REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANAEOUS CIVIL APPL. NO 130 OF 2015

BETWEEN

M/S MBALUKA & CO ADVOCATES.....APPLICANT

VERSUS

B2 YATTA RANCHING COOPERATIVE SOCIETY LIMITED.....RESPONDENT

ADVOCATE/CLIENTS BILL OF COSTS ARISING FROM HCCC 9 OF 2008

BETWEEN

B2 YATTA RANCHING COOPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF KITUI & 11 OTHERS .....DEFENDANTS

RULING

1. The respondent filed the application dated 15th June, 2015 under Sections 3 and 3A of the Civil Procedure Act, Order 11 of the Advocates Remuneration Order and all other enabling provisions of the law. This court vide a ruling dated 24.10.2019 had stayed the decision in respect of the prayer No.4 for an order to set aside the taxation in **High Court Misc. Civil Application No. 54 of 2014** and the consequential certificate of costs as well because the file High Court Misc. Civil Application 54 of 2014 had been reported missing. In fact, the applicant's application aforesaid had sought for an order to reconstruct a new file in view of the missing file. The same having been availed to me, it then dispenses with the prayer for an order for reconstruction of the file and what remains is the prayer for an order to set aside the taxation in the **High Court Misc. Civil Application 54 of 2014**.

2. The grounds in support of the application were that the applicant firm filed a bill of costs that was taxed at Kshs 3,748,651 on 27th April, 2015 and that a certificate of costs was issued on 28th April, 2015. It was further the respondent/applicant's case it became aware of the said taxation when a notice was served on them. However, at the High Court Registry they were informed that the file could not be traced and thus they could not file this reference on time. It was alleged that there was no basis to award the sum demanded by the applicant as there was no documentation in support of their claim and that the applicant and the respondent had agreed on Kshs 750,000/- as legal fees for handling the matter and further that the applicant did not do any work with regard to **HCCC 9 of 2008**.

3. The application was supported by an affidavit deponed by Geoffrey Musya Katabwa on 15th June, 2015 and who reiterated the grounds in the notice of motion.

4. The applicant opposed the application vide a replying affidavit deponed by Rosemary Monyangi who averred that the instant application is an abuse of court process and the failure by the respondent to pay the taxed costs has caused the applicant financial loss. It was averred that the respondent was aware of the taxation as evidenced by the court attendance memos from the applicant advocate marked RM 1, 2 and 3. It was averred that a notice was issued to the respondents with regard to the ruling in the instant matter and hence they were fully aware of the same. Further, that the Kshs 750,000/- had been agreed as legal fees but however it was not to apply as the full legal fees and in placing reliance on Section 46(d) of the Advocates Act Cap 26 it was averred that an agreement for fees less than scale is not valid and in this regard the deponent urged the court to dismiss the instant application.

5. There is a supplementary affidavit on record on behalf of the respondent where the deponent averred that they never received a ruling

notice and that the property that is the subject matter of the taxation was not valued at Kshs 2.8 billion as claimed and reiterated that the applicant did not render any legal services and is only out to reap where it did not sow.

6. The parties were directed to file written submissions. Counsel for the respondent in placing reliance on the case of **Kezia Gathoni Supeyo v Yano T/a Yano & Co Advocates (2019) eKLR** urged the court to allow the application.

7. Counsel for the applicant in the submissions in reply framed three issues for determination. Firstly, whether the taxation and ruling in **Hc Misc Application 54 of 2014** was procedurally done; secondly whether stay of execution of the taxed bill will be prejudicial to the Respondent and finally whether a balance of convenience tilts in favour of granting the prayers sought. On the first issue, counsel submitted that the application for taxation in respect of HCCC 9 of 2008 was made and served on the respondent together with the bill of costs and that they replied vide an affidavit by Miriam Mbithe David filed on 5th May, 2014 objecting to the bill. Further that the parties appeared before the deputy registrar and a hearing date was fixed by consent and a ruling was delivered on 25th April, 2015 whereupon a certificate of costs was issued. Counsel submitted that the respondent had an opportunity to object to the bill of costs which were duly considered by the deputy registrar and who awarded costs at Kshs 3,748,651/- instead of the claimed Kshs 10,646,290/-. Counsel submitted that a determination in taxation is conclusive and placed reliance on the case of **Kinyua Muyaa & Co. Advocates v KPA Pension Scheme & 8 Others (2015) eKLR.** On the 2nd issue, counsel submitted that the bill was taxed in 2015 and setting aside the same will inconvenience the applicant in balancing his books. On the 3rd issue, in placing reliance on the case of **First American Bank of Kenya v Shah & Others (2002) 1 EA 64** where it was observed that the court cannot interfere with the decision of the taxing master unless it was based on an error of principle. Counsel submitted that the prayers sought ought not to be granted.

