



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 240 OF 2015

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAWS OF KENYA

ODERA OBAR & COMPANY ADVOCATES.....ADVOCATE

=VERSUS=

EQUIP AGENCIES LIMITED.....CLIENT

RULING

1. This is the notice of motion dated 22nd July 2016, brought under Section 51 (2) of the Advocates Act, paragraph 7 of the Advocates Remuneration Order Chapter 16 of Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

(1) That this honourable court be pleased to enter judgment in favor of Odera Obar & Co. Advocates against the respondent for the sum of Kshs.2,230,000.00 together with interest at the rate of 14% per annum from 28th day of October 2015 until payment in full.

(2) That costs of this application be borne by the respondent.

3. The grounds are on the face of the application and are:-

(1) The respondent instructed the advocates to represent the former in the transaction for the purchase and sale of Title No. Eldoret Municipality/Block 8/47 alongside assorted assets and equipment.

(2) Subsequently, the advocate filed a bill of costs on the 14th day of September 2015 against the respondent. The said bill was duly delivered to the respondent on the 28th day of September 2015.

(3) On the 30th day of June 2016, the Taxing Officer taxed the said bill at the sum of Kshs.2,230,000.00. A certificate of taxation for the said sum has been issued in the advocate's favour certifying the said amount as due to the advocate.

(4) The certificate of taxation has not been set aside or altered by the court. Additionally, the retainer has not disputed. Accordingly, the said certificate is final as to the amount of costs due in the sum of Kshs.2,230,000.00.

(5) In the circumstances, this honourable court has jurisdiction to enter judgment for the sum certified due of Kshs.2,230,000.00 together with interest at the rate of 14% per annum from the 28th day of September 2015.

4. The application is supported by the affidavit of Maria Kerubo Migiro, Managing Partner in the Advocates firm sworn on the 22nd July 2016.

5. Upon being served, the client filed the chamber summons dated 12th August 2016 brought under paragraph 11(2) of the Advocates (Remuneration) order and all other enabling provisions of the law.

6. It seeks orders:-

1. *This honourable court be pleased to quash and set aside the ruling delivered by Hon. Mwayuli, Deputy Registrar on 30th June, 2016.*

2. *This honourable court be pleased to strike out the bill of costs dated 14th September, 2015 filed by the advocate/respondent herein.*

3. *This honourable court be pleased to give any further orders and directions as it may deem fit and just to grant.*

4. *The costs of this application be provided for.*

7. The grounds are on the face of the application and are:-

1. *The taxing officer erred in failing to hold that there was an agreement between the parties as to the legal fees payable to the advocate for the services rendered on the subject matter of the transaction for which the advocate was instructed by the client.*

2. *The taxing officer erred in failing to hold that the advocate had been fully paid his legal fees as was agreed with the client at the completion of the subject transaction thereby making the bill of costs dated 14th September 2015 unnecessary and illegal.*

3. *The taxing officer erred in failing to hold that there cannot be taxation of advocates costs where an agreement has been made between the advocate and the client as to the legal fees payable for the services rendered.*

4. *The taxing officer erred in allowing an all-inclusive legal fees of Kshs.3,000,000/- exclusive of value added tax when parties had agreed on an all-inclusive fees of Kshs.1,250,000 which the client had already paid in full.*

5. *The taxing officer erred in proceeding to compute the instruction fees (item 1) in accordance thereby arriving at a grossly exaggerated amount so as to present an erroneous estimate in the circumstances of the subject matter in issue without considering section 456) of the Advocates Act that prohibited the taxing officer from taxing bill of costs that had been agreed between parties and fully settled.*

6. *The taxing officer erred in failing to appreciate and consider the client's pleadings and submissions on the subject matter thereby arriving at unreasonably unjust, unfair, oppressive and illegal decision.*

7. *The purported reasons given by the taxing officer for awarding costs of instruction fees (item 1) was a clear and deliberate misdirection on her part constituting an error in principle and fact and thereby erroneously awarding the advocate an illegal and grossly exaggerated amount in the circumstances.*

8. The application is supported by the affidavit of Divyeshkumar Indubhai Patel, the director of the client, sworn on the 12th August 2019.

9. The application is opposed. There is a replying affidavit sworn by Odera Obar Kennedy, a partner in the advocate firm sworn on the 12th January 2017. The advocate has also filed grounds of opposition dated 14th February 2017.

10. On the 21st December 2016, the court directed that the advocate's notice of motion dated 22nd July 2016 and the client's chamber summons dated 12th August 2016 be heard and determined together. On the 28th March 2017, it further directed that they be canvassed by way of written submissions.

The advocate's submissions

11. The client has not denied that it instructed the advocate to represent it in the transaction for the purchase and sale of Title No. Eldoret Municipality/Block 8/17 from Corn Products Limited and the transaction for the purchase of assets, machinery and equipment. Retainer is not disputed. The taxing officer has issued a certificate of costs dated 19th July 2016 for the sum of Kshs.2,230,000.00. The advocate has met the threshold for entry of judgment under Section 51(2) of the Advocates Act.

