



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 265 OF 2012

**IN THE MATTER OF ADVOCATES ACT, CAP 16, LAWS OF KENYA AND ADVOCATES
REMUNERATION ORDER**

AND

IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

AMUGA & CO. ADVOCATES.....APPLICANT

AND

ARTHUR GITHINJI MAINA.....RESPONDENT

RULING

There are two applications for this court's determination. The first one is the Chamber Summons dated 30th October, 2012 by the Applicant/Respondent. It is brought under paragraph 11 of the Advocates (Remuneration) Order and it essentially seeks that the decision of the taxing officer given on 18th October, 2012, particularly on items 2 and 5 of the bill of costs dated 9th May, 2012 filed by the Applicant herein be varied and/or set aside and that the said items 2 and 5 be allowed and the bill of costs be allowed as drawn. The applicant also seeks costs of the application.

The said application is premised on the grounds that the taxing officer disallowed and taxed off item No. 2 which relates to value added tax even though there was no objection to this item by the Respondent/Applicant; that the Applicant/Respondent is registered to collect value added tax on behalf of Kenya Revenue Authority and the instruction fee of Kshs. 517,485/- which the taxing officer allowed attracts the value added tax of Kshs. 82,790/- which was item No. 2 with the taxing officer's reason that the advocate had agreed with the client on fees which is charged under item 1 therefore the advocate cannot charge value added tax and that this reasoning is faulty and amounts to an error of principle because value added tax is chargeable under the provisions of Value Added Tax Act, Cap 467; that the taxing officer's decision to tax off item No. 5 was also wrong because the charge of Kshs. 5000/- under this item was in respect of disbursement paid by the advocate on behalf of the client and there was clear evidence before the taxing officer that this money was collected from the Applicant/ Respondent by one Emma Mwangi, a representative of Dr. Kinuthia on 30th September, 2008 and he prays that the bill of costs should not be referred to the taxing officer for the reason that the reference is on a point of law. The response to this application was the respondents supporting affidavit to their application dated 13th November 2012.

The respondents application is the Chamber Summons dated 13th November, 2012 by the Respondent/Applicant which is brought under paragraph 11 (1), (2) and (4) of the Advocates (Remuneration) Order. It essentially seeks three main orders. First, that leave be granted to the Applicant to lodge this objection to the decision of the taxing master out of time, secondly, that the decision of the taxing master given on 18th October, 2012 particularly item 1 and 2 of the bill of costs dated 9th May, 2012 be varied, reviewed and/or set aside and that the bill of costs in items 1 and 2 be taxed under schedule VII part B of the Advocates Remuneration Order.

The chamber summons application is premised on the grounds on the face of the application and on the averments in the supporting affidavit of the Respondent/Applicant herein sworn on 13th November, 2012. He states that the taxing master erred in failing to consider the fact that the agreement forming the basis of the bill of costs dated 9th May, 2012 was void *ab initio* because it offends the provisions of section 46 of the Advocates Act, Cap 16 Laws of Kenya and that the taxing master having based his arguments on section 45 of the Act failed to consider that section 45 is subject to section 46. He gave a background of the occurrences between him and the Applicant/Respondent. He stated that he had engaged the Applicant/Respondent to represent him in Milimani CMCC No. 7561 of 2007 for recovery of damages against the Attorney General. When it became apparent that the Attorney General was about to settle the decretal amount, the said advocate started avoided him. On 29th September, 2012 the Applicant/Respondent coerced him using threats to enter into a fees agreement with him, that the Applicant/Respondent would take a percentage of the decretal sum for his services, although he argued that he had paid all the filing fees and even deposited legal fees, the Applicant /Respondent stood his ground and he had no choice but to sign a document awarding the Applicant/Respondent 30% of the claim awarded. He states that although his advocates during taxation filed a preliminary objection to the entire bill of costs, the taxing master failed to consider the same and dismissed the preliminary objection. He finally states that the advocate's fees chargeable in the present case ought to be assessed under Schedule VII Part B of the Advocates Remuneration Order and not otherwise and he prays that the decision of the taxing master be set aside and be assessed under the relevant provision of the law.

Paul Amuga an advocate of the High Court of Kenya and the Respondent herein filed a replying affidavit on 15th April, 2013 in opposition of the Chamber Summons dated 13th November, 2012. He contends that the Respondent/Applicant did not file any objection to the taxation within fourteen (14) days as required even though he was fully aware of the ruling on taxation delivered on 18th October, 2012. He states that his firm filed notice of objection to the taxation promptly and later filed a reference on 1st November, 2012 within time. That the Chamber Summons seeking leave to lodge objection out of time was therefore only filed as an afterthought and no explanation has been given for failure to file the requisite notice of objection within time. That in any event the intended reference has no chance of success because the taxing officer correctly ruled that any application challenging a fee agreement between an advocate and a client ought to be filed in the High Court by way of Chamber Summons within six (6) months from the date of the agreement.

Parties filed their submissions in court. The Applicant's [Advocate] dealt with both applications. In the reference challenging the taxing officer's decision the applicant challenged Items 2 and 5 of the Bill of costs dated 9th May 2012.

