Balala & Abed Advocates v Bajaber (Miscellaneous Application E193 of 2022) [2024] KEELRC 1848 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1848 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E193 OF 2022

NJ ABUODHA, J

JULY 12, 2024

BETWEEN

BALALA & ABED ADVOCATES ..... ADVOCATE

AND

TAIB ABDULHADI SHEIKHAHMED TAIB BAJABER ..... CLIENT

RULING

1. The Client filed this Reference to this court vide chamber summons application dated 6th October, 2023 brought Under Rule 11 (2) of the *Principal Advocates Remuneration Order*, Section 45 (1) and (6) of the *Advocates Act*; and Order 21 rule 4 *Civil Procedure Rules*)

2. The Applicant is seeking for orders that:

    a. That the Honourable Court be pleased to order that the Taxing Master lacked jurisdiction to tax the Advocate-Client Bill of Costs dated 10th November 2022 by operation of sections 45 (1) and (6) of the *Advocates Act* as parties had a binding fee agreement between the Advocate and Client.

    b. That consequent to prayer (1) above, the Honourable Court be pleased to vacate the entire taxation Ruling delivered on 22nd September 2023 by the Hon. F. Nyamora Deputy Registrar, and to strike out the Advocate-Client bill of costs dated 10th November 2022.

    c. That the Honourable Court be pleased to order that no additional fee is owed to the Advocate, the Client having fully satisfied the terms of the binding fee agreement.

    d. That without prejudice to the foregoing prayers, the Honourable Court be pleased to order refund of the unutilised portion out of fees already paid, and make any further orders suitable to the circumstances of this case.

    e. That the Client be awarded the costs of this Reference and of the taxation proceedings.

3. The application was supported by the grounds therein and the Affidavit of Taib Abdulhadi Sheikhahmed Taib Bajaber the client herein who averred that there existed an error of principle that vitiated the entire taxation Ruling of the learned Hon. F. Nyamora Deputy Registrar delivered on 22nd September 2023.

4. The Client averred that the taxing master lacked jurisdiction to tax the Bill of Costs by reason of existence of a binding fee agreement and erred in affirming jurisdiction to tax the bill, as is shown below:

   i. The Advocate filed an Advocate-Client Bill of Costs dated 10th November 2022.

   ii. In response, the Client through his advocates, he filed and served documents proving existence of a binding fee agreement for KES 435,000/- and evidence of receipts and correspondence by the Advocate confirming full payment of the agreed fees in his Bundle of Documents dated 19th December 2022, filed within the taxation.

   iii. That similarly he filed submissions in the taxation also dated 19th December 2022 substantiating the fee agreement and its full performance; and he objected to the taxation as provided by Section 45 (1) and (6) of the *Advocates Act*. That the Advocate did not file anything in response.

5. The Client averred that however, the learned taxing master erroneously made the express finding that no evidence of a fee agreement was filed, and proceeded to tax the Bill of Costs vide the impugned Taxation Ruling dated 22nd September 2023.

6. The Client averred that the taxing master had no discretion under the Advocates Remuneration Order to exclude and fail to consider the relevant and uncontroverted evidence of the fee agreement as filed in his bundle of documents dated 19th December 2022, as he erroneously did.

7. The Client averred that the legal consequence of the fee agreement is that the taxing master lacked jurisdiction to tax the Advocate-Client's bill of costs pursuant to sections 45 (1) and (6) of the *Advocates Act*, or to issue the impugned taxation ruling as he did. This jurisdictional error justifies the Court's intervention by vacating the entire taxation ruling that issued without jurisdiction, as is prayed herein.

8. The Client secondly averred that there existed an error of principle in the taxing master's determination of uncontroverted issues within the taxation, resulting in an erroneous and self-contradictory taxation ruling, as is particularised below:

   a. Whereas he filed his bundle of documents and submissions in opposition to the entire Advocate-Client Bill of Costs, the Advocate failed and did not file anything in response and his documentary evidence therefore stood unchallenged

   b. That he particularly proved and submitted that he paid KES 435,000/- pursuant to a binding fee agreement, in full satisfaction thereof; and that the Advocate issued receipts and a letter acknowledging full fee payment. The Advocate did not rebut the evidence or counter his submissions on these three critical points.

9. The Client averred that the taxing master however made conflicting and contradictory findings in the taxation ruling, as follows:

   a. The taxing master accepted his submission that he had paid KES 435,000/- on grounds that it was uncontroverted by the Advocate, and proceeded to find that the Client indeed paid the sum.

b. However, the taxing master contradicted himself and erred by applying an inconsistent and conflicting standard to the fact of the fee agreement. That no reasons were given in the taxation ruling why the taxing master accepted the fact of his payment of KES 435,000/- as true, but ignored the fee agreement that informed that payment when deciding his objection to his jurisdiction.

10. The Client averred that the taxing master gave no reasons for the erroneous contradictory findings in the taxation ruling. The taxation ruling was incompatible with the evidence on record and with the law, the taxation ruling was liable to setting aside by the Court.

11. The Client thirdly averred that the learned taxing master erred by failing in his legal duty to determine all the issues in controversy within the taxation, resulting in an incomplete taxation ruling that is liable to setting aside by the Honourable Court. Particularly:

    a. Order 21 rule 4 of the *Civil Procedure Rules* requires judgments in defended suits to contain inter alia the points for determination, the decision thereon, and the reasons for the decision.

    b. That he particularised in his submissions the specific items challenged in the Advocate-Client bill of costs, with his arguments and supporting evidence thereon.

    c. However, the taxation ruling failed to resolve or issue a decision on some of the challenged items. Specifically: (i) Page 4 of the taxation ruling on items 14, 26, 45 and 46 on photocopies does not quantify the costs allowed or taxed off, leaving it unresolved.

