



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 23 OF 2018

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

ATAKA KIMORI & OKOTH ADVOCATES.....APPLICANT

VERSUS

SURESTEP SYSTEMS AND SOLUTIONS LIMITED.....RESPONDENT

RULING

The Application

1. The ruling herein is on an application that arises from a ruling on the taxation of an Advocate-Client Bill of Costs dated 21st March 2018 filed by the firm of Ataka, Kimori & Okoth Advocates (hereinafter referred to as “the Advocate”). The said ruling was delivered on 13th June 2019 by Honourable C. Kithinji, who was the Taxing Officer. The Taxing Officer struck out the Bill of Costs for want of jurisdiction, on account of there being a valid agreement between the parties for legal fees.

2. The Applicant subsequently filed the instant application by way of a Chamber Summons dated 3rd July 2019, seeking the following orders:

- (a) The decision of the taxing master, the Honourable C. Kithinji made on the 13th June, 2019 striking out the Bill of Costs dated 21st March 2018 be set aside.**
- (b) This Court be pleased to remit the Bill of Costs dated 21st March 2018 for taxation before another Taxing master.**
- (c) Costs of this application be borne by the Respondent.**
- (d) This court be pleased to make such other orders as it may deem fit and just to grant.**

3. The said application is supported by an affidavit sworn on 3rd July 2019 by Sheila Kaburu, an advocate practicing in the Advocate’s firm. She averred that the Bill of Costs dated 21st March, 2018 sought advocates-clients costs amounting to Kshs 633,231.20, and that the Advocate, being aggrieved with the ruling thereon delivered on 13th June 2019, filed a Notice of Objection dated 20th June 2019 requesting for reasons for the decision. However, that it has not been furnished with reasons for the decision.

4. The Advocate challenges the decision of the taxing officer on the grounds that she erred in law and in fact, in holding that there was an agreement on legal fees between the advocates and the client; that she did not have jurisdiction to tax the Bill of Costs dated 21st March, 2018; in striking out the said Bill of Costs; and failed to consider the submissions and authorities it submitted. Therefore, that it is in the interests of fairness and justice that this Court does grant the prayers sought in this application.

5. The Respondent herein is Surestep Systems and Solutions Limited, (hereinafter referred to as “the Client”), and it filed a replying affidavit sworn on 11th October 2019 by Jackson Kiio, its Chief Executive Officer, as its response to the application. The Client explained that it engaged the Advocate for legal representation in Public Procurement Administrative Review Board (PPARB) Application No. 7 of 2018, and that they entered into an oral agreement that legal fees in the said matter would accrue at Kshs. 200,000.00 exclusive of disbursements. That subsequently the Advocate raised a fee note of Kshs 214,000.00 inclusive of disbursements dated 10th January 2018, in respect of the legal services rendered in PPARB Application No. 7 of 2018.

6. In addition, that the Public Procurement Administrative Review Board delivered its ruling on 25th January 2018, in which costs of Kshs 150,000.00 plus filing fees were awarded to the Client. Further, that the Advocate represented the Client in an application in the High Court to review the said ruling, which was made in Judicial Review Misc. Application No. 37 of 2018, which application was dismissed with no order as to costs. That subsequently, the Advocate in a letter dated 31st January 2018 demanded settlement of the costs awarded pursuant to the decision of the Public Procurement Administrative Review Board and filing fees, which amounted to Kshs. 217,772.00. However, that the Advocate failed to account for the said costs and filing fees.

7. The Client stated that this notwithstanding, on 19th June 2018 a cheque of Kshs. 214,000.00 in favour of the Advocate was credited and cashed in the Advocate’s bank account in full settlement of the its legal fees in PPARB Application No. 7 of 2018. However, that the delay in settlement of the said payment is what may have led the Advocate to file the Advocate-Client Bill of Costs dated 21st March 2018, demanding fresh payments over and above what was earlier agreed. Further, that cumulatively, the Advocate may have received a total sum of Kshs. 364,000.00 inclusive of costs awarded by the PPARB, in settlement of their legal fees and disbursements.

