



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 29 OF 2016

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

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT

RULING

The Applicant/Advocate (hereinafter referred to only as “the Applicant”) filed advocate/client bill of costs herein on 24th February, 2016 for taxation as against the Respondent/Client (hereinafter referred to as “the Respondent”). The bill of costs was drawn in the sum of Kshs.1,601,746/= and was in respect of services allegedly rendered by the Applicant to the Respondent between 5th October, 2015 and 18th November 2015. The particulars of the said services are set out in the said bill of costs dated 23rd February, 2016.

After being served with a Notice of Taxation, the Respondent filed a Notice of Preliminary Objection dated 7th April, 2016. The Preliminary objection was in the following terms:

“TAKE NOTICE that the Respondent will raise a Preliminary Objection on a point of law at the earliest opportunity in relation to the Applicant’s Bill of cost dated 23rd February, 2016 on the following ground:-

1. The Honourable Deputy Registrar lacks jurisdiction to proceed with taxation of costs in an instance where the parties had agreed on the legal fees and the Client/Respondent has settled the agreed fees in full.”

The Respondent filed affidavit sworn by Adam M. Boru on 7th April, 2016 in support of the said Preliminary Objection. The Preliminary Objection was opposed by the Applicant through a replying affidavit sworn by Muema Kitulu on 11th May, 2016.

When the said bill of costs came up for taxation before the Deputy Registrar/taxing officer on 21st July, 2016, the parties agreed that the file be placed before this court for directions on the disposal of the Respondents’ Preliminary Objection. The matter was mentioned before this court on 30th August, 2016 when Mr. Kitulu appeared for the Applicant while Mr. Odundo appeared for the Respondent. As at the time when the matter was being mentioned, the parties had already filed written submissions in respect of the Respondents Preliminary Objection aforesaid. During the mention, the parties agreed that the Preliminary Objection be heard by this court. The parties also agreed to rely entirely on their respective affidavits and submissions in support of and in opposition to the said Preliminary Objection.

I have considered the Respondent's Preliminary Objection together with the affidavit filed in support hereof. I have also considered the Applicant's Replying Affidavit in opposition to the said objection. Finally, I have considered the parties' respective submissions and the authorities cited in support hereof.

What is before me is an objection raised against a bill of costs. The jurisdiction to tax a bill of costs is conferred upon the Deputy Registrar under paragraph 11 of the Advocates Remuneration Order. This court only intervenes in the taxation of advocates' costs in limited circumstances provided for in the said Remuneration Order. Paragraph 13A of the Advocates Remuneration Order gives the Deputy Registrar (hereinafter "taxing officer") full power to deal with all the issues that may arise during the taxation of a bill of costs. The instances when this court can intervene in a taxation of a bill of cost are first, when an objection is raised to a decision of the taxing officer under paragraph 11 of the Advocates Remuneration Order (hereinafter "the Remuneration Order") and secondly, where with the consent of the parties, the taxing officer refers any matter in dispute arising out of a taxation of a bill of cost for the opinion of the court under paragraph 12 of the Remuneration Order.

As I have mentioned earlier in this ruling this matter was referred to this court by the taxing officer by consent of the parties. There is no indication on record under what provisions of the law the matter was referred to this court. When the matter was mentioned before this court on 30th August 2016, the advocates for the parties informed the court that a Preliminary Objection had been raised on the jurisdiction of the taxing officer and that they wanted this court to determine the said objection. Following that representation by parties, I took this as a reference to the court under paragraph 12 of the Remuneration order aforesaid although the procedure adopted by the parties and the taxing officer was not strictly that of case stated.

In the case of, Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 others (2014) eKLR, the Supreme Court stated as follows on Preliminary Objection;

"To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors (1969) EA 696.

'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion'."

In the case of Orarovs.Mbaja[2005]1KLR141, it was held that;

"A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised."