12. The Client further averred that no decision was made on his request for refund on the unutilised portion of filing fee, yet he led evidence proving that the Advocate had conceded to refund filing fee. That proof of the advocate's letter conceding to refund his unutilised filing fee is at para 9 on pg. 19 of his bundle of documents.

13. The Client averred that for the reasons given above, he verily believe that this reference is proper, and the Honourable Court was therefore justified to intervene and vacate the erroneous taxation ruling as prayed herein.

14. That this reference was filed within time and without delay, and that the Honourable Court has jurisdiction to grant the orders sought herein in the interests of justice.

15. In reply the Advocate filed their Grounds of opposition dated 31st October 2023 where the Advocate averred that the application was fatally defective, incompetent and an otherwise abuse of curt process.

16. The Advocate averred that the application offended Rule 11 of the *Advocates (Remuneration) Order* 1962 and that the client had not demonstrated sufficient grounds to impugn exercise of judicial discretion by the Taxation Master to warrant the Court's interference.

17. The Advocate in addition filed Replying Affidavit sworn on 26th Janauary,2024 and averred that jurisdiction of this court was ascertained in the ruling dated 22nd September,2023 where the court held that the client failed to file documents or an affidavit to prove existence of purported fees agreement and any payment receipts hence the client was looking for a scape goat by alleging that the taxation master gave no reasons for the erroneous contradictory findings in taxation rules.

18. The Advocate averred that the Ruling determined all the controversial issues within the taxation, is compatible with the evidence on record, is within the law and ought not be set aside.

19. The Application was disposed of by written submissions.

Determination

20. The Advocate raised an objection grounded on Rule 11 of the *Advocates Remuneration Order* where the client was supposed within 14 days to notify the taxing officer of their objections and seek to be supplied with the reasons for the taxation.

21. I note that in this case the taxing Master delivered an elaborate ruling with reasons for each item hence it was not necessary for the client to go through the process provided for under Rule 11 above. The objection by the Advocate therefore fails.

22. Section 45(1) of the *Advocates Act* provides as follows;

> Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
>
> a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
>
> b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
>
> c. before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

Section 45(6) provides as follows;

> Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

23. This court notes that as per above provision of law such an agreement will only be binding if it is in writing and signed by the Client or his agent. The agreement referred to by the client is dated 8th September,2021 titled as Deposit request note of Kshs 400,000/=. This court also notes that consultation fees of Kshs 35,000/= requested and paid on 19th March, 2021.

24. The court in the case of *Ali Mohammed Egal v Maina & Onsare Parterners Advocates* [2021] eKLR upheld this position as follows;

> The agreement for fees must not only be in writing, it must be signed by the client or by his authorized agent.

25. This position was also emphasized in the case of *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* (2) [2006] 1 EA 5;[2007] eKLR .

26. The Court notes that the deposit request note was clear that it was part fees payment and not all the fees payment further the same was signed by the Advocate and not the Client as per clear provisions of Section 45(1) above. This therefore, meant that the said deposit Request Note did not meet a proper agreement anticipated under the above provisions to qualify to stop the court from proceeding with taxation. There are no valid elements of a valid agreement since the client did not signal his acceptance

or sign the same. Even if he signaled by paying the same, it was clear that it was a deposit and not full fees payment.

27. In the case of *Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of TNK (minor) & others* [2020] eKLR it was held that;

> "An agreement for fees contemplated under section 45, is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise."

28. Whereas I note that the correspondences herein most specifically the letter dated 17th September, 2021 terming the Kshs 200,000/= as the final fees payment, it was clear from the onset that, that was the final payment of the requested deposit fees and not the whole fees.

29. I also note the letter dated 22nd July, 2022 where the Advocate wrote to the Client upon the Client terminating their services and they indicated that they would be raising a final fee note as per work undertaken in his file.

30. It is therefore clear that the client's assertions that the taxing officer proceeded without jurisdiction due to the said agreement were baseless. Upon perusal of the taxing master's ruling the issue of jurisdiction was well determined and I fully agree with the taxing Master's decision that he had jurisdiction since the agreement herein did not form an exemption under section 45(6) of the *Advocate Act*.

31. I now revert to the issue of the Taxing Master's ruling on merit and if he dealt with all the issues. It is trite law that this court will only interfere with the taxing officer's discretion if the taxing officer erred in principle in assessing the costs. This was well pronounced by the Court of Appeal in *Kipkorir,Tito & Kiara Advocates v Deposit Protection Fund Board*(2005) eKLR

32. The taxing officer herein gave a very elaborate ruling and even went on to subtract the deposit fees paid by the client of Kshs 435,000/= from the amount he taxed of Kshs 671,664.56/=.

33. The allegations by the Client that the taxing officer did not address the issue of refund are therefore found without basis because what was taxed was way above what the client had paid as seen above. He was supposed to pay more by the amount taxed of Kshs 236,664.56/=. How could he then request a refund after such an elaborate ruling?

34. I agree with the taxing master's taxation and I do not find any reason to interfere with his ruling. I therefore uphold the taxing Master's ruling and order that the client should pay the Advocate the taxed amount of Kshs 236,664.56/=

35. The application is therefore found without merit and is hereby dismissed with costs.

36. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY JULY, 2024

DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE