



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 342 OF 2017

NJUGUNA & PARTNERS ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

BEDROCK SECURITY SERVICES LTD.....CLIENT/RESPONDENT

- MATTER ARISING IN -

PUBLIC PROCUREMENT REVIEW BOARD APPLICATION NO. 111 OF 2016

-BETWEEN-

BEDROCK SECURITY SERVICES LTD.....APPLICANT

-AND-

JUDICIARY.....PROCURING ENTITY

JUDGMENT

(Being a reference under paragraph 11 of the Advocates (Remuneration) Order to the

Taxation of the Advocates/Client by Deputy Registrar Hon. S. A. Opande on 18th January 2018.)

1. This is a reference brought under paragraph 11 of the Advocates (Remuneration) Order.

BACKGROUND

2. ***Bedrock Security Services Ltd*** (the client) responded to a bid by ***The Judiciary*** where the Judiciary invited tenders for the provision of security services for a period of 1 year renewable for a further 1 year. That tender was awarded to ***Lavington Security Services Ltd***. The client appealed against the award before ***Public Procurement Administrative Review Board*** (the review board).

3. The review board identified three issues for determination. Those 3 issues related to the process that ***the Judiciary*** followed in making the award. The review board by its decision dated ***20th December 2016*** allowed the review and set aside the award tender to ***Lavington Security Services Ltd***.

4. The client was represented by the law firm ***Njuguna & Partners Advocates*** (the advocate) before the review board. The advocate presented his advocate/client bill of costs before the taxing master of this court.

5. The advocates reference is directed at 3 items of the taxed bill of costs that is, item no. 1 instruction fees; item no. 8 which related to the attendance before the review board; and item no. 16 which was the filing fee before the review board.

CHAMBER SUMMONS

6. The advocate by chamber summons dated **6th February 2018**, seeks the decision of the taxing master, **S.A. Opande** to be set aside in respect to items no. 1, 8 and 16 in the bill of costs and that this court does proceed to tax those items as drawn in the bill of costs.

7. In support of that chamber summons, the advocate relied on the affidavit of **Jane Mubangi** an advocate of the High Court of Kenya. The said advocate deponed that the value of the client's tender was **Ksh 180,112,152**. The instruction fees in the bill of costs was drawn by the advocate at **Ksh 2 million** which the deponent stated was reasonable based on the contract value of the client's tender amounting to **ksh 180,112,152**. Further that the amount of **ksh 2 million** took into account the nature of the proceedings, the complexity of the matter, the times expended by the advocate, the general conduct of the matter and the volumes of documents involved. That the decision of the taxing master, in taxing the instruction fee at ksh 200,000 was against the trite principles of taxation which requires that the value of the tender be considered in taxation of that item.

8. The advocate further deponed that the taxing master erred to have failed to allow item no. 16 in the bill of costs which represented the filing fee before the review board. In respect to that filing fee, the advocate deponed that:

"...the payment was a common ground to both parties and the respondent (the client) did not dispute or insist on the receipt.."

9. The advocate annexed the receipt of the review board in respect of the filing fee for ksh 182,528. It is not disputed by the advocate that that receipt, which he now presented to this court, was not before the taxing master when the bill of costs was taxed.

10. The advocate also submitted that the taxing master erred in awarding ksh 14,753 for attendance before the review board.

11. The chamber summons was opposed by the client. The client drew the court's attention to the guiding principle in a reference, that is, that the court should only interfere with the decision of the taxing master where there has been an error in principle. The client submitted that the advocate failed to lay sufficient basis for this court to interfere with the decision of the taxing master. That the taxing master's decision was correct, legally sound and well within the settled principles of taxation.

12. The client further submitted that :

"i. The nature of the proceedings before the Procurement Board was for all intents and purposes geared towards reversing the decision of the procuring entity. That being the case, the Board was called upon to review the exercise of authority by the procuring entity with a view to establishing whether or not the procuring entity in exercising its authority as conferred to it by statute and the Constitution of Kenya, it complied with the procedural and substantive dictates of the law in so far as a fair, competitive and transparent process is concerned.

ii. furthermore, the issue before the Review Board was not whether the tender sums or any sums of money was payable to the Client/Respondent but whether there had been compliance with the law by the procuring entity.

iii. Therefore, the amount of the tender is not necessarily the determinant factor in deciding quantum of costs payable to an advocate or a party in matters arising from the Review Board.

iv. For the above reasons, the matter before the Review Board was an ordinary matter that bore no complex elements or any novel element which would have weighed heavily or at in the Taxing Master's mind.

v. On the issue of time expended by the Advocate, we submit that being an ordinary review matter the prosecution of the application for review required no deployment of extra special or considerable amount of industry, personnel and resources or that it was inordinately time consuming.

vi. In any event, if the Applicant contends that there was novelty, complexity or a considerable amount of industry deployed by his, then the yardstick laid down in Republic vs Minister of Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others should be met more so, in terms of cogent specification of any elements in support thereof, specific description of the novelty and details demonstrating the deployment of a considerable amount of industry."

RULING ON TAXATION

13. The learned taxing master by his ruling dated **18th January 2018**, on instruction fees item no. 1 favoured the submissions made on behalf of the client, that is, that it was the tendering process that resulted in the award which was before the review board and not the client's contractual amount. The taxing master found that there was no justification in the advocates submissions that the value of the tender was the subject matter for calculating the instruction fee.

