**Kuria v Humprey & Co LLP (Miscellaneous Application E843 of 2022)**
**[2023] KEHC 23519 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23519 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION E843 OF 2022**

**FG MUGAMBI, J**

**OCTOBER 13, 2023**

**BETWEEN**

**PATRICK NJIRU KURIA ..... APPLICANT**

**AND**

**HUMPREY & CO LLP ..... RESPONDENT**

**RULING**

1. Before the court is the application dated 28th November 2022. It is brought under Paragraph 11(2) of the *Advocates Remuneration Order* (the ARO). It seeks to set aside the decision of the taxing officer delivered on the 11th March 2022 and for the advocate/client bill of costs dated 27th October 2021 to be remitted back to a different taxing officer for re-taxation or for this Court to re-tax the same.

2. The application was premised on the grounds on the face of it as well as the supporting affidavit sworn by Patrick Kuria and submissions dated 4th May 2023. The application was opposed vide a replying affidavit dated 19th January 2023 and further canvassed by way of the defendant's written submissions dated 4th May 2023.

3. The applicant challenged the taxation of the bill of costs noting that the fees taxed by the taxing master were manifestly excessive and that the taxation was based on an error of principle. This was denied by the respondent who insisted that the bill of costs had been drawn to scale on the minimal charges in accordance to *ARO*.

4. Counsel for the applicant took issue with the following specific issues which form the gravamen of the application:

    i. The retainer agreement between the parties

    ii. Instruction fees

iii. Other legal fees

iv. Disbursements

v. VAT

**Analysis**

5. I have carefully considered the rival pleadings, arguments and authorities submitted by respective parties. The principles of varying or setting aside a taxing master's decision are well crystalized. In *First American Bank of Kenya v Shah & others*, (2002) EA 64 and *Joreth Ltd v Kigano & Associates*, (2002) 1 EA 92, it has been well settled that the taxing master's judicial discretion can only be interfered with either based on an error of principle, or that the fee awarded is manifestly excessive as to justify an inference that it was 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.

6. As to what constitutes an error of principle, this Court concurs with the observations 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. I shall deal with each of the issues that has been raised by the applicant against this background.

**The retainer agreement between the parties:**

8. Counsel submitted that there was a retainer contract between the parties which had been established by way of conduct between the parties. It was on the basis of this implied contract that the respondent proceeded to make payment for legal services and the applicant accepted the payment. This implied that there had been a contract on the legal fees chargeable and the parties had a meeting of minds. Counsel took issue with the taxing master for failing to consider this.

9. The argument was refuted by the respondent who observed that there was no written agreement between the parties that would constitute a retainer agreement. Even then, a text message sent from the applicant which proposed an amount in legal fees was not responded to by the respondent and therefore could not amount to an agreement. It was the respondent's submissions that there being no retainer agreement the registrar acted within the law by taxing the bill of costs.

10. Section 45 of the *Advocates Act* provides as follows with respect to retainer agreements:

> " 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 mine).

11. The Court has pronounced itself on the threshold required to prove the existence of a retainer agreement under section 45 of the Act. The Court of Appeal was faced with an almost similar situation in a case of an unwritten agreement between a firm of advocates and its client in the case of *Omulele & Tollo Advocates v Mount Holdings Limited*, [2016] eKLR. In dismissing the claim of an oral retainer agreement, the court held that for the retainer agreement to exist, the terms of the agreement must have been reduced into writing, which was not the case.

12. Where an oral retainer relationship was implied, it resulted in a principal-agent fiduciary relationship which entitled an advocate to realize remuneration not under the implied agreement but under the *ARO*. (See *Halsbury's Laws of England*, (*supra*) at page 14 para 764).

13. In the instant case, there was a text message purportedly sent by the applicant proposing a figure to the respondent. There is no indication that the respondent replied to the text. This would appear to me to be at most an offer that was not acceded to. Borrowing from the observation by the Court of Appeal, there being no written agreement regarding the retention and payment of the appellant's fees by the respondent, it follows that there was no retainer agreement as envisioned by section 45 of the *Advocates Act*.

14. It is therefore my finding that the taxing master applied her mind correctly with respect to this issue and in finding that there was no retainer agreement and proceeding to tax the bill of costs as she did under the *ARO*.

**Instruction fees:**

15. The applicant took issue with instruction fees of Kshs 1,950,560/= as awarded for being manifestly excessive. Counsel reiterated that the same was based on an error of principle. The taxing master ought to have considered that the applicant instructed another firm of advocates to take over the matter from the respondent and therefore that the amount awarded was excessively high under the circumstances.

16. The applicant acknowledged that although the respondent was entitled to professional fees, the amount ought to be commensurate with the work done. The applicant further submitted that the award of Kshs 1,010,867/= as half increase in fees had not been prayed for by the respondent and should not have been awarded. In response the respondent pointed out that the taxing master had the discretion to increase the instruction fee by half.

