



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPL. NO. 142 OF 2018

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

SINGH GITAU ADVOCATES.....APPLICANT/ADVOCATE

V E R S U S

CITY FINANCE BANK LIMITED.....RESPONDENT/CLIENT

RULING

(1) Before this Court is the Chamber Summons dated 3rd December 2019 by which SINGH GITAU ADVOCATES, (the Applicant / Advocate) seeks the following orders:-

- “1. THAT the decision of the taxing master delivered on 31st July 2018 in so far as the same relates to the reasoning and determination pertaining to the Taxation of the Bill of Costs dated 19th March 2018 be set aside.**
- 2. THAT the Honourable Court be pleased to refer the matter back for re-taxation of the Bill of Costs and with proper directions thereof.**
- 3. THAT in the alternative to prayer 2, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax the Bill of Costs dated 19th March 2018 afresh and/or make directions to a fresh taxation.”**

(2) The Reference was premised upon the **Advocates (Principal) Remuneration Order, Rules 2, 11(1) and (2) Advocates Act, Section 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya** and all enabling provisions of the law and was supported by the Affidavit of even date sworn by **JOSEPH DONDO** an Advocate of the High Court of Kenya employed by the firm of **LJA Associates LLP**.

(3) **CITY FINANCE BANK T/A JAMII BORA BANK LIMITED** (the ‘Respondent/Client’) opposed the Reference through the Replying Affidavit dated **23rd January 2020** sworn by **CHRISTINE WAHOME**, the Legal Manager with the Respondent Bank. The Reference was canvassed by way of written submissions. The Applicant / Advocate filed in Court its written submissions dated **9th June 2020** whilst the Respondent / Client filed its written submissions on **26th June 2020**.

BACKGROUND

(4) In **October 1998**, the Bank (Respondent) instructed its Advocates to represent it in **HCCC 2243 OF 1998: GRANDOUGH LIMITED – VS- CITY FINANCE BANK LIMITED & SOTKEN LIMITED**. However no action was taken in this matter until **16th April 1999** when the suit in question as consolidated with another suit pursuant to orders made by **Hon. Justice Onyango Otieno** (Retired).

(5) Thereafter the Bank instructed the firm of **SINGH GITAU ADVOCATES** (the Applicant herein) to take over the conduct of the matter. The Applicant / Advocate represented the Bank in the matter and successfully applied for the Counterclaim against the Bank to be dismissed.

(6) The Applicant / Advocate then filed its Advocate – Client Bill of Costs dated **2nd February 2010** for taxation. The Taxing Master **Hon. S. Okato** in her Ruling delivered on **17th June 2010** taxed the Bill at **Kshs. 26,652/-**. Aggrieved by this Ruling the Advocate filed a Reference and on **11th November 2011**, **Hon. Justice Mugo** (Retired) struck out the entire Taxation and set aside the Ruling of the Taxing officer. The Hon. Judge directed that the taxation be conducted afresh under a properly drawn Bill of Costs.

(7) The matter was then placed before a different Taxing Officer **Hon. D. W. Nyambu**. On **17th May 2012** **Hon. Nyambu** directed that the Bill of Costs be filed afresh rather than rely on the previously taxed Bill of Costs.

(8) On **19th March 2018**, the Applicant / Advocate prepared a fresh Bill of Costs which was placed before **Hon. Elizabeth Tanui** for Taxation. In her Ruling delivered on **31st July 2018**, the Taxing Officer held that the Bill of Costs was time barred as it had been filed **six (6) years** from the end of the Advocate-Client relationship and as such had been caught up with the **Limitations of Actions Act, Cap. 22, Laws of Kenya**.

(9) The Applicant / Advocate being aggrieved by this Ruling of the Taxing Master filed this present Reference. As stated earlier the Respondent / Client opposed the Reference and urged the Court to uphold the decision of the Taxing Master.

ANALYSIS AND DETERMINATION

(10) 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 both parties and the relevant law.

(11) The Applicant submitted that in coming to her decision that the Bill of Costs dated **19th March 2018** was time-barred, the Learned Taxing Officer failed to take into account the history of the matter. The Applicants asserted that the Bill of Costs had been filed within the required time frame.

(12) In opposing the Reference the Respondents submitted that this Reference dated **3rd December 2019**, was indeed time-barred as the same had been filed **one year and four months** after the delivery of the Ruling by **Hon. Tanui** on **31st July 2018**. That the Applicant gave no reason for this delay. The Respondents submitted that no error of principle had been shown to exist in the Ruling of **Hon. Tanui** of **31st July 2018**. Accordingly the Respondent urged the Court to dismiss this Reference.

(13) The two issues which arise for determination in this Reference are:-

(1) Is the present Reference dated **3rd December 2019** time-barred.

(2) Do there exist sufficient grounds to interfere with the Ruling of the Taxing Master dated **31st July 2018**.

(1) Whether the Reference filed on 3rd December 2019 is time-barred.

(14) The period of limitation for filing a Reference is **fourteen (14) days** from the time when the reasons for the Ruling by the Taxing Master are given. The Respondent submitted that the Applicant herein filed this Reference one year and four months **after** said reasons had been supplied which amounted to inordinate delay making the Applicants guilty of laches.

(15) In response the Applicant states that the Reference could only be filed upon receipt of reasons by the Taxing Officer. That it was not until **28th November** that the Ruling was received by the Applicants and they filed the Reference immediately thereafter.