12. Paragraph 7 of the Advocate's Remuneration Orders provides that, the advocate may charge interest at 14% on the disbursement and costs from the expiration of one month from the delivery of his bill of costs to the client, providing such claim for interests raised before the amount is paid or tendered in full. They have put forward the cases of **Kithi & Co. Advocates vs Menengai Downs Limited [2015] eKLR**; **Muri Mwaniki & Wamiti Advocates vs John Ngigi Nganga & Another [2014] eKLR**.

13. In paragraph 5 of the supporting affidavit, the advocate has deponed that he delivered the bill of costs to the client on 28th September 2015. The client did not settle the bill. The advocate is entitled to interest on the amount certified on the certificate of costs.

14. With respect to the chamber summons dated 12th August 2016, the advocate submits that the taxing officer rendered her ruling on the bill of costs on 30th June 2016. On the 12th July 2016, the client filed a notice of objection to the taxation.

15. Under paragraph 11(2) of the advocates remuneration order, the reference from a decision of taxing officer should be filed within (14) days of receipt of the reasons for the decision. A reference ought to have been filed by 15th July 2016. Since the decision of the taxing officer contained reasons for the ruling, the reference filed on 12th August 2016 is incompetent for being filed out of time. They have put

forward the case of **Ahmednassir Abdikadir & Co. Advocates vs National Bank of Kenya Limited 2[2006] 1EA; Evans Thiga Gathuru vs Kenya Commercial Bank Misc App NO. 343 of 2011.**

16. The client has not given reasons for the delay in filing the reference. It ought to have sought order to enlarge time. They have put forward the case of **N. W. Amolo t/a Amolo Kibanya & Co. Advocates vs Samson Keengu Nyamweya Misc. App. No. 480 of 2014.** The client did not seek leave to file the reference out of time.

17. The sound principle of law cemented in the pronouncements of **Joreth vs Kigano & Associates [2002]1 EA 92, First American Bank of Kenya vs Shah [2002] 1EA 64; Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Civil Appeal No. 220 of 2004** is that this honourable court cannot interfere with the taxing officer's decision unless it is shown the decision is based on an error of principle or when the amount awarded is manifestly excessive as to justify and interference on an error of principle.

18. The question is whether there was written agreement between the parties with regard to the fees payable. From the fee note dated 28th July 2013, there was no suggestion that Kshs.1,250,000 or any other sum was in full and final settlement of the fees due. It was merely a demand for payment of fees. The client has not demonstrated that the taxing officer took into consideration irrelevant and extraneous matters in arriving at her decision so as to warrant interference by this honourable court.

The client's submissions

19. The client and advocate agreed on the full legal fees of Kshs.1,250,000/- that was to be paid to the advocate for undertaking the instructions. The transaction was completed when the advocate raised a fee note of Kshs.1,250,000/- . The taxing officer erred in principle by proceeding to tax the bill of costs dated 14th September 2015 when there was a clear material evidence that the advocate's legal fees had been fully settled by the client. They have put forward the case of **Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] KLR 528.** The bill of costs dated 14th September 2018 was unnecessary, illegal and an abuse of the court process. It ought to have been struck out in limine. After the letter dated 28th July 2013, there was no letter or correspondence exchanged between the advocate and client with regard to any further fees on this transaction. They have also relied on the case of **Abincha & Co. Advocates vs Trident Insurance Co. Ltd [2013] eKLR.** The taxing officer committed an error both in fact and in law by finding that there was no material evidence to prove that the fees was fully settled. Rule 3 of the Advocates Remuneration Order stipulates that an advocate and client may agree on the fees to be charged for a specific transaction. In the instant case both parties expressly agreed, acknowledged and intended by their conduct that the fees of Kshs.1,250,000 was the full fees until the completion of the transaction. They have also relied on the case of **D. Njogu & Co. Advocates vs National Bank of Kenya Ltd [2009] eKLR.** The client has demonstrated by way of sufficient factual and legal reasons and cogent evidence that the advocates bill of costs was one for striking out. The reference herein ought to be allowed, the decision of the taxing officer set aside and the bill of costs dated 14th September 2015 be struck out with costs to the client.

20. The taxing officer delivered her ruling on 30th June 2016 and directed that the parties would be issued with the ruling once the same was typed and certified. The typed ruling was issued to the client on 2nd August 2017. The notice of objection to the decision was filed on 8th September 2016 which was within (14) days prescribed under Rule 11(1) of the Remuneration Order. The reference dated 12th August 2016 was duly filed on time hence competent. The client's chamber summons dated 12th August 2016 ought to be allowed with costs to the client.

21. I have considered the notice of motion dated 22nd July 2016 and the chamber summons dated 12th August 2016. I have considered the affidavits in support, the replying affidavits, grounds of opposition. I have considered the written submissions of counsel and the authorities cited.