17. There are sufficient authorities including the Court of Appeal decision in *Joreth Limited v Kigano & Associates* [*supra*] and *Peter Muthoka & another v Ochieng & 3 others*, [2019] eKLR, both of which cement the fact that instruction fees are 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.

18. I note the observations of the taxing officer at page 4 where she correctly noted that since the matter was still ongoing, the value of the subject ought to be ascertained from the subject matter. She proceeded to base the instruction fee on Kshs 116,704,065/=, derived from the judgment of the Tribunal.

19. The applicant takes issue with the amount awarded under this head as being excessively high since the applicant instructed another advocate mid-way. This Court concurs with the view that the progress of a matter and the steps undertaken by an advocate should not be factors to consider in computing instructions fees.

20. The holding in *Okoth & Kiplangat Advocates v Board of Trustees National Social Security Fund*, [2007] eKLR is a sound position. Warsame J, found that what was important was to demonstrate that the advocates were instructed to undertake a brief pursuant to which they took steps towards enforcing and implementing the instructions of the client.

21. This position is supported by the Court in *J M Njenga & Co. Advocates v Kenya Tea Development Agency Limited*, [2011] eKLR to the extent that:

> " A new Advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the Taxing Officer's discretion to increase or (unless otherwise provided) reduce it and as augmented by the formula in Part B (increase by one half). A Client who changes Advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change Advocates notwithstanding that he can recover only one instruction fee in a Party and Party Taxation unless there is a certificate for more than one counsel."

22. For these reasons I would be hesitant to interfere with the award of full instruction fees. When it comes to increasing the instruction fees by one half, this is a discretion provided for under the *ARO*. The fact that the taxing master does not confirm in writing what she considered in increasing the instruction fees by one half does not entitle this court to interfere with the finding, purely on the basis that it would have awarded a lower amount.

23. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board*, NRB CA Civil Appeal No. 220 of 2004, [2005] eKLR the Court of Appeal stated 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".

24. I am therefore well guided and see no need to interfere with the discretion which in my view was well within the taxing officer's power. No reasons have been laid before me to so interfere.

**Other legal fees:**

25. The applicant contention was that the taxing master erred in principle by awarding Kshs 71,175/= christened as 'other fees' without enumerating what exactly fell under this heading. The respondent has not offered a suggestion. I would therefore agree with the applicant that the amount under this heading has not been substantiated and since it is impossible to tell how the figure was arrived at, the same should be taxed off.

**Disbursements:**

26. The applicant takes issue with the amount of Kshs 3,884/= awarded as disbursements, on the ground that the amount was not proved by way of receipts. I note that the respondent has not controverted this point.

27. The Court 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. The applicant's pointed out the decision in *Spire Properties v Nyachoti & Co. Advocates*, [2018] eKLR which this Court concurs with.

28. For these reasons the amount of Kshs 3,884/= is also taxed off.

**VAT:**

29. The applicant further took issue with the award of Kshs 485,216/= as VAT. It was noted that the amount was awarded despite not having been claimed by the respondent in the bill of costs. In response to the argument, Counsel argued that legal fees are subject to VAT and that the heading under VAT was a statutory requirement.

30. In *Mereka & Co Advocates v New Kenya Co-operative Creameries Limited*, [2018] eKLR the court held in similar circumstances that:

> "In regard to the question of whether VAT should be awarded when the same was not pleaded, the court's view is premised on the case of *Amuga & Co. Advocates v Arthur Githinji Maina* Miscellaneous Application No 265 of 2012 wherein the Honourable Judge made reference to the *AM Kimani & Co Advocates v Kenindia Assurance Co. Ltd* holding that:"... under the *Value Added Tax Act*, an advocate is entitled to charge VAT on instruction fees and also disbursements."

31. Similar sentiments were expressed by the court in *JP Machira T/A Machira & Co Advocates v MDC Holdings Ltd & 2 others* where Justice Ringera held that: "As regards VAT it is a statutory requirement that legal services are chargeable with VAT."

32. As to the computation of VAT, I agree with the finding in *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [*supra*], that VAT is a statutory charge on legal services rendered to the client. The tax is not chargeable on the entire award since it only applies to the professional fees charged for legal services. The taxing officer was therefore right in not charging VAT on disbursements. There was also no error of principle in charging VAT noting that the same is payable to the Kenya Revenue Authority and the advocate is only but a statutory agent.

**Determination**

33. For reasons I have set out above, the application of 28th November 2022 succeeds in part and direct that the Deputy Registrar certify the amount due to the advocates after taxing off the items on 'disbursements' and 'other legal fees'.

34. There shall be no order to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF OCTOBER 2023.**

**F. MUGAMBI**

**JUDGE**