On the Issue of Item 2 ,Value Added Tax, billed at Kshs 82,790/=charged on the professional fees of Kshs 517,485/= the applicant contended that the taxing master was wrong in taxing off the item because the advocates are obliged to charge 16% tax on their professional fees earned from the client and remit it to Kenya Revenue Authority. The advocate also stated that there was no need for value added tax to be included in the agreement for fees signed between the advocates and the client and that Value Added Tax was not for the benefit of the advocates as he was merely collecting the tax then remitting to the government agency concerned. He also submitted that this item was not objected to by the client and that the taxing master therefore did the taxing of this item *suo moto* which in his opinion was wrong and offended the law and public policy which require advocates to collect the tax and remit it to the government. The Advocate relied on **AM Kimani & Co. Advocates –vs- Kenindia Assurance Co. Ltd** where Koome J held that under the Value Added Tax Act an advocate is entitled to charge VAT on

instruction fees and also disbursements. In **J.P Macharia T/a Macharia & Advocates –vs- MDC Holdings Ltd & 2 others** where Ringera held that “As regards VAT it is a statutory requirement that legal services are chargeable with VAT The statement in the encyclopaedia of Forms and Proceedings which counsel for the defendants relies upon to the effect that if VAT is not mentioned in the quotation for cost it is presumed that the sum quoted is VAT inclusive cannot apply to a situation where what is in issue is not a quotation for costs but a duly taxed bill of costs. On Item 5 on the Doctors attendance fees paid to Dr. Kinuthia by the advocates on behalf of the client, he annexed a copy of the acknowledged note that read that one Emma Mwangi acknowledged Kshs 5,000 on behalf of Dr. Kinuthia for court attendance in CMCC No. 7561 of 2007 and the doctor issued a receipt in the client’s name. He submitted that it was normal and that it did not mean that money was not paid by the advocates. The taxing master however noted that the client paid the doctors’ fees and annexed a receipt .He also distinguished the receipt by the a document presumably the acknowledgment showing Emma Mwangi getting money for onward transmission to Dr. Kinuthia and that there was no indication between Emma Mwangi and the client. The advocate argued that the fact that the receipt was issued by Dr. Kinuthia in the name of the client was not conclusive evidence that the client had paid the money to Dr. Kinuthia .He further submitted that the receipt was issue in the name of the client to facilitate recovery of the money as an expense.

On the Respondent’s application, the advocate submitted on the extension of time that there must be good cause to allow extension of time. He relied on the case of **Obanga & Co. Advocates –vs- Kipkebe Limited** and **Jerusa Wairimu Kamau –vs- Josephat Mburu Mundthi** where it was held that an application for extension of time was discretionary. The length of the delay, the reason for delay the chances of succeeding if the application is granted and finally the degree of prejudice to the respondent if the application is granted. He submitted that the delay in filing notice was not explained. He further submitted that he has not explained the reason as to why he is enlarging time or leave to lodge objection to taxation out of time.

The Respondent submitted that he was unduly influenced to sign a fee agreement with the advocate that he would share 30% of the proceeds of the case. He also submitted that he was paid Kshs 1,604,950/= but it took the intervention of the Advocates Complaints committee for the advocates to release Kshs 1,000,000/= about seven (7) months after payment was made. He said that the advocate withheld Kshs 604,950/= allegedly on the account of his legal fees pursuant to the said fee agreement .He also submitted that pursuant to section 46(d) of the Advocates Act and stated that the amount recoverable by the advocate is 25% of Kshs 800,000 which translates to 200,000 and not Kshs 517,485/= under Item 1 was usurious and unconscionable as it is way above what is stipulated by the law. He relied on the case of **Ahmed Nasir Abdikadir % Co. Advocates-vs- National Bank of Kenya Limited** where court declined to give effect to a fee agreement that was in contravention of the Advocates Act. On the issue of enlargement of time the Respondent relied on Order 11 (4) of the Advocates (Remuneration) order and argued the court to exercise its discretion and allow the application out of time

On the first application dated 30th October, 2012, I have read the ruling of the taxing officer. In his ruling the taxing master rightly stated that the agreement was not valid as it asked for 30% against the Advocates Act requiring 25% as stated in Section 46(d).The section is also express on taxing the general damages and not the entire claim. For this reason I therefore set aside the taxing officers ruling on Item 1. On Item 2 I hold the same view as Koome J held in **AM Kimani & Co. Advocates –vs- Kenindia Assurance Co. Ltd.** The applicant is entitled to VAT after the taxing master has taxed item 1 as per the provisions of section 46(d) of the Advocate’s Act. I therefore set aside the taxing officers findings on Item 2.

On the issue on Item 5, the advocate has not justified that amount since his explanation as to why the doctor had to write a receipt in the clients name after receiving the money is wanting and also the fact that the Respondent was holding the same receipt and therefore I uphold the taxing master’s decision in taxing it off item 5. On the chamber summons application dated 13th November, 2012 seeking for extension of time within which to lodge objection, I dismiss the application for the reasons that the applicant has not in any manner attempted to explain the reason for his delay to lodge such an objection. He ought to have shown diligence and good faith in his application. His application therefore fails. Having declined to grant to grant prayer 1 in my view there is no need to make a finding on the rest of the other prayers being

sought in the application and is therefore dismissed with costs. Having set aside the taxing officer's award on item 1 and 2 and given directions both, I order that the Bill of Costs be placed before the taxing master to tax Item 1 and 2 as directed in this ruling.

Orders accordingly.

Dated, signed and delivered this 7th Day of May 2013.

R. OUGO

JUDGE

In the Presence of:

.....Plaintiff/Applicant

.....Defendants/Respondents

.....Court clerk