party and party bill of costs were taxed at Kshs. 340,000.

8. In response, the respondent filed a replying affidavit sworn on the 11th February 2023 in which he deposed that there was a letter from the applicant to the late Thomas Adongo Onuka dated 25th November 2008 that explicitly indicated that there was an agreement to the fees payable as a client.

9. The respondent further deposed that the applicant had received Kshs. 1,100,000 on behalf of the deceased's estate but had failed to remit the same to the respondent and thus the applicant owed the respondent Kshs. 780,000 after deduction of all his fees.

10. It was the respondent's further deposition that pursuant to Section 45 (6) of the *Advocates Act*, the costs of an advocate in any case where an agreement had been reached in respect of the remuneration of an advocate was not subject to taxation.

11. The respondent contended that there was a valid agreement between his late father and the applicant advocate herein vide a letter dated 25th November 2008 wherein the deceased cleared the advocate's legal fees save for Kshs. 16,000 that was the VAT that was pegged at 16% of the legal fees and thus the applicant was estopped from claiming further legal fees.

12. The respondent relied on the case of Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited (2) [2006] 1 EA 5 where it was held that a reading of section 45 (1) of the *Advocates Act* revealed that the agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorized in that behalf.

13. The parties were to dispose of the matter by written submissions but the respondent indicated that he would not file any submissions but instead rely on his replying affidavit as filed.

****The Applicant's Submissions****

14. On behalf of the applicant advocate, it was submitted that the taxing master failed to exercise her discretion judicially by declining to consider relevant factors in the assessment of the applicant's advocate-client bill of costs and concentrating on one letter without considering instructions given to the applicant by the respondent after the said letter thereby misguiding herself by issuing a manifestly low award justifying an inference that the decision was based on an error of principle.

15. Reliance was placed on the case of Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR where the court stated that whenever a taxing master is called upon to exercise discretion in the taxation of Bill of Costs, the taxing master ought to exercise such discretion judiciously and not in a capricious manner.

16. The applicant also relied on the Court of Appeal decision in Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board, Civil Appeal No. 220 of 2004 where the court held that if the taxing officer fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of the schedule VIA (1), that would be an error in principle.

17. It was submitted that the taxing master did not consider the general conduct of the matter but rather considered an irrelevant letter that was written before the instructions in the matter in dispute were issued, further that the taxing officer failed to consider that an appeal was defended and a cross-appeal filed and prosecuted.

18. The applicant submitted that as the taxing officer's decision was based on an error of principle and the amount taxed manifestly low and thus the court ought to interfere with the decision of the taxing master and allow the applicant's advocate-client bill of costs dated 14.7.2017 as it had been drawn to scale. Reliance was placed on the case of Eastland Hotel Limited v Wafula Simiyu & Co Advocates [2014] eKLR which provided for the Court of Appeal's interference where the decision of the taxing master was based on an error of principle.

Analysis and Determination

20. I have carefully considered the Reference before this Court, together with the Supporting Affidavit thereto. I have also considered the Replying Affidavit filed by the Respondent /Client as well as the written submissions filed by the applicant and the respondent.

21. It was the applicant's case that the taxing master erred in principle by regarding an irrelevant letter and failing to consider the conduct of the matter.

22. In opposing the Reference, the Respondent swore an affidavit urging this court to dismiss the reference as the taxing master exercised her discretion correctly in light of the letter in which the applicant stated his final fee. The Respondent contended in deposition that no error of principle had been shown to exist in the Ruling of the Taxing Master and therefore the reference was not merited. The respondent relied on the replying affidavit to canvass the opposition to the reference.

23. The issue that arises for determination in this Reference is whether there exist sufficient grounds to interfere with the Ruling of the Taxing Master dated 10th August 2018.

24. For avoidance of doubt, this reference is in respect of the taxation filed affecting Kisumu High Court Civil Suit No. 110 of 1996 and the subsequent appeal which were subject of the letter dated 25/11/2008 written by the applicant advocate herein to Thomas Adongo Onuko-deceased.

