REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HC. MISC. APPLICATION NO. 1156 OF 2005

NYAMOGO & NYAMOGO ADVOCATES.....APPLICANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPODNENT

RULING

On 15th February, 2013 Waweru J delivered a ruling relating to two applications, one by the Advocate and the other by the client, relating to a dispute concerning fees payable for professional services rendered.

The first application was a Notice of Motion by the advocate dated 22nd August, 2011 under Section 51 (2) of the Advocate's Act, Cap 16 Laws of Kenya. It sought the orders that the court do enter judgment for Kshs. 15,604,233/60 against the client in terms of the certificate of taxation issued on 11th August, 2011, interest at 14% per annum from 13th August, 2003 until payment in full and costs of the application.

The other application by the client was by way of Chamber Summons dated 25th October, 2011 brought under paragraph 11 (2) of the Advocates (Remuneration) Order, seeking orders that the taxation on instruction fees be set aside or struck out, the taxation on Value Added Tax be quashed or set aside and that in the alternative the amended Bill of Costs is struck out. In the alternative, the client pleaded that further proceedings in respect of the taxation be stayed pending the hearing and determination of Nairobi HCCC No. 1242 of 2005 which suit sought to impeach the alleged instruction fees.

The learned judge decided that the ruling upon the two applications must await the disposal of the said suit in the High Court. That suit was eventually heard and determined by Ougo J, in a judgment delivered on 23rd January, 2015. The plaintiff was Kenya Pipeline Limited while the defendant was Nyamogo and Nyamogo Company Advocates.

From the Judgment aforesaid the prayers were as follows;

> i. "That there be a stay of proceedings in High Court Miscellaneous Application No. 1156 of 2005 until the determination of this suit.
>
> ii. A declaration that there is no binding agreement between parties herein fixing the amount payable as instruction fees to the defendant in respect of instructions to hold brief in criminal case no. 1693 of 2003.

iii. Alternatively the purported agreement providing payment of the defendants instruction fees of Kshs. 13 million be and is hereby set aside.

iv. The defendants be ordered to re-draw for taxation of its Bill of Costs for services rendered in Criminal Case No. 1693 of 2003 as per Advocates Remuneration Order".

Having set out the prayers in the said suit, I deem it necessary to also set out the grounds relied upon in the two applications, whose ruling was deferred by Waweru J.

The advocate's application dated 22nd August, 2011 was supported by the following grounds;

1. The Bill of Costs was filed on 29th July, 2005 and amended on 14th and 20th July, 2009.

2. The said Bill of Costs was taxed at Kshs.15,604,233/60 against the respondent and a certificate of taxation subsequently issued.

3. The notice of demand for payment after taxation was issued but the client did not oblige.

On the other hand the application by the client dated 25th October, 2011 set out the following grounds;

1. That the taxing officer erred in law and fact by awarding the advocate Kshs. 13 Million alleged to be agreed instruction fees when she had no jurisdiction to tax the bill.

2. That there was no valid agreement fixing the advocates fees at Kshs. 13 million.

3. That in any event the amount awarded was excessively high and not justified in the circumstances of the case.

In his ruling, Waweru J identified the main issue in contention between the advocate and client was whether there was a valid agreement for the advocate's fees and found that, that issue could only be properly ventilated in the substantive suit, which is HCCC No. 1242 of 2005.

The learned counsel for the client now submits that Ougo J confined herself to two issues.

1. Whether there was an agreement between the parties, and

2. Whether there was a variation of that agreement.

By so doing, the learned counsel submitted the judgment does not conclude the reference before the court. The issue that remains is whether an advocate whose instructions are withdrawn before the matter is concluded is entitled to full instructions fees. He cited two authorities in support of his position that, where instructions are withdrawn the advocate would be entitled to fees up to the time the instructions are withdrawn. That is to say he shall not be entitled to full instruction fees.

In reply thereto, the advocate submits that, whereas there is nothing wrong with the attack on the judgment of Ougo J, there are procedures to do that. Those are, either an appeal or application for review. Both cannot be done orally.

The matter now being raised was not raised before Ougo J neither was it part of the pleadings. The cited authorities are not relevant, it is so submitted. It is the position of the advocate that the taxing master found there was an agreement on fees and that he is entitled to judgment as prayed on the taxed costs. Section 45 (5) of the Advocates Act and in particular the proviso thereto, deals with the issue.

On my part I have considered all the material before me and submissions by counsel. I have related the pleadings in HCCC No. 1242 of 2005 to the two applications whose ruling was deferred by Waweru J.

With respect, the issue being raised by the learned counsel for the client was never pleaded or canvassed in the prosecution of the said suit. The learned Judge (Ougo J) observed

> "***The plaintiff having made the offer to the advocate as evidenced by the letter dated 12th August, 2003 and the same having been accepted by the defendant on his letter dated 13th August, 2003 it can't then turn around and argue that there was no agreement between it and the defendant law firm……***
>
> ***The plaintiff in my view has not adduced any evidence that proves there was another agreement that superseded the earlier agreement and as such the plaintiff's claim on variation fails……..***
>
> ***I find that the plaintiff's suit lacks merit and dismiss it with costs to the defendant."***

In the event the client was aggrieved by the decision of Ougo J, the avenues of law available are well known.

There was concurrence in the decision of the Taxing Master and the Judge in the civil case about the existence of a binding agreement between the client and the advocate. Professional services were rendered in line with the said agreement. The taxing master did not err in law in so holding and taxing the Bill now being challenged. The advocate has justified the prayer for judgment with interest as prayed and therefore his application succeeds while that of the client fails. The advocate shall have the costs of the reference.

Orders accordingly.

Dated and delivered at Nairobi this 8th Day of July, 2015.

A.MBOGHOLI MSAGHA

JUDGE