REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERICAL & TAX DIVISION

HCCC MISC. NO. 282 OF 2007

MURIU MUNGAI & CO. ADVOCATES ..... ADVOCATES/APPLICANTS

VERSUS

NEW KENYA CO-OPERATIVE

CREAMERIES LIMITED ..... CLIENT /RESPONDENT

RULING

1. The proceedings before Court are a Reference dated 9th April 2009 challenging of the decision of the Taxing Officer of 20th September 2007.

2. The Taxing Officer was presented with a Bill of Costs dated February 2007 by the Advocates being an Advocate/Client bill. In the impugned decision, the Hon. W. Mokaya, the Taxing Officer, struck out the Bill of Costs with costs. This aggrieved the Advocates.

3. That grievance is expressed in the Reference before Court which is brought under the provisions of Paragraphs 11 and 12 of the Advocates Act. The Reference raises 5 grounds, but two can be fused;-

(a) That the Taxing Officer erred in law by inferring the existence of agreements on remuneration/fees between the Advocate and Client yet no such agreement was produced.

(b) The Taxing Officer erred in law by holding that the Advocate/Client Bill was fatally defective on the basis of existence of an agreement yet no valid and binding agreement in writing signed by the Client was proved as stipulated under the express provisions of the Advocates Act as relates to an agreement on remuneration.

(c) That in any event, Section 45 of the Advocates Act relates to agreements in relation to fees only to contentious matters and not non-contentious matters.

(d) That the Taxing Officer erred in law and principle by holding that the Advocate was not entitled to rely on the valuation report from Tysons Limited in establishing the value of the property.

(e) The taxing officer erred in law and fact by striking out the Bill of Costs with costs to the Client as there is no provision from the award of costs under the Advocates Remuneration Order.

4. This matter has taken sometime in the Court. One of the reasons for the delay is that, on 25th September 2018, counsel for the parties agreed that the hearing of this matter do await the determination of Civil Appeal No. 286 of 2010 **Muriu Mungai & Co. Advocates –vs- New Kenya Co-operative Creameries Limited**. The decision in that Appeal was delivered on 8th February 2019. That decision features prominently in these proceedings for reasons that will be apparent presently.

5. A short background to the dispute. The Government of Kenya is the majority shareholder of the Client. The Client is a Company incorporated on 19th November 2004. A decision was made by the Client to buy back Kenya Co-operative Creameries Limited (KCC 2000) together with all its goodwill, assets and business as a going concern. There is no dispute that the Advocates were appointed to act for the

Client in the buy back process which included conveying various parcels of land from KCC 2000 to the Client. One such parcel of land was Nakuru Block 6/68 to which this reference relates (although the Advocates have sometimes referred to it as Eldoret Municipality Block 6/68).

6. The contention of the Client,both before the Taxing Officer and this Court, is that the parties agreed on fees of Kshs.12,760,000/= which was inclusive of fees to complete conveyance of all assets of the Client in the buy back process. This would include Nakuru Block 6/68 (the subject property) and a block fee note was rendered by the Advocates.

7. The Client asserts that the filing of the Bill of Costs by the Advocates was triggered by a demand by it for refund of Kshs.12,373,053 being overpayment for litigation work done during the buy back process.

8. On their part the Advocates maintained that there was no binding agreement between the parties and they were justified in filing the Bill of Costs.

9. Another disputed issue that arose during the Taxation was whether or not the Advocates could use a valuation report dated 9th June 2006 prepared by M/s Tysons Limited to demonstrate the value of the subject property.

10. In answer to the primary issues as to whether there was agreement for fees; The Taxing Master held:-

> **"A question that needs to be determined at this juncture is whether in view of the agreement for global sum for the conveyancing work done (which is inclusive of the title or property herein) is the applicant entitled to tax this Bill? Does the agreement for the global sum have any effect on this Bill?**
>
> **I find in my humble view that that agreement was binding. The applicant would have no justification to tax this Bill in light of the fact that the sum of Kshs.11,000,000/= has been paid as fees for this transaction".**

11. Regarding the use of the valuation prepared by Tysons Limited, the Taxing Officer, inter alia, held:-

> **"In view of the foregoing it would mean that the applicants have no authority from Tysons Limited to use this valuation report. I (sic) would also that the value reflected in this report may not assist the applicants assess (sic) accurately the value of this property. There was need for the applicant to get an independent valuation for their use".**

12. In their submissions to Court the parties identified three issues which if determined would resolve this dispute:-

> **(a) Whether there was a binding agreement between the parties.**
>
> **(b) Whether the Advocates needed an independent valuation for purposes of taxation.**
>
> **(c) Whether the Advocates needed the authority of Tysons Limited prior to use of the said valuation report.**

To these I would add a fourth; whether a Taxing Officer can make an order of costs upon determination of a Taxation?