22. Then issue for determination are:-

(i) Whether the reference is incompetent for being filed out of time.

(ii) Whether the taxing officer erred in principle by allowing the bill of costs dated 14th September 2015 to be taxed as drawn by the advocates.

(iii) Is the advocate entitled to judgment under section 51(2) of the Advocates Act?

(iv) Is the advocate entitled to interest at 14% p. a?

23. I have gone through the client's record. It is not disputed that the taxing officer rendered her decision on the bill of costs dated 14th September 2015 on 30th June 2016. Upon delivery of the decision, Mr. Muga sought to be supplied with certified copies of the ruling and proceedings. The taxing officer then ordered that certified copies of ruling and proceedings be availed to the parties upon payment of the requisite fees. It is therefore not true as claimed by the client's advocate that he would be supplied with typed copy of the ruling. I have gone through the court record and confirm that the taxing officer delivered a typed ruling on 30th June 2016.

24. There is a letter by M/S Muga & Muga Advocates dated 27th July 2016 to the deputy registrar seeking to be furnished with a copy of the ruling. There is also a receipt showing that they paid for the same on 2nd August 2016. There is no explanation given by the client as to why they did not obtain the certified copy of the ruling immediately. The claim that the file was missing is neither here nor there. They have not attached any proof to show that the file was missing. Under paragraph 11 (2) of the Advocates remuneration order, the reference from a decision of the taxing officer should be filed within 14 days of receipt of the reasons for the decision. The client has conceded on its submissions that the reasons for the taxation are contained in the ruling.

25. It is clear from the letter dated 27th July 2016 that the client sought to be furnished with a copy of the ruling a period of about 30 days after the decision of the taxing officer. I find that the reference filed on 12th August 2016 is therefore incompetent for having been filed out of time as the ruling contained the reasons. There was no need to seek for further reasons.

26. I will however go ahead and consider the next issue no. (ii). It is the clients contention that the taxing officer erred in principle by allowing the bill of costs dated 4th September 2018 as taxed as drawn. The circumstances under which the court can interfere with the taxing officers exercise of discretion are reaffirmed in the case of **First American Bank of Kenya vs Shah & Others 1EA 64**. It was held:-

“.....First, I find that on the authorities, this court cannot interfere with the taxing officers decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify the interference. That it was based on an error of principle (see Steel Construction Petroleum Engineering (EA) Limited vs Uganda Sugar Factory (Supra) of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and competence of the cause or matter, the amount of value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge”.

This position was reinstated in the case of **John Maina Mburu t/a John Maina Mburu & Co. Advocates vs George Gitau Munene (Sued as Administrator of the Estate of Samuel Gitau Munene & 3 Others [2015] eKLR**. The client has faulted the taxing officer for failing to hold that there was an agreement between the parties on the fees payable.

27. Section 45 of the Advocates Act provides that for an agreement to be valid and binding it must be in writing and signed by the client and his agent duly authorised in that behalf. I find that the client has failed to substantiate the allegation that there was an agreement on fees between the parties. I find that in the absence of proof of existence of an agreement, the taxing officer did not err in taxing the advocate’s bill of costs dated 14th September 2015. I rely on the case of **Kahari & Kiai Advocates vs Kenya Safari Lodges & Hotels Ltd [2007] eKLR, Hatari Waweru J** held that:

“.....However, this agreement does not appear to have been confirmed by the client in writing. The clear words of the statute (Section 45(1) of the Act) state that for an agreement on fees to be valid and binding on the parties it must be in writing and signed by the client or his agent duly authorized in that behalf. In the present case, without any document duly signed by the client or its agent duly authorized in that behalf confirming the agreement and fees, which appears to have been reached orally, there is no valid and binding agreement between the parties on fees. I also find it is not sufficient that an agreement of fees can be inferred from the fee notes sent by the advocates to the client; the agreement must satisfy the strict requirements of section 45(1) of the Act.”

I am guided by the above authority.

28. The taxing officer has issued a certificate of costs dated 19th June 2016 for the sum of Kshs.2,230,000. I find that the advocate has met the threshold for entry of judgment under Section 51(2) of the Advocates Act. I find that the advocate is also entitled to interest at 14% upon expiry of one month from the date of delivery of the bill of costs. There is an affidavit of service on record confirming that the bill of costs was served on the client on 28th September 2015.

29. The upshot of the matter is that, I find no merit on the client’s chamber summons dated 12th August 2016 and the same is dismissed with costs to the Advocate. The Advocate’s notice of motion dated 22nd July 2016 is hereby allowed on the following terms.

(a) That judgment be and is hereby entered in favour of Odera Obar & Co. Advocates against the client (Respondent) for the sum of Kshs.2,230,000 together with interest at the rate of 14% per annum from 28th October 2015 until payment in full.

(b) The Advocate shall have costs of this application.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kiama for Muga for the Client

Ms Nduta Kamau for Odera for the Advocate

Kajuju - Court Assistant