



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO 196 OF 2020

CONRAD MALOBA & ASSOCIATES.....ADVOCATE

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK).....CLIENT

RULING

1. In its Chamber Summons dated 6th April 2021 and filed on 15th April 2021, the Advocate sought an order that the decision of the Taxing Master of 23rd March 2021 with respect to Item 1, Item 13 and Item 21 on Instruction fees, getting up fees and Advocates fees increased by 50 % on the Applicant's Advocate- Client Bill of Costs dated 14th September 2020, be set aside and taxed afresh.
2. Cain Mingo, an Advocate practicing as such in the Advocate's firm, swore an affidavit on 6th April 2021 in support of the said application. The Advocates averred that the Taxing Officer failed to take into account the scale of fees prescribed under Schedule VI Rule (j) of the Advocates (Remuneration) Order 2017 (hereinafter referred to as "the Remuneration Order") in a Constitutional Petition Suit claiming threatened violations of fundamental rights and freedoms and seeking prerogative writs.
3. They were categorical that in awarding a lesser amount, the Taxing Master failed to give any justification as prescribed under the said Schedule. They added that the Taxing Officer also failed to take into account that the advocates fees in this matter had already been determined by the High Court in the case of **Mauwa & Company Advocates vs Music Publishers Association of Kenya & Another [2018]eKLR** who acted for the 2nd Respondent in consolidated suits **High Court Petition 15 of 2017 Kisumu Bars Owners Association & Another vs Music Copy Right Society of Kenya, High Court Petition No 11 of 2017 Kisumu Bars Owners Association & Another vs Music Copy Right Society of Kenya** and **High Court Petition 3 of 2017 Laban Juma vs The Kenya Copyright vs Others** and which these proceedings were in reference to.
4. They pointed out that in her Judgement, Cherere J, entered Judgment in its favour as follows:-
 - a. **Judgment is hereby entered for the advocate against the Respondents jointly and severally for Kshs 13,017,319.56**
 - b. **Interest shall accrue on the taxed costs at 14% per annum from 20.9.18 until payment in full.**
 - c. **The Advocate will also have the costs of the application.**
5. They contended that this court was vested with the powers to grant the orders sought to avert an injustice being occasioned and thus urged this court to allow the application as prayed.
6. In opposition to the Advocates application, on 22nd September 2021, Richard Sereti Nyamweya, a Legal Officer at Music Copyright Society of Kenya, swore a Replying Affidavit. The same was filed on 28th September 2021.
7. The Client averred that with regard to the case **Kisumu High Court Petition No 11 of 2017** as consolidated with **Kisumu High Court Petition No 15 of 2017** and **Kakamega High Court Petition No 3 of 2017**, it had submitted that the amounts charged as instruction fees of Kshs 11,020,000/= in item 1 were excessive and the Taxing Officer correctly applied the law and facts in finding it excessive and were not based on any subject value as none had been pleaded or shown. It was categorical that consequently the amounts charged as getting up fees in item 21 were also rightly found to be unmerited.
8. It further contended that the Advocates were seeking to introduce new facts by claiming that there was a Judgement supposedly entered for the advocate against the Client in **Kisumu High Court Miscellaneous Application No 164 of 2018** which it stated had nothing to do with the present Advocate- Client Bill of Costs that the Advocates were claiming for their work.

9. It asserted that if it was true that the Advocates had been awarded costs in the sum of Kshs 13,017,319.56 as they had claimed, then it beat logic why they would file a Advocate- Client Bill of Costs on it instead of going for the decree directly.
10. It pointed out further that indeed if there had been a judgment entered of such amounts, the Advocates ought to have stated so in their Advocate- Client Bill of Costs. It stated that there was no indication of a cost or subject value or judgment in the said Advocate- Client Bill of Costs. It averred that parties were bound by their pleadings.
11. It was emphatic that the Taxing Officer correctly exercised her discretion on taxation of the Advocate- Client Bill of Costs and correctly made her findings. It was its averment that this application ought to be dismissed.
12. The Advocate's Written Submissions were dated 30th July 2021 and filed on 18th August 2021. The Client on the other hand did not file any Written Submissions. This Ruling is therefore based entirely on the affidavit evidence that was presented by both parties and the Advocate's Written Submissions.

