MS Advocates v China Wu Yi (Kenya) Limited (Commercial Miscellaneous Application E623 of 2021) [2023] KEHC 18253 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION E623 OF 2021

DO CHEPKWONY, J

MAY 12, 2023

BETWEEN

MS ADVOCATES ..... ADVOCATE

AND

CHINA WU YI (KENYA) LIMITED ..... CLIENT

RULING

1. Before this court is a Chamber Summons application dated 4th April, 2022 brought under the provisions of Paragraph 11 of the *Advocates (Remuneration) Order, 2014* and *Advocates Act*. The summons seek for the following Orders;

    a. That this Honourable Court be pleased to set aside the decision of the Deputy Registrar, Hon. E. M. Nyakundi Taxing Officer delivered on February 28, 2022 and the resultant Certificate of Costs if any be set aside to the extent that it related to the reasoning and determination pertaining to the taxation of the following items of the Advocates/client Bill of costs dated August 19, 2021.

        i. Item 1

        ii. Items 2, 3, 4, 5 and 6.

    b. That this Honourable Court be pleased to tax off all items of the Bill of costs dated August 19, 2021.

    c. That costs of this application and of the taxation be awarded to the client.

2. The application is anchored on the grounds on its face and reiterated in the affidavit of Zhang Hua sworn on April 4, 2022. In summary the grounds are couched as follows;

i. That the taxing officer erred in fact and law in finding that the instructions to send the letter in question were separate from the instructions to the advocate to represent the client in a conveyancing transaction.

ii. That the learned taxing officer erred in fact and in law by classifying instructions to draft the subject of this taxation as separate from the instructions under section 3.1 of the retainer agreement dated June 14, 2016, and which specifically included drafting letters.

iii. That the learned taxing officer erred in fact and in law in failing to appreciate that conveyancing instructions of the nature of instructions contained in the retainer agreement dated 14th June, 2016 are for a transaction and as such, a single item in the transaction cannot be singled out and billed separately.

iv. That the learned Taxing Officer misapprehended the facts in failing to fully appreciate the scope of instructions in Clause 3.1 of the Agreement dated June 14, 2016.

v. That the learned Taxing Officer erred in law and in fact in dismissing the preliminary objection dated 13th September, 2021.

vi. That the learned Taxing Officer erred in law and in fact in proceeding to tax the bill of costs dated 19th August, 2021 while there is an agreement for fees contrary to section 45(6) of the *Advocates Act*.

vii. That despite correctly finding that the client asked the advocate to communicate if it will be required to pay any additional fees in advance on April 4, 2020, the learned taxing officer then erred by proceeding to award the advocate any fees.

viii. That the learned taxing officer erred in fact and in law by awarding the advocate instructions fees despite finding that the advocate acted contrary to express instructions of the client.

ix. That the learned taxing officer erred in fact and in law by failing to award only nominal fees, if at all of Kshs.10,000/= for preparing the draft letter.

x. That the learned taxing officer erred in fact and in law by awarding Items 2-6 as drawn despite the same not being drawn to scale.

xi. That the learned taxing officer erred in fact and in law in arriving at an arithmetically wrong figure of Kshs.151, 705/= when as per her ruling the final figure ought to be Kshs.136,200/=.

3. In response to the Chamber Summons, the Respondent filed a replying affidavit dated June 12, 2022 wherein the Respondent contends that the Client has sought numerous services from the advocate and attempted to run away from any payment of the same causing them undue and untold hardship. The advocate also states that the entire application is untenable and not grounded on any tangible reason known to section 11 of *Advocates Remuneration Order*. According to the Respondent, the Taxing Master having delivered a ruling to a Preliminary Objection, this reference is deemed as an appeal through the back door. The Respondent contends that its law firm and the client had no agreement in terms of debt collection services such as seeking the payment of monies owed and outstanding as it continues to be aggrieved by the delay in receiving payment for services well rendered by its law firm. And in any event, the Advocate/Respondent avers that it is aggrieved by the Taxing Master having taxed the services to a meager nominal fee, and yet it rendered legal services in terms of the demand for monies owed to the client for which remuneration with interest must be made as the retainer relationship is now severed.

4. On June 16, 2022, parties agreed to canvass the application by way of written submissions. The Applicant filed their submissions dated July 5, 2022 but there are no submissions on record filed by the Respondent.

Analysis and Determination

5. I have read through and considered the Chamber Summons application, written submissions on record and the cited authorities. The following are the issues that emerge for determination:

    a. Whether the Applicant has made out a case to warrant setting aside of the Taxing Officer's decision of February 28, 2022.

    b. Whether the application dated June 16, 2022 should be allowed and adopted as an order of the court.

Whether the Applicant has made out a case to warrant setting aside of the Taxing Officer's decision of 28th February, 2022.

6. The application was brought under the provisions of rule 11(2) of the *Advocates Remuneration Order*, which provides as follows:-

> " Objection to decision on taxation and appeal to court of appeal
>
> 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 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.
>
> 3. Any person by the decision of the judge upon any objection referred to such a judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the court of appeal.
>
> 4. The high court shall have power by order to enlarge the time fixed by subparagraph (1) or (2) for taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

7. The principles guiding courts in considering applications seeking to set aside decisions of Taxing Masters are now well settled. In the case of *First American Bank of Kenya v Shah & another* (2002) EA 64, which include;

    a. Based on an error of principle,

    b. The fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.

    c. The successful litigant ought to be fairly reimbursed for the costs he has incurred.

d. So far as practicable there should be consistency in the award.

8. Having outlined the principles, the next question this court needs to ask itself is whether the Taxing officer made an error in taxing the Bill of costs. The applicant submitted that where there exists an agreement as to advocates fees the *Advocates Remuneration Order* does not apply. This is in accordance to section 45(6) of the *Advocates Act*.

9. It is trite that the court should not interfere with the decision of a taxing officer unless it is based on an error of principle or the fee awarded is manifestly excessive. In the case of *Kipkorir, Tito & Kihara Advocates v Deposit Protection Fund Board* (2005) eKLR, where the court held that;

> " On 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."

10. According to the Applicant the advocate-client relationship was crystalized by the retainer agreement dated June 14, 2016 which clearly set out the client's instructions to the advocate under Paragraph 3.1 and 3.2 which includes and is not limited to drafting letters.

11. In view of the issues raised by the applicant, it is important to note that where there is a retainer agreement, relevant law applicable is section 45 of the *Advocates Act*. The said Section 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". (emphasis added)

12. The Court of Appeal in the case of *Omulele & Tollo Advocates v Mount Holdings* [2016] eKLR, the court defined a retainer agreement as an agreement in which parties fix or put a cap on the advocate's instruction fees and as such both parties are beholden to the amount so fixed. The court further stated that for the retainer agreement to be valid and binding, it must be put in writing and signed by the client and/or his agent.

13. From the pleadings, the Applicant urged that there existed an agreement on legal fees between the parties. It was the contention of the applicant that the demand letter was part of the instructions as per the agreement and thus not within the scope of the Advocates Remuneration Order.

14. Section 45(1) (c) of the *Advocates Act* makes it 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.

15. I have had the opportunity to peruse the record and I note that there is indeed an agreement signed by the parties dated 14th June, 2016. Clause 3 thereof provides for performance of the contract and it states that;

> " 3.1. The law firm shall render legal services to the client, which services will include the following;
>
> a. .....
>
> b. .....
>
> c. .....
>
> d. .....
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> e. Preparation of the letters of offer for the purchase of the respective units;
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> f. .....
>
> g. Preparation od share certificates for the purchase and maintaining correspondence with the purchaser's law firms for the protection of your interests, as well as the provision of timely legal advice on the process and progress of the matter; correspondences; to perusing documents and letters relating to this matter; telephone calls; attendances; general conduct, care and control with regard to the urgency of this matter and generally protecting your interests."

16. Elsewhere, in the case of *Ahmednasir Abdikadir & Company Advocates v National Bank of Kenya Limited* (2007) eKLR, this Court has held that,

> " Indeed, Section 45 (1) stipulates that such agreements would be valid and binding on the parties, provided that they are in writing and signed by the client or his agent duly authorised in that behalf."

17. Having established that there indeed existed an agreement between the parties, it is this Court's finding that the Taxing Officer made an error in principle when she proceeded to tax the bill of costs despite the existence of an agreement on legal fees between the parties. The payable fees should be as per the agreement as agreed.

18. Based on the foregoing, it is this Court's considered view that the Taxing Master made an error in dismissing the Preliminary Objection raised by the applicant that the matter fell squarely under section 45(6) of the *Advocates Act*.

Whether the application dated 16th June, 2022 should be allowed.

19. Having found that there existed an agreement it therefore follows that the Applicant's application succeed. It is the finding of this court that the Taxing Officer misdirected herself in taxing Bill of costs.

20. In the circumstances and based on the foregoing reasons, the taxing officer lacks jurisdiction to tax the Bill of Costs by dint of section 45 of the *Advocates Act* as the agreement amounted to a retainer between the parties. Consequently, the application dated April 4, 2022 is allowed as presented.

21. Each party to bear their own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Eredi counsel for Client/Applicant

No appearance for and by Advocate /Respondent

Court Assistant – Mwenda/Sakina