I have at the beginning of this ruling set out the objection that was raised by the Respondent to the Applicant's bill of costs. The Respondent's contention was that the taxing officer had no jurisdiction to tax the Applicant's bill of costs because the fees sought to be recovered by the Applicant through the taxation of the said bill of costs had been agreed upon by the parties and fully paid by the Respondent. In his affidavit in support of the Preliminary Objection, Adam M. Boru contended that the Respondent is a state corporation and as such is bound by the Public Procurement and Disposal Act, No. 33 of 2015.

He contended that before giving instructions to the Applicant for the services which are the subject of the bill of costs in dispute, the Respondent called for quotations from qualified law firms and of the three (3) law firms which responded to the Respondent's request for quotations, the Applicant gave the lowest quotation of Kshs.817,000/= and was instructed to undertake the work. Mr. Boru contended that in the course of undertaking the work which was the subject of its instructions, the Applicant sought a variation of the fees aforesaid which had been agreed upon by the parties but the Respondent declined the request citing the provisions of the Public Procurement and Disposal Act and the Regulations made thereunder.

He contended that the Applicant was paid the full fees that was agreed upon by the parties and that the work of registering the caveats and cautions on the titles of various properties which were the subject of the dispute in which the Applicant represented the Respondent in court was not undertaken by the Applicant and as such the Applicant was not entitled to receive any fees in relation thereto.

In his affidavit in reply, the Applicant denied that the Respondent had called for bids for the work which it was instructed to undertake on behalf of the Respondent. The Applicant also denied that the fee for the services that it rendered to the Applicant was agreed upon. The Applicant contended that the services which it rendered to the Respondent of drawing and registering caveats and cautions against the titles of over 344 parcels of land which is the subject of the bill of costs herein were separate from the instructions it had initially received from the Respondent which required the filing of a suit.

The Applicant contended that the said caveats and cautions were prepared and registered by it and that it is entitled to be paid the amount set out in its bill of costs in contention. The Applicant contended that it had not been paid at all for the services it rendered to the Respondent in respect of the said caveats and cautions.

I am in agreement with the submissions by the Respondent that where an advocate and client have agreed on fees, the advocate cannot file its bill of costs for taxation even in cases where such agreement was illegal. See, the decision of the Court of Appeal in Njogu & Company Advocates vs. National Bank of Kenya Ltd. (2016) eKLR. It follows therefore that if at all the Applicant and the Respondent herein had agreed on fees for the services which are the subject of the bill of costs filed herein then the taxing officer would have no jurisdiction to tax the said bill of costs.

For the taxing officer to lay down his tools however, the Respondent had to establish that indeed the fees which is the subject of the bill of costs filed herein on 24th February, 2016, was agreed upon by the parties. The Respondent's Preliminary Objection is dependent on the determination of this issue.

As can be seen from the affidavits and submissions filed by the parties, there was no agreement on this issue. The Respondent had contended that there was an agreement on fees while on the other hand, the Applicant had denied the existence of such agreement. Whether or not there was an agreement between the parties on fees is both a factual and legal issue. The Applicant has denied all the facts placed before the court as the basis of the alleged agreement. The issue which arises and which was raised by the Applicant and rightly so, is whether this court can determine on the Preliminary Objection before it whether or not there was agreement between the Applicant and the Respondent on fees. The answer must be in the negative.

I am in agreement with the submissions by the Applicant that the issue of the jurisdiction of the taxing officer was wrongly raised by the Respondent by way of a Preliminary Objection. The parties having reached a consensus that the issue should be referred to this court for its opinion under paragraph 12 of the Remuneration Order, they should have agreed on all the facts of the case after which the case should have been stated for the opinion of the court. What I am saying in other words is that, the jurisdiction of this court should have been invoked by way of case stated and not through a Notice of Preliminary Objection. Paragraph 12(2) of the Remuneration order is very clear on this issue.

