



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO 55 OF 2013

P.A OSINO & CO. ADVOCATES.....APPLICANT

- VERSUS -

ALI NYAMAI JONO.....RESPONDENT

RULING

On the 29th November 2013, **Hon. B. M. Ekhubi, Deputy Registrar**, delivered a ruling on taxation by which the Advocate/Client's **Bill of Costs** dated 30th April 2013 was taxed in the sum of **Kshs 150,792.20**. That decision aggrieved the Advocate who then filed a chamber summons dated 26th May 2014, later amended on 18th July 2014, and sought an order that the order on taxation be set aside and in the alternative agreement embodied in the letter dated 29th May 2006 be declared to be binding upon the parties pursuant to **section 45** of the Advocates Act.

The reasons advanced for the reference was that it was erroneous for the taxing master to fail to adopt the agreement on the fees and in taxing instruction fees at **Kshs. 44,530/-**, which decision failed to take into account the importance of the matter and the parties interest in the same regard being had to the nature of proceedings taken and thus the sum taxed then became overly too low.

The reference was supported by the affidavit of the Advocate/Applicant whose grievance was that there having been an agreement on fees, the assessment of instruction was bound to be based on the formula provided in the said agreement.

Even though the Application was duly served upon the Respondent, there was never a response thereto nor appearance on the date set for hearing. The matter thus proceeded without any input by the Respondent. I will thus in making a determination on the reference look at the Bill as filed and reasons given for the taxing master decision then mirror same against the Advocate's complaint as disclosed in the Amended Chamber Summons.

The guiding principle in application of this nature is that a judge will not lightly, freely and in every event interfere with the decision of the taxing officer unless it be demonstrated that the same was exercised injudiciously and that happens where the taxing master is propelled by improper motive; where he fails to properly apply his mind to the materials placed before him as is relevant for the determination, where there is apparent regard to irrelevant matters and disregard of the relevant matters and short of that, where it is demonstrated that the officer misapprehended the principle of taxation or misinterpreted the applicable law and therefore arrived at a wholly wrong and erroneous decision, no reasonable person in his position would have reached thus depicts an injustice on the parties. The summary of the consideration were succinctly captured by the court in **Republic -vs- Ministry of Agriculture & others ex parte Muchiri W'njuguna [2006]eKLR** where the judge said:-

“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 interference, that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors...”

In this matter, the error for which the decision is challenged is the assertion that there was an agreement on fees dated 29th May 2006. That agreement did provide:-

“I ALI NYAWANI JONO of Post Office Box Number 46, MAZERAS agree and undertake to pay $\frac{1}{3}$ of the amount awarded to me as general damages to P.A OSINO & COMPANY ADVOCATES on account of their profession fees.

Signed

Plaintiff/s

29th May 2006”

That agreement became the subject of argument at the taxation before the taxing officer when one looks at the submissions filed by both parties. While the Respondent/Client took the view and position that the Advocate/Applicant had opted to abandon the agreement for fees by filing the Bill of Costs, the Advocate equally took the view that the parties had failed to file an agreement therefore they opted to file the Bill of Costs. That is what my reading of the submissions reveals. The words used by Advocate are these:

“Your Honour, Section 57 is very clear that where parties fail to file an agreement, they may opt to file the Bill of Costs based on the agreement on fees...”

The Respondent has all along objected to the agreement on fees and we enclose herewith the correspondence to this effect, hence the filing of the bill.”

After considering these submissions the taxing officer rendered himself in the following words:

“It is clear from the foregoing that in cases where the parties have an agreement on fees payable, the applicant has two options. One option is to file a bill of costs and proceed to taxation. The other alternative is for the parties to file a letter recording the agreement which ordinarily and generally have the force and effect as a certificate of taxation.

In the instant case, though there was an agreement on fees, a joint letter to record the agreement has not been filed rather the applicant has filed a bill of costs. The applicant therefore elected on the latter and not the former. In any case the applicant cannot elect to proceed with both”

The foregoing excerpt is the core of the applicant’s complaint and basis of the reference. It being so, can it be justifiably said that the taxing officer committed any error in principle so as to justify the Courts interference with his decision on taxation?

I have set out the terms of the alleged agreement on fees. It is the kind of an agreement that pegs payment of fees on the outcome and thus subject to being questioned on its validity.

While it is true that an advocate and client may before, during or after the conclusion of a contentious business, agree on the remuneration of the advocate under **section 45**, the provision is clear that the agreement must fix the remuneration and not just provide a formula for calculating the fees.

More importantly, the agreement as drafted and signed says that before the matter is concluded there would be no parameter to calculate the fees payable. It also connotes that if the matter was to be dismissed or discontinued; there would be no threshold of calculating the fees payable and thus none would be payable.

In short the agreement was dependent upon the success of the Respondent’s suit. Such an agreement is bereft of validity in terms of the provisions of **section 46 (c)** which provides;

“Nothing in this Act shall give validity to-

(c) any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceedings stipulated for payment only in the event of success in such suit or proceedings...”

That provision clearly deprives the agreement sought to be relied upon by the Advocate/Applicant of any validity and it being so invalid, it would not be the basis of calculating the instruction fees payable to the applicant. It did not exist and was otherwise null for being contra statute. If so null then the bill filed was one subject to be taxed pursuant to **Schedule VII** of the **Advocate Remuneration Order**. That is what the taxing master did and I find no fault with the decision thereby reached to warrant my interference.

Instead I do find that the taxing master did properly exercise his discretion as such taxing master and arrived at a figure which I find to be reasonable and in consonance with the then reigning remuneration order.

The upshot is that I do find the chamber summons by the Advocate/Applicant, as amended, to lack any merit and thus order that it be dismissed with costs to the Client/Respondent.

Dated ,Delivered and Signed at Nairobi this 20th day of September 2019.

PATRICK J O OTIENO

JUDGE