



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION CASE NO. 81 OF 2016

ROSA ASSOCIATE.....APPELLANT/CLIENT

VERSUS

GTK ADVOCATES.....RESPONDENT/ADVOCATE

RULING

1. The Appellant/Client filed a Chamber Summons dated 8th March, 2017, under the provisions of Order 11(2) of the Advocates Remuneration Order seeking orders that;

(a) The ruling/decision of the taxing master the Hon. F. Rashid made on 23rd February, 2017 taxing the Advocate – Client Bill of Costs at Kshs. 8,346,658 be set aside and/or vacated.

(b) The bill of costs be remitted back for re-taxation by a different taxing officer with appropriate directions

(c) In the alternative, this Court do tax the Advocate’s Bill of costs; and

(d) The costs of the application be provided for.

2. The Application is supported by the Affidavit of **JAMES NYIHA** dated 8th March, 2017 and a Further Affidavit of **CATHERINE NYIHA**. From the grounds in support of the Application and aforesaid Affidavits, the reference is against the taxation on item 1 of the Bill of Costs. In the Affidavit of James Nyiha, it was deponed that the Taxing Master erred in law and fact in failing to consider that the Advocate had initially valued his work at USD \$ 2,000, that the subsequent filing of the bill of costs amounting to Kshs. 236,226,844/= was based on malice and vengeance and that the taxing master failed to consider the Affidavit and Submissions of the Appellant. Catherine Nyiha Advocate deponed that the decision of the taxing master did not consider that the Advocate was not instrumental in having the suspension lifted in that, the Client’s suspension ran for the entire six (6) months from 13th April, 2015 to 13th October, 2015 without the intervention of the advocate.

3. The application was opposed by the Respondent/Advocate who filed grounds of opposition dated 24th March, 2017 on the grounds that the Appellant failed to establish legal basis on where the taxing master erred, that the basis of the application are matters of opinion of the Appellant, that the application is fatally defective and the allegation that the Advocate valued his work at USD \$ 2,000 lacks merit.

4. The Application was canvassed by way of written submissions. The Appellant filed submissions dated 4th December, 2017 and submitted that the subject matter did not have a monetary value as the Advocate was instructed to write to Athletics Kenya to protest against the suspension of its license and request for immediate reinstatement of the same. It was further submitted that the taxation of the instruction fees, at Kshs.5,000,000/= by the taxing master was not commensurate to the actual work done by the Advocate and it amounted to unjust enrichment. It was contended that the work done by the Advocate was in the nature of correspondences and attendance of meetings. The Appellant relied on the case of **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR** where the Court of Appeal upheld the High Court taxation of the bill of costs at Kshs. 1,200,00/= and held that;

“Having found that there was no basis for the award by the taxing master what is the recourse for the advocate(s). They are entitled to their costs. This is his livelihood. He has worked. He has given a sound and credible opinion and as a result he succeeded in having the suit against the claimant struck out. He won the case.

The advocates pay however must be commensurate to his work otherwise shall be what is termed as “unjust enrichment”. The same must be a reasonable compensation for professional work done.

The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances.

Having carefully perused through the rival affidavits and submissions and taking into consideration the issues I have observed above I am inclined to set aside the taxing master's certificate issued herein. The sum of Kshs. 278,466,690/= was manifestly excessive (sic) in the circumstances."

5. The Appellant therefore suggested that the fees awardable herein should be less than Kshs. 1,200,000/=

6. The Advocate filed submissions dated 9th February, 2018 and submitted that the reference fails to meet the basic principles and test established in law, that it is an application for review couched as a Reference and is for dismissal. The Advocate filed two sets of authorities dated 24th March, 2017 and additional case law dated 7th November, 2011 which he relied on.

7. I have considered the application, the grounds of opposition, the affidavits on record and the submissions of both parties. The item in contention in this case, is the instruction fees. The Appellant's case is that the learned taxing master awarded excessive instruction fee which was not commensurate to the work done. It is therefore important to consider the nature of the legal services offered by the Advocate. A perusal of the Advocate/Client Bill of Costs dated 25th February, 2016 will reveal that the services offered by the Advocate consisted of drawing letters, emails and receiving and perusing the same. On the instruction fees, the Advocate charged the sum of Kshs. 203,610,000 for receiving instructions from the Client to act in lifting their suspension by Athletics Kenya including review of the applicable doping laws.

8. In as much as I agree that an Advocate is entitled to compensation for the work done, the Advocate's fees should not be too excessive as to inhibit access to justice and the same should be commensurate to the work done. The instructions to the Advocate were to act in lifting the suspension of the Client with the Athletics Kenya and the nature of work done involved writing and perusal of correspondences and in so doing he had of course to peruse the laws, so that he could have a case for the lifting of the suspension. In the case of **First American Bank of Kenya vs. Shah and Others** the court held that, "*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.*"

9. A taxing master is empowered to exercise his/her discretion in assessing the instruction fees in a manner which is just and fair considering the circumstances of the case. In so exercising her jurisdiction, the taxing master is expected to consider all the relevant factors of the case and exercise her discretion judiciously in arriving at her decision. On record is a fees request note for the sum of USD 20,000 dated 15th October, 2015 being the amount the Advocate had charged for the work done herein and a further follow up letter dated 27th January, 2016 to the Client requesting the payment of the same amount.

10. In assessing the instruction fees, the taxing master ought to have considered the fact that there was no much complexity in the matter. It is the opinion of this Court that the award of Kshs. 5,000,000/= in instruction fees was excessive in the circumstances considering the above mentioned factors and this court is empowered to intervene in such a situation. The case of **Premchand Raichand Ltd & Another vs. Quarry Services E. Africa Ltd (1972) E.A. 162** outlined the guidelines in taxation inter alia that;

"...the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants." (Emphasis mine)

11. As held in the above case, I find that costs should not be excessive as to confine access to justice to the wealthy only, and there should be consistency in awards. In the case of **Moronge (supra)**, the Court of Appeal upheld the High Court decision in retaxing the bill of costs from Kshs. 278,466,690/= to Kshs. 1,200,000 in which case the Advocate had succeeded in having the suit against the Claimant struck out and the Court held that, "*The advocates pay, however, must be commensurate to his work otherwise shall be what is termed as "unjust enrichment". The same must be a reasonable compensation for professional work done.*

"The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances."

12. In the instant case, the matter did not proceed to Court and therefore I find the award of Kshs. 5,000,000/= in instruction fees to be unreasonable and excessive in the circumstances of this case. The award was not commensurate to the work done. In the spirit of **Article 48 of the Constitution of Kenya** which provides that, "*the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access*" it is only just and fair that item 1 of the bill of costs is re-taxed afresh before a different taxing officer in light of the foregoing and the taxing master to be guided by the provisions of article 48 of the constitution and the principles laid down in the case of Premichand. The Respondent shall get the costs of the reference.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*