8. The Client annexed copies of the fee note of Kshs 214,000.00 dated 10th January 2018 issued by the Applicant in respect of PPARB Application No. 7 of 2018, the decision of the Public Procurement Administrative Review Board dated and delivered on 25th January 2018, the letter dated 31st January 2018 issued by the Applicant, and an extract from the Advocate’s bank statements in support of its averments.

9. On the ruling delivered on 13th June 2019 by the Taxing Officer, the Client averred that the said ruling determined that there was a valid agreement for legal fees between the parties, which in effect ousted the jurisdiction as the taxing master, and as such the agreement remained in force as there was no application made by the Advocate to have the same set aside in accordance with Section 45 of the Advocates Act. Further, that to buttress the validity of the agreement between the parties, the Advocate acknowledged receipt of Kshs 214,000.00 as payment for legal services rendered as per their issued fee note, and has not contested or denied receipt of the stated amount.

The Submissions

10. This Court directed that the instant applications would be heard and determined by way of written submissions. The Advocate filed submissions dated 1st November 2019, while TLO Law Associates, the Client’s advocate on record, filed submissions dated 11th November 2019.

11. The Advocate submitted that there was no agreement on legal fees with the Client in existence, and that the taxing Officer’s decision to hold that the fee note dated 10th January, 2018 was an agreement on fees is erroneous. Further, that the Client knew that the fee note issued was not final, and that the Advocate would be entitled to charge fees per scale on taxation of the advocates/client bill of costs, as the same was clear on the face of the fee note which included a note that read as follows:-

“NOTE: That this is not a tax receipt and the amounts charged herein does not amount to fees chargeable under the Advocates Remuneration Order which shall remain chargeable by the Advocate on taxation of the advocates/client Bill of Costs”

12. According to the Advocate, a fee note does not constitute an agreement on fees as contemplated by the law, capable of barring the advocates from taxing its costs. Reliance was placed on section 45 of the Advocates Act, and the decisions in **Omulele & Tollo Advocates vs Mount Holdings Limited [2016] eKLR** and **Kakuta Maimai Mahise vs Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency [2017] eKLR** for the position that an agreement on fees must be in writing, and signed by the client or his agent duly authorized in that behalf.

13. In addition, that it was the disagreement on the issue of fees that resulted in filing of the Bill of Costs dated 21st March, 2018, at which time the Respondent had already refused to settle the interim fee note. In any event, that the sum demanded was paid after the Bill of Costs was filed hence the payment cannot be said to form part of an understanding or agreement on fees.

14. The Advocate further submitted that the Client’s depositions alleging that the it received costs pursuant to the decision on the Public Procurement Administrative Review Board are scandalous and ought to be disregarded, and were disputed during the taxation. The Advocate contended that the forum for the determination of the allegations is at taxation stage, and not in the present reference. However, that the Taxing Officer made no determination on the allegations. The Advocate nevertheless was categorical in its submissions that it did not any monies pursuant to the decision of the Public Procurement Administrative Review Board.

15. The Client on its part submitted that it entered into an oral agreement with the Advocate for legal presentation in PPARB Application No. 7 of 2018, wherein it was to pay Kshs 200,000.00 as the agreed legal fees. Further, that the fee note dated 10th January, 2018 attests to this agreement, and ratified the oral agreement as it clearly reads “*To agreed legal fees for services rendered*”.

16. The Client contended that that the said fee note was a final fee note base on the reasons above, and for the reason that the Advocate being alive to the fact that the life of the suit at the PPARB would be short, read together with the oral agreement subsisting, the proceeded to raise the said fee note. In addition, that it is only the fee note that has been presented before this court as evidence of the relationship between the

Advocate and the Client with respect to legal representation in PPARB application No. 7 of 2018.

17. The Client's position therefore is that that the oral agreement, further evidenced by the fee note dated 10th January 2018, constituted a binding legal agreement. Reliance was in this regard placed on the decisions of the Court of Appeal in **Adopt A light vs Ochieng, Onyango, Kibet & Ohaga Advocates, (2016) eKLR, Njogu & Company Advocates vs National Bank of Kenya Limited, (2016) eKLR** and **Otieno Ragot & Company Advocates vs National Bank of Kenya Limited, (2018) eKLR**.

18. The decision in **Little Africa Kenya vs Andrew Mwitii Jason, (2014) eKLR** was also cited for the position that the function of costs in a suit is to reimburse the successful litigant of the expenses incurred in prosecuting or defending a matter. Further, that it is settled law that costs awarded belong to the Client and not the Advocate, and that it is the Advocate on record to pursue execution of the awarded costs. According to the Client, the Advocate has not accounted to for these costs, and should be compelled to account for and pay the said costs to it.

The Determination

19. I have considered the pleadings and arguments made by the parties, which raise two issues for determination. The first issue is whether there was an agreement on fees between the Advocate and Client. The second issue is whether the Advocate was paid the costs awarded by the Public Procurement Administrative Review Board. Lastly, whether the Advocate merits the orders sought.

20. On the first issue, the applicable law on agreement on fees between an advocate and client is section 45 of the *Advocates Act*. Section 45 (1) of the Advocates Act in this respect 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.

21. It is evident that section 45(1) only applies to contentious proceedings, which are defined in section 2 of the Act to mean “any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court, or any statutory tribunal or before any arbitrator or panel of arbitrators.” Section 45(1) is therefore applicable to the present proceedings as it is not disputed that the Advocate was representing the Client in proceedings in the Public Procurement Administrative Review Board and in this Court. Under section 45(6), the costs of an advocate in any case where an agreement on legal fees has been entered into shall not be subject to taxation, nor to section 48 which provides for actions for recovery of costs.

22. In the present case, the Advocate claims that no such agreement as to legal fees existed, while the Client has alleged that that the fee note sent to it by the Advocate dated 10th January 2019 was evidence of their agreement as to fees. The said fee note raised by the Advocate, and which was addressed to the Client stated as follows:

“FEE NOTE

RE: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD NO. 7 OF 2018

DATE	NO.	PARTICULARS	AMOUNT CHARGED
05.10.18	1.	On instructions to represent you in a Request for review in the Public Procurement Oversight Authority against Industrial & Commercial Development Corporation. To drafting and preparation of the Request for Review. To attendance to matter at the Review Board. To general care and conduct and necessary service. To agreed legal fees for services rendered	

			200,000
	2.	Disbursements: To preparing the required ten (10) copies of the Request for Review together with annexures and binding	14,000
E&OE		Total amount due and payable	214,000

Please return this account with your remittance to within 7 days.

With compliments;

FOR ATAKA KIMORI & OKOTH ADVOCATES

NOTE: That this is not a tax receipt and the amounts charged herein does not amount to fees chargeable under the Advocates Remuneration Order which shall remain chargeable by the Advocate on taxation of the advocates/client Bill of Costs”

23. The form of that a legal fee agreement is required to take is addressed in section 45(1) of the Advocates Act, and two critical requirements in the proviso to the section is that that it is required to be in writing and signed by the Client or his agent. As explained in **Halsbury’s Laws of England, Fourth Edition Reissue, Volume 44(1)** at paragraph 180:

“A solicitor is entitled by statute to make a written agreement (called a Contentious business agreement) with his client, as to his remuneration in respect of any contentious business done or to be done by him, providing that he shall be remunerated by a gross sum, or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

To bind the client the agreement must be signed by him. It may be contained in a letter or any other document provided that all the terms of the agreement which relate to the remuneration appear in it and are sufficiently specific and the intention of the parties is clearly shown.”