LEGAL ANALYSIS

13. It was the Advocates' contention that this being a first appeal, parties were entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons. In this regard, they relied on several cases which they did not attach to their Written Submissions.
14. They submitted that an Advocate- Client Bill of Costs is governed by Schedule VI Part (b) of the Remuneration Order which sets out the parameters to consider when calculating the costs payable to an Advocate for professional legal services rendered to a client. They were emphatic that the instruction fees of Kshs 11,020,000.00/= was calculated to scale pursuant to the said Schedule of the Remuneration Order as the value of the subject matter was Kshs 315,135,064.00/= being the total distributable Royalty income received by the Client in the year 2015 which figure was not disputed.
15. They argued that their fees had already been determined by the High Court in the Case of **Mauwa & Company Advocates vs Music Publishers Association of Kenya & Another [2018] eKLR** and hence this court was bound by that decision. In support thereof, it placed reliance on the case of **Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR** and other cases where the courts therein held that the doctrine of precedent not only bound lower courts but also bound courts of final jurisdiction to their own decisions and that courts could only depart from their own decisions when satisfied that the said decisions were erroneous.
16. They further argued that they were entitled to getting-up fees pursuant to the provisions of Schedule VI paragraph 2 of the Advocates Remuneration Order as calculated in the Advocate- Client Bill of Costs. They contended that the Client had not challenged the calculations as per the scale and urged this court to refer to the decision by Cherere J which it argued conclusively dealt with the issue and allow the taxation of their Advocate- Client Bill of Costs as drawn.
17. Right at the outset, this court found it prudent to determine whether or not the decision in **Mauwa & Company Advocates vs Music Publishers Association of Kenya & Another [2018] eKLR** was applicable in this instant case as argued by the Advocates.
18. A reading of the said case shows that this court entered judgment in the sum of Kshs 13, 071,319.66 in favour of Mauwa & Company Advocates, as against the Client herein and another, following a taxed Advocate- Client Bill of Costs in the same amount wherein a certificate of costs regarding the same had been issued. The said firm of Mauwa & Company Advocates had represented the Client herein in **Kisumu Petition No 15 of 2017 Kennedy Moses Amukoye vs MSCK & 8 Others which was consolidated with Kakamega Petition No 3B OF 2017.**
19. Notably, the decision therein did not automatically apply to the instant case as the sum entered as judgment therein was solely in relation to Mauwa & Company Advocates' Advocate- Client Bill of Costs which had already been taxed and a certificate of costs issued and not any other Advocate- Client Bill of Costs. In addition, it was evident from the decision of the Learned Judge that the application by the said advocates was not opposed as the client therein neither attended court nor filed a response in opposition to the said application. There was also no indication if the client therein opposed the said Bill of Costs at the time of taxation.
20. The fact that both the Advocate herein and Mauwa & Co Advocates represented the Client in the same matter did not mean that a decision on one Advocate- Client Bill of Costs would apply to the other. Both taxing officers, if taxed by different taxing officers were of equal and competent jurisdiction and neither decision was binding on the other. The Advocates herein were thus estopped from claiming that the decision therein was applicable to its case pursuant to the doctrine of precedents. Therefore, it was not correct that the Advocates fees in this matter had already been determined by the impugned case.
21. Having said so, this court delved into the merits of the Advocate's reference herein. The principles upon which the court exercises jurisdiction in a reference are well settled. In **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Nairobi [2005] eKLR**, the Court of Appeal held 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 for the reason that questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases.
22. The Taxing Officer identified the taxing provisions as Schedule 6 Paragraph 1(j) of the Advocates Remuneration Order (2014) which provides as follows:

(j) Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

(i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000 (Emphasis court).

23. A perusal of the Advocate- Client Bill of Costs in the file showed that the value of the subject matter was not indicated therein. As the Client had rightly indicated in its affidavit evidence, parties are bound by their pleading and the court will only limit itself to the pleadings that have been presented before it. It is not for the court to enquire about the value of the subject matter, the complexity of a matter or the work done. The Kenyan legal system is not inquisitorial. It is adversarial. Hence, the court must never be seen to be litigating the case on behalf of one party as it is a neutral arbiter in any dispute that is presented before it.

24. This court had due consideration of the case of **Republic vs Kenyatta University & Another Exparte Wellington Kihato Wamburu [2018] eKLR** where the court therein stated that the taxing master has discretionary power to take into account the **subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit** (emphasis court) with a view to awarding a reasonable fee.

25. The Taxing Officer thus correctly applied the above provision as a starting point for the assessment of instruction fees and the said Order (2014) for the reason that the matter at hand was filed in the year 2015.

26. The Taxing Officer did not therefore err when she did not base the assessment of the advocates' fees on the basis of the value of the subject matter of the case as none was indicated in the said Advocate- Client Bill of Costs.

27. Further, as was held in case of **Grace Wangui Ngenye vs Wilfred Kiboro & Another [2013] eKLR** that the Taxing Master relied upon in arriving at her decision, costs of consolidated suits should be apportioned when it comes to instruction fees. Indeed, this is to avoid double payment and/or unjust enrichment over causes of action that were heard and determined simultaneously.

28. This court was also satisfied that the Taxing Master correctly assessed the getting up fees at one third (1/3) of the instruction fees as is provided in Schedule 6 Paragraph (2)(i) of the Remuneration Order and not the fifty (50%) per cent that the Advocates had claimed in their Advocate- Client Advocate- Client Bill of Costs of Costs.

29. The said Schedule 6 Paragraph (2)(i) of the Remuneration Order provides as follows:-

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation

Provided that this fee may be increased as the taxation officer considers reasonable but it does not include work comprised in the instruction fees...”

30. Having found that the instruction fees were properly taxed, it follows that getting up fees were also properly assessed.

31. Notably, the duty of a Taxing Officer is an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by, which is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria, which discretion requires the court to take into account relevant factors.

32. This court thus came to the firm conclusion that the conclusions that the Taxing Officer arrived at were founded on a proper exercise of judicial discretion and consequently, this was not a suitable case for it to interfere with the said decision of Taxing Officer

DISPOSITION

33. For the foregoing reasons, the upshot of this Court's decision was that the Advocate's Chamber Summons dated 6th April 2021 and filed on 15th April 2021 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

34. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF DECEMBER 2021.

J. KAMAU

JUDGE