(16) The procedure for the challenge of the results of taxation is provided under **Paragraph 11** of the **Advocates (Remuneration) Order** which provides 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.

(17) In **NYAKUNDI & COMPANY ADVOCATES –VS- KENYATTA NATIONAL HOSPITAL BOARD[2005]eKLR** the Court held that:-

“Under Rule 11 (2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(4) of the same Order.”

(18) Similarly in **TWIGA MOTOR LIMITED –VS- HON. DALMAS OTIENO ANYANGO [2015]eKLR** it was observed that:-

“The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the

said time lines would mean that the application would be rendered incompetent in the first instance.” [own emphasis]

(19) The Ruling by the Taxing Master was delivered on **31st July 2018**. The reasons for the Taxation were contained in that Ruling. The Applicant did not file this Reference until **3rd December 2019** a full **one year and four months after** the date of delivery of the Ruling. The Applicants failure to adhere to **Rule 11** of the **Advocates Remuneration Order** renders this Reference incompetent.

(20) The Applicants have submitted that the Court had the discretion of allowing the Reference. This is so but the Applicant must satisfy the Court that there was sufficient cause for said delay. In this case the Applicant has not advanced any persuasive reason and/or explanation for their delay in filing the Reference.

(21) In the Further Affidavit dated **9th June 2020** it was averred that the Applicants engaged in trying to obtain a copy of the Ruling from the Hon. Deputy Registrar. The Applicant annexed two letters they had written to follow upon the issue. One letter was dated **1st August 2018** and the other was dated **13th November 2019**. The Applicant took more than one year to follow upon the letter of **1st August 2018**. The Applicant also had the option to seek for enlargement of time within which to file a Reference. They did not do so. They were clearly not vigilant in their efforts in this regard.

(22) In **NATIONAL OIL CORPORATION LTD –VS- REAL ENERGY LTD & ANOTHER [2016]eKLR Hon. Justice G. V. Odunga** observed that:-

“In my view there is no magic in requiring the Taxing Officer to furnish reasons before making a Reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so ...” [own emphasis]

(23) Accordingly this Court is not inclined to exercise its discretion in their favour.

(ii) Are there sufficient Grounds to interfere with the decision of the Taxing Master

(24) It is now 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 –VS- MINISTRY OF AGRICULTURE & 20 OTHERS EX-PARTE MUCHIRI W’ NJUGUNA [2006]eKLR, Hon. Justice J. B. Ojwang (Retired)** 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.” [own emphasis]

(25) In her Ruling delivered on **31st July 2018** the Hon. Taxing Master stated as follows:-

“In my view, therefore, it is indisputable that between the time of rendering of the last service, drafting of the Bill of Costs and the filing of the present Bill of Costs a period of more than 8 years have lapsed. The Applicant cannot argue that he is still on record for the Respondent in HCCC No. 525 of 1998 and yet he filed a Bill of Costs against the Respondent on 5th January 2010. The Advocate Client Relationship came to an end after filing of that Bill of Costs. Consequently, I find that the present Bill of Costs having been filed after expiry of 6 years from the end of the Client Advocate relationship has been caught up by the Limitation of Actions Act.”

(26) The Applicant contended that time stopped running upon the filing of the Bill of Costs dated **2nd February 2010**, and that following the order to submit a fresh taxation made by **Hon. Nyambu** there was no timeline within which the Applicant was required to file their Bill of Costs. However the Respondent countered that it has been more than **eight (8) years** since the Applicants filed their initial Bill of Costs and over **thirteen (13) years** after the dismissal of the suit for want of prosecution.

(27) The Respondent cited and relied on the case of **ABINCHA & CO. ADVOCATES –VS- TRIDENT INSURANCE CO. LTD [2013]eKLR** where the Court stated as follows:-

“An advocate’s claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in Section 4(1) (a) of the Limitation of Actions Act. In this connection see also Halsbury’s Laws of England, 4th Edition, Volume 28 at paragraph 879 (page 452) which states –

“879. Solicitor’s Costs. In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action;

1. if a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor;

2. if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act

as such, until the appeal is decided;

3. if judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute.

In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.

A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, **but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill.** If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.” [own emphasis]

(28) An advocate’s retainer is subject to the limitation period of **6 years** as set out in **Section 4 of the Limitation of Actions Act** which provides as follows;

“4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued...

a) actions founded on contract...

b) actions to enforce a recognizance

c) actions to enforce an award

d)

e)

(3) *An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.*

(4) *An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt be recovered after the expiration of six (6) years from the date on which the interest became due. [own emphasis]*

(29) I find and hold that indeed time stopped running on **11th November 2011** when **Hon. Lady Justice Mugo** delivered her Ruling as the Applicant/Advocate was clearly bound by **Section 4 of the Limitation of Actions Act. Section 52 of The Advocates Act** provides:-

Charging orders

“Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice, be void as against the advocate:

Provided that no order shall be made if the right to recover the costs is barred by limitation”. [own emphasis]

(30) Accordingly I find that the learned Taxing Officer did not err in holding that the Bill of Costs dated **19th March 2018** presented by the Advocate was time-barred.

(31) Finally I find no merit in this Reference. The Chamber Summons dated **3rd December 2019** is hereby dismissed in it’s entirety with costs to the Respondent / Client.

DATED IN NAIROBI THIS 12TH DAY OF MARCH, 2021.

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MAUREEN A. ODERO

JUDGE