24. Ialso in this regard adopt the holding by Odunga J. in and **Kakuta Maimai Mahise vs Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency (supra)** as follows:

“ In my view for a document to be said to constitute a valid and binding agreement for the 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 Rajni. K. Somaia vs. Cannon Assurance (K) Ltd Kisumu HCMA No. 289 of 2003”

25. Coming to the Advocate’s fee note dated 10th January 2019, it is evident that the said fee note was not signed by the Client, and secondly, had an express disclaimer that it was subject to further fees that may be due under the Advocates Remuneration Order. The Client did not provide evidence of any other document by which he signalled his acceptance of the fees demanded by the Advocate, that would then meet the legal requirements of his signature and acceptance of the alleged agreed fees. It is thus the finding of this Court that the said fee note does not meet the legal threshold of a valid agreement as to fees as envisaged by section 45(1) of the Advocates Act, and was also not a final fee note as argued by the Client.

26. As held by the Court of Appeal in Omulele & Tollo Advocates vs Mount Holdings Limited (supra), while there may have been oral instructions given to the Advocate by the Client which created a retainer relationship, these were distinct from the retainer agreement as to fees envisioned by section 45 of the Advocates Act, whose existence has not been demonstrated by the Client.

27. In addition, it appears that the Taxing Officer in her ruling delivered on 13th June 2019 did not address the issue raised and argued by the parties during the taxation as to whether the fee note was evidence of such an agreement, and her decision on the issue was as follows:

“On the issue as to whether there was an agreement, I am guided by the provisions of the Advocate Remuneration Order under section 45. The order provides that where there is a valid agreement between the parties for the jurisdiction of the taxing master is ousted”

It is evident that the Taxing Officer gave no reasons or basis for her finding that there was an agreement between the parties that ousted her jurisdiction, and never considered the issue as to whether the fee note qualified as an agreement as argued by the Client.

28. Lastly, it is also notable that in the decisions relied by the Client namely, Adopt A light vs Ochieng, Onyango, Kibet & Ohaga Advocates, (supra); Njogu & Company Advocates vs National Bank of Kenya Limited, (supra); and Otieno Ragot & Company Advocates vs National Bank of Kenya Limited, (supra); the Court of Appeal did find that the agreements therein were valid as they were in writing and signed by the clients, unlike in the present case.

29. Coming to the second issue, it is manifest from the pleadings and submissions made by the parties that the issue of whether costs were paid to the Advocate is a contested issue, and on which no decision was made by the Taxing Officer in her ruling of 13th June 2019, as she did not proceed with the taxation of the Advocate’s Bill of Costs. In addition, the Client has not brought any evidence of such payment, and the evidence exhibited, which is the letter by the Advocate dated 31st January 2018 is only evidence of the demand for, and not payment of the said costs. The Client in this regard has also admitted that it was the Advocate’s duty and responsibility to make such demand and follow-up on payment of the costs.

30. To this extent this Court cannot make a determination that there was payment of costs made to the Advocate, as it is *inter alia* not the proper forum to do so, and there is no basis presented to it to definitively make such a decision. The only relevance of this finding in the present application is that it is also indicative of the absence of meeting of minds as between the Advocate and Client as regards the fees that were payable to the Advocate and in what form, which buttresses the previous finding that no valid agreement as to legal fees between the said parties was in existence.

31. On the last issue, since this Court has found that there was no validly binding agreement on fees between the Advocate and Client as contemplated by the section 45 of the Advocates Act, the Advocate was therefore perfectly entitled to file his Bill of Costs for taxation. The Taxing Officer was in this regard therefore in error in finding that her jurisdiction was ousted by an agreement as to fees.

32. In the premises, the Chamber Summons dated 3rd July 2019 is merited, and I order as follows:

I. The ruling delivered on 13th June 2019 by Honourable C. Kithinji striking out the Advocate’s Advocate- Client Bill of Costs dated 21st March, 2018 be and is hereby set aside.

II. The Advocate- Client Bill of Costs dated 21st March, 2018 be and is hereby remitted for taxation before another Taxing Officer in the Constitutional, Human Rights and Judicial Review Division of the High Court at Nairobi.

III. There shall be no order as the costs of the Chamber Summons dated 3rd July 2019.

33. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY 2020

P. NYAMWEYA

JUDGE