25. It is trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006] eKLR, J. B. Ojwang J (as he then was in the High Court) stated as follows:

> " The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The 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 manifestly excessive as to justify an inference that it was based on an error of principle." [emphasis added]

26. In her Ruling delivered on 10th August 2018 the Taxing Master stated as follows:

> " On the same breath I find that the firm of Mwamu is estopped from claiming further fees on a matter that fees were fully paid..."

27. The learned Taxing Master Hon Mbulikah relied on the case of Abincha & Co Advocates v Trident Insurance Company Limited [2013]eKLR at para 32 where the court stated as follows:

> " The advocates having presented what appeared to be a final fee note upon completion of each brief, and the same having been paid by the client who then proceeded to archive or destroy its related files, the advocate is estopped in law and equity from turning around, between 8 and 11 years later as the case, may be to raise 'final' bill of costs..."

28. I have perused the record placed before this court. No agreement signed by the parties to the application was exhibited by either parties to support the argument that they entered into an agreement for the legal fees payable by the respondent's father to the applicant advocate herein.

29. The respondent and the taxing master extensively referred to a letter dated 25th November 2008, arguing that the same constituted an agreement between the deceased, the respondent's father and the applicant. In that letter, the applicant advocate herein wrote as follows, in part, to the respondent's father, referring to Kisumu HCC 101 of 1996 Thomas Adongo Onuko v Small Enterprises Finance Co.:

> " The above matter refers. Take notice that we have received Kshs. 400,000 (Four Hundred Thousand Only) from your adversaries in the meantime note that an application is coming for hearing on 3/12/2008 in the Court of Appeal.
>
> Our final legal fee for both High Court and Court of Appeal is 100,000/- (One Hundred Thousand Only) plus V.A.T. of 16% making a total of Kshs. 116,000/- (One Hundred and Sixteen Thousand Only)
>
> We shall deduct Kshs. 100,000/-(One Hundred Thousand Only) from the amount paid leaving a balance of Kshs. 16,000 to be paid later. Kindly collect a cheque of Kshs. 300,000/- (Three Hundred Thousand Only) from our office when the cheque is through."[emphasis added]

30. The question that this court is faced with is whether the aforementioned letter amounts to an agreement on fees as envisioned by section 45 of the *Advocates Act*. Section 45 (1) of the *Advocates Act* which provides as follows:

> " 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."

31. Decisions of this court including Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd [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.

32. In Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency [2017] eKLR, the court stated that:

> " [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 has 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 vs Cannon Assurance (K) Ltd Kisumu HCMA No. 289 of 2003."

33. In Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others [2020] e KLR it was stated that:

> " 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."

34. A scrutiny of the aforementioned letter dated 25/11/2008 shows that it was not signed by the respondent/client, however, the letter was written by the applicant/advocate and was clear and unequivocal on the final fees that the advocate set to be settled by the client in the cited matter and in the appeal. The said client is since deceased and his successor in title is the respondent herein. The letter stated that the final fees was Kshs 100,000 One hundred thousand Kenya shillings only plus 16% VAT. When that letter was being written, the advocate applicant herein also disclosed that he had received Kshs 400,000 on behalf of the client and even asked the client to collect his cheques for Kshs 300,000 from the advocate and pay the 16% VAT on Kshs 100,000 later.

35. I cannot agree more that in such circumstances, the applicant advocate is estopped from charging any other fees in the same matter wherein he made the client believe that, that was the final fees chargeable for the specified matters being the High Court matter and the matter pending before the Court of Appeal. It is also not lost to this Court that 2008 is 15 years ago and therefore the value of the Kenya shilling then is not the same as today. Whereas that amount of money appears to be little as stated by the applicant advocate, it served its purpose in 2008. I say so because the advocate was holding, as at

that time, Kshs 400,000 which he had received on behalf of the client and he clearly asked the client to collect Kshs 300,000 since he- the applicant had already deducted the Kshs 100,000 which he had set as his final fees for the matter in the High Court and the Court of Appeal. The advocate could therefore not turn around and ask that his legal fees be taxed in respect of the matters referred to in the letter dated 25/11/2008 as there is no evidence that the client rejected the fees set by the advocate, for a dispute to have arisen for resolution by way of taxation.

36. In my view, the applicant advocate bound himself on the final fees to be paid by the client charged and this court cannot interfere on terms that the applicant himself set. I am in agreement with the holding by the Taxing Master that having set the final legal fees and having retained the same, the applicant cannot seek to have another bite at the cherry to the detriment of the respondent. The applicant cannot approbate and reprobate.

37. If this court were to sanction the taxation of the advocate/ client bill of costs, in the matter subject of the letter of 25/11/2008 and in the circumstances of this case, it would set a dangerous precedent where counsel would set legal fees to be settled by clients and after the clients have relied on that representation and settled the fees in question, the advocate would turn around and say that, that was not the legal fees that they made the client pay and believe that that was full fees.

38. This case calls into this court the application of the doctrine of Equitable Estoppel. Equitable estoppel is a legal doctrine that prevents a party from taking a position that is contrary to their previous position, if doing so harms the other party. This rule prevents someone from going back on their word in a court of law.

39. The basic principle here is that a person cannot go back on a promise if the person to whom the promise was made has relied upon it to their detriment. The leading case on equitable estoppel in Australia is Waltons Stores (Interstate) Ltd v Maher (1988). In this case, a builder (Maher) agreed to commence work on a property on the understanding that the newly built premises would be leased to Waltons Stores (Waltons). Maher relied on Waltons representations, but once Maher demolished the old building and commenced the new building, Waltons reneged on the agreement. While there was no written contract, the High Court of Australia held that Maher had suffered detriment because of his reliance on Waltons' representation and subsequent unconscionable conduct. Waltons was therefore estopped from denying the existence of the contract. This case set a precedent in Australia over the right of a plaintiff to claim equitable estoppel. The remedies available to a party who was promised and relied on that promise ate that courts can order a range of remedies on the basis of equitable estoppel. Typically, the relief is either a fulfilment of the plaintiff's expectation or sufficient damages to compensate for any loss incurred as a result of the expectation. The courts may be particularly inclined to fulfil the plaintiff's expectations if it is exceptionally difficult to calculate the plaintiff's loss. See the case of Abincha & Co Advocates v Trident Insurance Co. Limited(supra)

40. In the instant case, the advocate clearly wrote to the client and informed him of the final fees that the client was to pay, inclusive of Value Added Tax, in respect of the case at hand as cited hereinabove inclusive of the appeal. As at that time, the advocate was holding the client's money received on the client's behalf. The advocate asked the client to collect from him the balance of kshs 300,000 as the advocate had already deducted his kshs 100,000. The advocate told the client to pay VAT later which is kshs 16,000. The client did not challenge that representation. Later, the advocate filed his bill of costs in court for taxation. In my humble view, it would be unconscionable to allow the advocate get away with breaking of his own promise to the client who believed and acted on the promise and let the advocate retain the kshs 100,000 as final fees, if this court were to allow for taxation of the advocate/ client bill of costs simply because the advocate feels that the final fees charged was too little.

41. I am therefore unable to agree with the applicant that the Taxing Master was in error in principle in striking out his Bill of Costs. In the circumstances, the Applicant's Notice of Motion dated 14th October 2021 is found to be devoid of any merit and the same is hereby declined and dismissed. I reiterate that this ruling is only in respect of costs in Kisumu HCC 101 of 1996 as I have not seen any consolidation order with any other matter in the series of Miscellaneous Civil Application Nos. 131 and 133 of 2017 between the same parties, which shall be dealt with on their own merit as and when they are set down for consideration.

42. Each party to bear their own costs of this Reference.

43. This file is accordingly closed.

Dated, Signed and Delivered at Kisumu this 12th Day of April, 2023

R.E. ABURILI

JUDGE

Page **15** of **15**