According to Collins English Dictionary, the word "*Case Stated*" is defined as "*a statement of the facts of a case prepared by one court for the opinion or judgment of another court.*"

In West's Encyclopedia of American Law, 2nd Edition, Case Stated is defined as "An action that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversary positions as to the legal ramifications of the facts thereby requiring a judge to decide questions of law presented."

From the above definition, I am of the view that this court's role where a matter is referred to it by way of case stated is to give its opinion on legal questions on agreed set of facts. In this case, the parties should have agreed of the facts of the case and set out the legal issues upon which they required the court to give its opinion. What is before me is not a case stated but a Preliminary Objection. As I have stated above the issues raised for this court's determination cannot be determined on a preliminary objection.

Due to the foregoing, it is my finding that the jurisdiction of this court was not properly invoked. The order that commends itself to me is to strike out the Respondent's Preliminary Objection dated 7th April, 2016. The parties shall be at liberty to move this court by way of case stated for the determination of the issues which were the subject of the Respondent's preliminary objection if they still wish to pursue that option. Otherwise, they can have all the issues arising from the Respondents bill of costs filed herein including the issue of the jurisdiction of the taxing officer determined by the taxing officer. The taxing officer has wide powers under paragraphs 10 and 13A of the Remuneration order which he can employ to determine whether or not there was an agreement between the parties on fees. Since the determination of the issue would require calling of evidence, the taxing officer is better placed to take such evidence and he has power to do so. The party who is aggrieved with the decision of the taxing officer on any issue raised before him can file can raise objection under paragraph 11(1) of the Remuneration Order. This I believe would bring to an end the practice which is gaining root in which parties for various reasons are raising all sorts of objections to bills of cost and seeking reference of such objections to the High Court for determination. Some of these objections are raised for the purposes of delaying taxation of bills of cost.

I believe that judicial time and costs to the parties would be saved if all the issues in dispute in a bill of costs are determined by the taxing officer and a single reference is brought to the High Court under paragraph 11(1) of the Remuneration order for all objections which a party may have against the decision of the taxing officer. The only exception should be where the parties agree under paragraph 13A of the Remuneration Order to refer a matter to the High Court for its opinion.

I have considered the decisions of my brothers, Waweru J. and Gikonyo J. in the cases of Abincha & Co. Advocates vs. Trident Insurance Co. Ltd.[2013]eKLR and Kenya Orient Insurance Limited vs. Oraro & Company Advocates[2014]eKLR which were cited by the Respondent in support of its submission that the issue as to whether or not the taxing officer had jurisdiction to tax the Applicant's bill of costs could only be determined by this court. I beg to differ from the restricted interpretation which my colleagues gave to paragraphs 10 and 13A of the Remuneration Order. As I have stated above, my view is that the taxing officer has power to determine all issues factual and legal, arising out of or in connection with a bill of costs before him and that this court's intervention is limited only to giving an opinion pursuant to a reference by agreement of the parties under paragraph 12 of the Remuneration Order and determining objections under paragraph 11 of the said Remuneration Order. The taxing officer has no power to refer an issue to the High Court for its opinion in the absence of agreement by the parties. If the position taken in the two cases above was to hold, the question which then arises is, what happens if the parties do not agree to refer an issue to the High Court for its opinion? Does the taxation of a bill of costs come to a halt?

I have said enough to dispose of the issues which were raised before me. My final orders in the matter are that the Respondent's Preliminary Objection dated 7th April 2016 is struck out with costs to the Applicant. The matter is referred back to the taxing officer with directions that a case should be stated for the opinion of this court on the issues in contention if the parties agree to such course of action otherwise the taxing officer should proceed to determine all the issues raised by the parties including the taxing officer's jurisdiction. If the taxing officer concludes that he has jurisdiction, he should proceed with the taxation of the bill of costs filed herein by the Applicant.

Delivered and Signed at Nairobi this 24th day of February, 2017

S. OKONG'O

JUDGE

In the presence of

Mr. Amadi for Kitulu for the Applicant

N/A for the Respondent