14. The taxing master disallowed the disbursement under item no. 6 of ksh 183,000 because it was not supported by a receipt.

15. On item 8, where the advocate sought ksh 30,000 for attendance before the review board, the taxing master found that the advocate had not demonstrated any cogent reason to warrant exercise of his discretion to award that amount under this head and proceeded to award Ksh 14,753.

ANALYSIS AND DETERMINATION

16. In the case **Republic vs Minister of Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna & 6 Others[2006]eKLR** the court

considered the basis upon which the court can interfere with the exercise of discretion by a taxing master and stated:

“...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..”

17. The advocate relied on a number of authorities in support of the chamber summons. One such case is ***Famy Care Ltd vs Public Procurement Administrative Review Board & 4 Others [2013] eKLR***, in that case the taxing master taxed party and party bill of costs and in so doing reduced the instruction fees from the amount of ksh 7,229,168/= to ksh 200,000. The party in that matter, with the bill of costs was unsuccessful before the review board and challenged that decision before the High Court by seeking a prerogative order under the constitution. The High Court dismissed the petition. The learned judge who considered the reference from the taxing master’s taxation found that the taxing master had failed to explain how she took into account the various factors that led her to conclude that the sum of Ksh 200,000 was reasonable amount.

18. That above case is distinguishable from the taxation under consideration because the taxing master in this taxation gave the basis which led him to find the advocate costs should be taxed at ksh 200,000. This is what the taxing master stated in his ruling:

“On the instruction fees, I agree with the reasoning of the Respondent that the novel issue was the integrity of the tendering process that resulted into the award of the tender and not the contract in itself. The applicant cannot demonstrate how the flaws in the tendering process resulted into a quantifiable financial loss to his client or a gain to the winner. Construing the contract sum to be the value of the subject matter is not justifiable because the contract itself was not the dispute before the board. The contract sum cannot therefore form the basis for assessment of instruction fees.”

19. In the case of ***ICK Kimathi Muchena Arimi Kimathi & Company Advocate vs Baseline Architects Limited [2013] eKLR*** the court at first pronounced itself that the value of the subject matter cannot be based on the value of the tender to the client but should be based on the fees the client will derive from performing the tender. The court then proceeded to make the following finding:

“The Taxing Master ought to have considered the weight of the subject matter or the facts leading to these proceedings. While I agree that the suit value was not the alleged Kshs.2 billion, the tender value was agreed to be of Kshs 2 billion and therefore the process to which the advocate was invited to oversee was of great importance, of high value and of serious economic consequences. This realisation should be reflected on the final award.”

20. In reading the above case, it was not clear what issue was before the review board; was it the contract amount or, as in this taxation under review, or was it the process of the tender awarded. It is because I was unable to discern exactly what the review board was considering that I am unable to state if that decision is useful to what is before me. The same case will apply in the case of ***Masika Koross Advocates vs China Wuyi Company Ltd [2014] eKLR***.

21. The case of ***Alex S.Masika vs EPCO Builders Limited [2008] eKLR*** the court in considering a reference was faced with the same facts as are before me. This is what the court held in that case:

“Having considered all the issues raised by the counsel regarding both references before me and the ruling of the Taxing Master, I am satisfied that the Taxing Master did not err. The learned Taxing Master applied the correct principles in accessing the bill. The Taxing Master was correct in my view, not to base the instruction fees on the value urged by the Advocate. As already stated the Advocate was instructed to represent the Client in the Public Procurement Board in which the subject matter was an appeal and application for review of the decision of the Tender Committee of N.S.S.F. The issue before the Board was the decision making process of the Committee and whether the Tender awarded was upholdable. The value of the Client’s tender could not be applied to determine the instruction fee payable to the Advocate, as it was not the value of the subject matter before the Board.”

22. The Holding in that case is in tandem with the holding of this court. The taxing master in this matter under consideration was correct to find that what was before the review board was not the contract amount but the process of the tender award. That process was faulted by the review board which set aside the award and ordered the Judiciary to re-advertise and start afresh the tendering process. The taxing master was, in my view correct in exercising his discretion as provided under paragraph 16 of the Advocates (Remuneration) Order by awarding ksh 200,000 as instruction fee.

23. The taxing master cannot also be faulted for awarding the advocate Ksh 14,753, and not Ksh 30,000 claimed by the advocate, for attendance before the review board.

24. On item 16, it is this court’s finding that the taxing master should have as provided under paragraph 74 of the Advocate (Remuneration) Order, have requested the advocate to produce the receipt of the claim of Ksh 183,000. Paragraph 74 provides:

“...receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer”.

25. The taxing master by his ruling rejected that claim for that disbursement but there is no evidence that he requested the advocate to produce it and that advocate failed to produce it. The advocate has now filed before me a receipt which shows that the disbursement was ksh 182,528. This court will allow that amount.

26. Since the advocate did not succeed on two grounds of this referene, the court will not award him costs of the chamber summons.

27. Accordingly the judgment of this court is:

a. *The reference in respect to item no. 1 and item no. 8 of the bill of costs is rejected.*

b. *The reference on item no. 16 is allowed to the extent that this court allows an amount of ksh 182,528 and accordingly, on that item ksh 472 is taxed off from that item.*

c. *In the end the advocates bill of costs is taxed at ksh 564,198. 22. A certificate of costs shall issue for that amount.*

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE