



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. CIVIL APPLICATION NO.611 OF 2014**

**ELIAB MUTURI MWANGI.....APPLICANT**

**VERSUS**

**LSG LUFTHANSA SERVICE EUROPA/AFRIKA**

**LSG SKY CHEFS KENYA LTD.....RESPONDENTS**

**RULING**

1. **Eliab Muturi Mwangi**, the advocate, filed in this matter an advocate/client bill of costs which was taxed on **4<sup>th</sup> April, 2019** at **Ksh 11,600,000**.

2. The background is that **LSG Lufthansa Service Europa Afrika GmbLt** (1<sup>st</sup> respondent) was awarded a tender by Airport Authority (KAA), to set up and operate a kitchen at Jomo Kenyatta International Airport (JKI) for in-flight catering. 1<sup>st</sup> respondent was the lead firm in a consortium. LSG SKY Chefs Kenya Limited (the 2<sup>nd</sup> respondent) was set up to carry out the tender. The 2<sup>nd</sup> respondent was required to execute three agreements, that is;

- i. A lease of the portion of the kitchen;*
- ii. Building agreement for construction of the kitchen; and*
- iii. A concession agreement*

3. The advocate was appointed by the respondent, after the award of the tender, to give advise which would lead to execution of the aforesaid agreements. Those agreements were drafted by another advocate firm Goa & Company. The agreements were executed by 2<sup>nd</sup> respondent and KAA on 8<sup>th</sup> May 2014.

4. The advocate has filed chamber summons dated 21<sup>st</sup> May 2019, a reference against the taxing master's taxation. The advocate submitted that the instruction fees of Ksh 10 million is ***"so manifestly low as to constitute an error in principle."***

5. The advocate faulted the taxing master on her alleged failure to consider the value of the subject matter. According to the advocate the subject matter could have been discernable from the documents at the centre of the relationship of advocate/client, that is:

- (i) Concession agreement valued at USD 411,871,000;***
- (ii) Building operate Transfer agreement valued USD 14,500,000;***
- (iii) Lease agreement value USD75,000.***

6. The respondents submitted where parties have not reached an agreement as to legal fees the Advocates (Remuneration) Order would be applicable. The respondents also pointed out that the advocate was engaged after the tender was awarded to the 2<sup>nd</sup> respondent.

7. The taxing master after considering the submissions made before her and considering the value of the concession agreement, which she termed irrelevant for determining fees, she stated the following as her finding:

(i) That the Applicant and the Respondent did not enter into an agreement as to legal fees:

(ii) That in absence of such agreement the calculation of the applicant's instruction fees will be based solely on the Advocates Remuneration order. The accepted international practice of charging fees will be irrelevant at this point. The same ought to have guided the parties in entering into an agreement as to fees which they were unable to conclude.

(iii) This being a non contentious matter, the applicable Remuneration Order as noted above is Schedule V of the 2009 Advocates (Remuneration) (Amendment) Order. The 2009 order is applicable. Under Part II Paragraph 1, it is provided as follows:

**“Such fee for instructions as having regard to the care and labour required, the number and length of the papers perused, the nature or the importance of the matter, the amount or value of the subject matter involved; the interest of the parties, complexity of the matter and all other circumstances of the case, may be fair and reasonable, but so that due allowance shall be given in the instruction fees for other charges raised under this schedule”.**

(iv) The Applicant upon being instructed and upon receiving the draft lease agreement, concession Agreement and Building Agreement carried out extensive review, amendments and harmonization of the documents to serve the objectives of the Respondents. From the documents attached and marked as ‘SZ1’ to the Affidavits of Dr. Stephen Zilles sworn on 6<sup>th</sup> December 2016, the Applicant must have expended long hours and effort in reviewing the documents within the time given.

(v) It is further noted that the agreements were not drafted by the Applicant but by one Michael Goa, an advocate of the High Court of Kenya practicing in the firm of Goa & Co. Advocates which firm was acting for Kenya Airports Authority (KAA) in the transaction.

(vi) The applicant took time to consider his legal fees on the 13<sup>th</sup> February 2014. The applicant asked from the Respondents for a deposit on fees of Ksh 7,000,000. The applicant's forwarding email of 13<sup>th</sup> February 2014, indicates that the request by way of proforma invoice was done after the bulk of his work had been done. What was pending was the execution of the agreements with Kenya Airports Authority. The forwarding email reads, in part:

**“...we forward herewith an interim request for payment of some fees by way of a proforma invoice dated today's date pending the settlement of our final fee note in short course after execution of the concession BOT and lease agreements with Kenya Airports Authority.....”.**

(vii) Whereas the request for the deposit of Kshs. 7,000,000/= is not in any way indicative of the instruction fees, the same in a way suggests the value that the Applicant placed in the work done as at that time. It is instructive that the Applicant's services were terminated thereafter and no further work was done by the Applicant on behalf of the Respondent.

8. The taxing master proceeded to determine the instruction fees to be Ksh 10 million.

9. It is useful to see how courts have considered when a court is called upon to interfere with the taxing master's discretion.

10. In the case **Lubulellah & Associates Advocates v Baranyi Brokers Limited & 2 others (2014) eKLR** it was stated:

**“The legal parameters within which the Court can interfere with the taxing master's decision are well settled. In First American Bank of Kenya Vs Shah and others [2002] E.A.L.R 64 at 69, Ringera J (as he then was) delivered himself thus;**

**“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.**

11. In this case from the reproduction of the taxing master's Ruling it becomes clear that the taxing master had in mind the transaction that engaged the advocate and the value of the agreement. Bearing that in mind the taxing master exercised her sound discretion and awarded Ksh 10 million as instructions fees. That discretion, as the reproduced Ruling shows, that it was “specified cogent” and with conviction. I do not find a basis of interfering with that exercise of discretion in the award of instruction fees.

12. It is clear the taxing master, contrary to what was submitted by the advocate, bore in mind the nature of the matter, the labour required and all the other circumstances.

13. There is no basis, in my view of interfering with taxing master's exercise of her discretion and there is therefore no merit in the chamber summons dated 21<sup>st</sup> May 2019. The same is hereby dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15<sup>th</sup> March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**MARY KASANGO**

**JUDGE**