



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CAUSE NO. 61 OF 2016

MUEMA KITULU & CO. ADVOCATES.....APPLICANT

- VERSUS -

KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT

RULING

1. The issue for determination is the Preliminary Objection which the client raised in opposition to the Advocate/Client Bill of Costs.
2. It is the client's position that the Deputy Registrar lacks jurisdiction to tax the Bill of Costs because the parties had agreed on the legal fees payable, and that the client had already settled the said fees in full.
3. The client has exhibited its own summary of the quotations it received from the 4 law firms which it had requested to give quotations for legal services.
4. In the said request to the 4 law firms, the client had explained that it had the intention of obtaining a Court Order, under a certificate of urgency, to stop the former Directors of **DUBAI BANK LIMITED** from transferring and/or dealing with their properties in any form whatsoever.
5. Based upon the material currently before the court, it does appear that the law firm was later given instructions to undertake many other tasks.
6. Those other tasks included the following;
 - a. Seeking orders against AFRICA ENERGY LIMITED; SULEIMAN ENTERPRISES LIMITED; KAMP GENERAL ENGINEERING LIMITED; KEME SALT PACKERS PRODUCTION LIMITED; and MAESTRO PROPERTIES LIMITED;*
 - b. Seeking orders for the recovery of the property and bank deposits of the 5 companies cited in (a) above;*
 - c. Drawing about 350 CAVEATS and CAUTIONS, to restrain dealings in the titles which were recovered from the personal office of the chairman of the Board of DUBAI BANK KENYA LIMITED.*
7. In the light of the expanded scope of tasks which it undertook, the law firm submitted that it was entitled to vary the terms and conditions of the agreement between it and the client.

8. But the client insists that any amendment to a contract resulting from the use of open tendering could only be effected if the amendment was approved in writing by the Tender Committee of the procuring entity.

9. In any event, variations could not exceed 10% of the original contract quantity.

10. And the variation should, in law, be executed within the period of the contract.

11. In this case, the law firm had given a quotation of Kshs. 817,000/-. The client gave instructions to the law firm because the said firm had given the lowest quotation.

12. But the law firm had now given to the client, an itemized fee note dated 11th February 2016, which is for Kshs. 61,923,127/-.

13. It is in those circumstances that the client has raised an objection to the Advocate's Bill of Costs, because the client insists that there was an agreement that the law firm would charge Kshs. 817,000/-.

14. Whilst the client makes the point that the law firm, together with other firms, were invited;

“to quote for a specific brief?;

the law firm says that the client thereafter gave other instructions which were beyond the specific brief.

15. In effect, the parties are not in agreement on the facts of the case. More particularly, the client does not appear to accept the lawyer's contention about the enlargement of the scope of instructions. In its submissions, the client talks about the lawyer's claim of *“expanded scope of work?”*

As the client construes the lawyer to be making a claim, that presupposes that the client does not acknowledge the existence of the alleged claim.

16. But the client also appeared to have acknowledged that there had been some variations of the scope of work. I say so because the client submitted that;

“27. It is the client's submission that the variation of scope of work as alleged by the Advocate and the consequential cost of the expanded scope is well above the allowable variation prescribed by Regulation 31, in which case the option that was opened (sic!) to the Advocate was to terminate the contract?.

17. On a *prima facie* basis, I find that there was a retainer agreement between the parties. In effect, the law firm was duly instructed by the client, and also that there was an agreement on the fee to be charged by the lawyer, in respect to the specific brief.

18. A reading of the Bill of Costs filed by the law firm shows that the said Bill was in respect to a lot of work which was not incorporated into the specific brief.

19. The client does not suggest that the advocate did not undertake the services specified in the Bill of Costs.

20. The client reasoned that the law firm should have terminated the contract, as the resultant fee increment would exceed the 10% allowable variation.

21. On a *prima facie* basis, the scenario that presents itself before me is one in which the client invited the lawyer to give a quotation for a specific brief. After the lawyer gave the most responsive quotation, the client duly instructed the lawyer.

22. However, the client appears to have given to the lawyer, instructions which went beyond the specific brief. The lawyer seems to have failed to secure a written variation to the agreement, but he proceeded to carry out the expanded scope of work.

23. In those circumstances, the client sought to have the court declare that the Deputy Registrar lacked jurisdiction to tax the Advocate/Client Bill of Costs because the result may be the award of fees which was much higher than had been agreed upon, and also a sum which was well in excess of what is permissible under the law governing the variation of contracts.

24. In my considered opinion, the matters in issue cannot be effectively and conclusively determined through the Preliminary Objection raised. I so find because although there appears to be an agreement on the scope of work which the advocate had been asked to give a quotation for, the Bill of Costs makes no reference to services that would fall under the specific brief which the client originally alluded to.

25. The Bill of Costs makes reference to instructions which were allegedly given by the client, in relation to matters which were separate from those which were in the specific brief, for which the lawyer had given a quotation.

26. In the event, before the court can determine whether or not the Bill of Costs may proceed to taxation, the parties would have to delve into matters of fact and matters of law, which go beyond the Preliminary Objection. For instance, can the client give instructions which go beyond a brief specified in an invitation to tender, and then refuse to pay for such services?

27. On the other hand, the lawyer would have to deal with the question as to why he accepted and acted on instructions which went beyond the specific brief, for which he had given a quotation.

28. The questions are of major concern because the client appears to be a body that was subject to the provisions of the **PUBLIC PROCUREMENT AND DISPOSAL ACT**.

29. But those questions cannot be answered at this stage, of a preliminary objection. Accordingly, I overrule the said Preliminary Objection. The client will pay to the advocate the costs of the said Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of November 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Deya for Kitulu for the Applicant

Owiti for the Respondent

Collins Odhiambo – Court clerk.