8. Having considered the pleadings in respect of the instant application as well as the submissions of parties, the singular issue for determination is **Whether the Taxation award given by the Taxing Officer in Hc Misc Civil Application 54 of 2014 should be set aside.**

9. In determining the issue, I will bear in mind the principle established by decided cases that ***"an appellate court will only interfere with the decision of the Taxing Master, where it is proven that his/her discretion was exercised injudiciously or that he/she misdirected himself/herself on the law".***

10. In order for this court to consider the applicant's prayer, the applicant ought to have made a request for written reasons for a decision as required under Paragraph 11 or an application for reference or an application for extension of time within which to file a reference that is provided for within the same order.

11. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

> **"11. Objection to decision on taxation and appeal to Court of Appeal.**
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> (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.**
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> (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.
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> (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
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> (4) The **High Court** shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
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> **(5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."**

12. Having looked at the contents of the file in **High Court Misc Civil Application 54 of 2014**, I note that there is a certificate of taxation dated 28.4.2015, in respect of the bill of costs dated 20.3.2014. The proceedings that led to the taxation were that the parties on 17.7.2014 canvassed the taxation by oral submissions and ruling was delivered on 27.4.2015 in the presence of the counsel for the applicant. There is a letter dated 4.5.2015 informing the advocates for the client of the decision and in the affidavit in support of the application, the respondent deponed that they became aware of the taxation on 15.5.2015 and went to the registry to peruse and acquaint itself of the decision but could not find the file that was reportedly missing. The instant application was filed on 17.6.2015 without being aware of the decision and well within a month from the date when they were aware of the taxation and in view of the vicissitudes of the instant file I would be constrained to allow the application as being filed within time having exercised my discretion to in *suo moto* allow the same under the purview of Paragraph 11(4) of the Advocates Remuneration Order. I say so with all caution because the application was filed even before the respondent got to know the reasons for the decision that they were unable to obtain due to the file that conveniently went missing.

13. I will then consider whether or not to set aside the decision of the taxing officer. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated in **First American Bank of Kenya v. Shah and Others [2002] 1 EA 64**, as follows;

a. 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;

b. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;

c. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

d. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

e. The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

f. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

g. The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

14. The scope of this application requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The respondent challenges the amount awarded as legal fees because there was no basis for the valuation of the subject property there being no valuation report. It was the respondent's case that there was an agreed legal fees of KShs 750,000/- for handling the matter whereas the applicant challenged the existence of the retainer agreement so to speak and stated that the advocate-client relationship was as per scale. With regard to the issue of advocate-client relationship, the evidence that was presented on record that was challenged by the respondent was that the applicant did the work that he claimed to have done. I find that there is need to establish if there was an advocate-client relationship in respect of the specific transaction or a retainer. There is also need to establish the value of the subject matter if it is found that there is an advocate-client relationship because from where I sit, and having regard to the objection by the respondent, the amount awarded appears to be manifestly excessive. In this regard, I see merit in the application and I will allow the same and remit the file back to the taxing master for fresh taxation.

15. In the result it is my finding that the Respondent's application dated 15.6.2015 has merit. The same is allowed in the following terms:

a. The taxation conducted in High Court Misc. Civil Application number 54 of 2014 on the 27.4.2015 and the subsequent certificate of taxation are hereby set aside.

b. The matter is hereby remitted back to the taxing master for fresh taxation.

c. This file be consolidated with the original file High Court Misc. App. No.54 of 2014.

d. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 6th day of May, 2020.

D. K. Kemei

Judge