13. The Advocates ask this Court to find that there was a binding agreement on fees in view of the provisions of Section 45 of the Advocates Act which reads:-

> **45. Agreements with respect to remuneration**
>
> **(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.**
>
> **(2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—**
>
> **(a) that the agreement be upheld; or**

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.

(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.

(3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof: Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.

(4) Where any agreement made by virtue of this section is made by the client as the guardian or committee of, or trustee under deed or will for, any person whose property will be chargeable with the whole or any part of the amount payable under the agreement, the advocate shall, before payment thereunder is accepted or demanded and in any event within six months after its due date, apply by chamber summons to the Court for approval of such agreement, and every such application shall be dealt with in accordance with subsection (2).

(5) If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

14. Two arguments are made. First, that the provisions of Section 45 are only in respect to agreements for contentious business and would not cover fees in this matter,which admittedly is non-contentious. Second, that even if it did, the circumstances here are such that was no agreement in writing or signed by the Client.

15. True, subsection 1 of the provision of the Act refers to contentious business only and the quick impression is that agreements in respect to remuneration of an Advocate and his Client would only be in respect to contentious business. Yet that in my view is not complete picture. And although not raised by any of the parties either before the Taxing Master and this Court, Section 44 that precedes Section 45, is an indicator of the true breadth of the provisions of Section 45. That section reads:-

44. Chief Justice may make orders prescribing remuneration

(1) The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious.

(2) An order made under this section in respect of non-contentious business may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode or partly in another, and may regulate the amount of remuneration with reference to all or any of the following, among other, considerations, that is to say—

(a) the position of the party for whom the advocate is concerned in the business, that is, whether as vendor or

purchaser, lessor or lessee, mortgagor or mortgagee, and the like;

(b) the place where, and the circumstances in which, the business or any part thereof is transacted;

(c) the amount of the capital money or rent to which the business relates;

(d) the skill, labour and responsibility involved therein on the part of the advocate;

(e) the number and importance of the documents prepared or perused, without regard to length.

(3) An order made under this section may authorize and regulate—

(a) the taking by an advocate from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him under any such order; and

(b) the allowance of interest.

(4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order.

16. Now it is common grounds that then (at the material time to the matters at hand), and even now,the Chief Justice has prescribed the fees in regard to the remuneration of advocates in respect to their business, whether contentious or non-contentious. At that time it was under the scales for Advocates Charges, 1997. Subsection 4 is then telling and I again reproduce it:-

"(4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order".

17. Clearly, from those provisions, the provisions of Section 45 covers non-contentious business as well where they are not specifically in reference to contentious business like sub-section 1. And that Section 45 also covers agreement with respect to remuneration for non-contentious business is fortified by the provisions of sub-section (3) of Section 45 which I also reproduce for clarity:-

"(3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof: Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement".

18. The use of the words " if made in respect of contentious business" is an acknowledgment ,I would think, that agreements with respect to remuneration for non-contentious matters can also be made between an advocate and his client.

19. Now sub-section 45(i) on which the Advocates rely as an alternative argument covers remuneration in respect to the business referred to in parts (a), (b) and (c) of the provisions. Non-contentious business is not one such business. It would therefore seem to this Court that agreements in respect to remuneration for non-contentious business will be valid as long as they are agreements that comply with the general law of contract governing agreements and for as long as they are not harsh, unconscionable, exorbitant, unreasonable, in breach of statute or otherwise unlawful.

20. Bearing that in mind, I turn to examine the circumstances of this Advocate-Client dispute. The evidence placed before the Taxing Master was that by a letter of 17th February 2005, the Advocates wrote to the Client and informed it that:-

"As regards our fees, a sum of Kshs.11 Million is acceptable save for the fact that you shall bear all necessary disbursements and taxes thereon. We have enclosed our fee note on that regard…."

21. The fee note enclosed is dated 16th February 2004 and is for Kshs.11,000,000/= plus VAT at 16% to make Kshs.12,760,000/=. The fee note includes fee for the work for lodging transfers of numerous properties to the Client. It is not in dispute that the conveyance of the subject property was included in the fee note. Although it is submitted by the Advocates that the block fee note was initially rejected by the Client, it is common ground that the fee note was substantially settled. In essence there was an offer in writing made by the Advocates and accepted by the Clients through conduct by part performance. There was undoubtedly an agreement and the Taxing Master was perfectly entitled to find that a binding agreement existed between the parties. The agreement has not been said to be counter statute.

22. In reaching that conclusion, I am not prepared to go as far as the Taxing Officer who found that the Clients letter of 17th April 2007 was a confirmation of an agreement. This is because the letter came after a disagreement had arisen and the Bill of Costs filed.

23. This Court takes solace on its finding from the decision of the Court of Appeal in Civil Appeal No. 286 of 2010 in which the Court considering similar circumstances relating to the same parties herein respecting transfer of Nakuru Municipality Block 11/38 reached the following decision:-

18. In setting aside the taxation, the Judge was satisfied that the taxing officer had committed an error of principle in that the taxing officer had failed to appreciate that the instructions given to the advocates by the client entailed "a block exercise" of transferring assets. That conclusion is well supported by the material that was before the Judge including the advocates own letter to the client dated 17th February 2005 in which the advocates indicate that a global fee of Kshs. 11 million, excluding disbursements and taxes was acceptable with respect to the "*transfers for the properties*". It was not until the client demanded a refund of "*overpayment*" of fees in connection with other legal matters the advocates were handling for the client

that the advocates took umbrage and threatened the client that they would "*proceed to tax our bill based on the actual value of each and every property we have transferred or we are in the process of transferring*".

24. Although the Advocates tell this Court that the Court of Appeal decision was reached on unique circumstances of the case they were deciding and that the decision was not a test case, this Court is not told what distinguishes this matter with the dispute that the Court of Appeal decision settled.

25. Having reached that conclusion then the other two issues are quickly resovled.

26. This Court was asked by the Advocates to give regard to paragraph 13(1) of the Advocate (Remuneration) Order, 1962 which reads:-

"13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form".

27. The Court is asked to find that the Client disputed the block fee note and demanded refund of part of the fees already paid. The demand for refund is in a letter of 24th January 2007 which cites fees paid in respect to business of three contentious matters namely HCCC Misc No. 722 of 2003, HCCC Misc Case No. 693 of 2003 and HCCC Misc. Case No. 990 of 2003. As evident from the contents of that letter, the fee note referred to by the Client is that of 19th November 2004 and not the block fee note of 16th February 2004.No evidence of the Client contesting the Block fee note for the non-contentious work was produced.

28. In the presence of a binding agreement for renumeration, the provisions of Paragraph 13 cannot be invoked.

29. I turn,briefly, to the issue relating to the use of the valuation report by Tysons Limited. The matter is now moot because of the Court's finding that there was an agreement for fees. Since there was a lawful remuneration agreement then the Advocates were not entitled to tax their Bill of Costs and there would be no basis to determine the value of the subject matter.

30. Upon striking out the Bill of Costs, the Taxing Officer concluded by stating:-

"I make no order to costs".

Although no arguments were made at the hearing of the reference, one ground for the reference was that the Taxing Officer erred in law by striking out the Bill of Costs with costs to the Respondent as there was not provision for the award of costs under the Advocates Remuneration Order.

31. As a factual issue it is not correct ,as stated by the Advocates, that the Taxing Officer made an award of costs to the Respondents. The truth is that he made no order of costs. Yet given that the issue has given rise to an interesting question as to whether a Taxing Officer can make an award of costs in deciding a Bill of Costs, I will venture an opinion.

32. The answer is to be found in Paragraph 69 of the Advocates Remuneration Order which reads:-

69. Manner of preparing bills for taxation

(1) Bills of costs for taxation shall be prepared in five columns in manner following—

(a) the first or left-hand column for dates, showing year, month and day;

(b) the second column for the items, which shall be serially numbered;

(c) the third column for the particulars of the services charged for;

(d) the fourth column for the professional charges claimed; and

(e) the fifth column for the taxing officer's deductions.

(2) Disbursements shall be shown separately at the foot of the bill.

(3) Fees for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer.

Sub-paragraph 3 simply talks of fees for attending the taxation. In respect to taxation there is no such thing as instruction fees to file and prosecute a Bill of Costs. In that regard the only fees which a party filing a costs is entitled to is fees for attending the taxation. In addition, the filing party would be entitled to disbursements that have been properly incurred. Indeed, the Advocates in compliance with the provisions of Paragraph 69, sought attendance fees of Kshs.1,000/= (See item 12 of the Bill).

33. Having said that, if a Bill of Costs ought not to have been presented at all in the first place, like here, then the Taxing Officer has the discretion to award costs for the improper proceedings. This would be within the discretionary authority of the Taxing Officer. A party who has been required to defend an improperly filed Bill of Costs is entitled to compensation for costs incurred in defending it.

34. Otherwise for reasons discussed earlier, the Reference dated 9th April 2009 is dismissed with costs.

Dated, Signed and Delivered in Court at Eldoret this 8th Day of June 2020

F. TUIYOTT 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 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT JUDGE

PRESENT:

Munge for the Advocates.

No appearance for the Clients.