



**KTK Advocates v Rosa & Associati (Civil Appeal 420 of 2019)  
[2021] KECA 192 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 192 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 420 OF 2019  
AK MURGOR, S OLE KANTAI & JW LESSIT, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**KTK ADVOCATES ..... APPELLANT**

**AND**

**ROSA & ASSOCIATI ..... RESPONDENT**

*(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (L.M. Njuguna, J.) dated 10th May, 2018 in HC. Misc. Application No. 81 of 2016)*

**JUDGMENT**

- 1 The matter before the High Court did not involve litigation. The appellant, KTK Advocates, was instructed by the respondent, Rosa & Associati to intervene in lifting of the respondent's suspension by Athletics Kenya on doping allegations against some of the respondent's athletes. What followed were various correspondences by letters or emails by the appellant to Athletics Kenya and its lawyers questioning why athletes had been suspended. The suspensions were finally lifted in circumstances not agreed by the parties. According to the appellant the suspension was through its efforts to do so but according to the respondent it was the intervention of International Athletics Association Federation (I.A.A.F.) that led to lifting of the suspensions. In the end the appellant delivered to the respondent a Fees Request Note dated 15th October, 2015 appearing at page 423 of the record which read:

"R/0054/002 15th October, 2015

Licence Suspension

Athletics Kenya

AND

Rosa & Associati

Fees request note



To our final fees in respect of your instructions that we act for you to fight for the lifting of your suspension by Athletics Kenya on doping allegations against some of your athletes and proceeding so to do and including all perusals, review of applicable doping laws and more specifically as set out in the IAAF statutes and Rules, Kenya Doping Laws and Laws and Rules on international sports arbitration and having multiple meetings with yourselves, Athletics Kenya and successfully having the suspension lifted and all incidentals.

Instruction fees ...US \$ 20,000.00

NOTE

Our instructions above are modest taking into consideration the complexity, importance, sensitivity and global nature of the issue and the fact that we resolved it without going into international litigation in Switzerland.

This is not a Tax Invoice. We will issue a Tax Invoice when we receive your payment.

DONALD B. KIPKORIR

FOR: KTK ADVOCATES

No. 4919

DBK/jk.”

- 2 The respondent was of the view that the fee requested was high and there followed correspondence on that issue and since the issue was not agreed the appellant presented to the High Court an Advocate/Client Bill of Costs. The contested item in that bill is item 1 where for:

”Receiving instructions from Client to act for them in lifting of their suspension by Athletics Kenya on doping allegations against some of their athletes and proceeding so to do and including all perusals, review of applicable doping laws and more specifically as set out in the IAAF statutes and Rules, Kenya Doping Laws and Laws and Rules on international sports arbitration and having multiple meetings with the client, Athletics Kenya and successfully having the suspension lifted and all incidentals.”

a fee of US\$2,000,000 (Ksh.203,610,000) is charged.

- 3 The Taxing Master (F. Rashid – Deputy Registrar) considered the bill of costs and submissions by both parties and in a considered ruling delivered on 23rd February, 2017 taxed the said item 1 at Ksh.5,000,000; the other items were uncontested; to the grand total the Taxing Master added ½ Advocate/Client fees and Value Added Tax and the grand total of the bill was found to be Ksh.8,346,658. A Certificate of Taxation was issued. The appellant moved the Court to adopt Certificate of Taxation as a Judgment of the court but that move was thwarted by the respondent by Chamber Summons dated 8th March, 2017 where it was prayed that the ruling by the Taxing Master be set aside or vacated; that the bill of costs be remitted to a different Taxing Master with appropriate directions or in the alternative the High Court to tax the bill. It was said in grounds in support of the application and in a supporting affidavit of James Nyiha, an Advocate of the High Court of Kenya on record for the respondent that the Taxing Master had erred in law in failing to properly subject the Advocate-Client bill of costs to Schedule V of the Advocates Remuneration Order particularly on item 1 of the bill of costs; that the Taxing Master had failed to take into account all relevant factors that had been raised in an affidavit of an official of the respondent; that the Taxing Master did not take into account the fact that the appellant had valued his work for services rendered at US\$ 20,000; that the filing by the appellant of a bill of costs of Ksh.236,224,844 was based on malice and vengeance and not



the actual work done. The reference ended up with L. Njuguna, J. who in a considered ruling delivered on 10th May, 2018 found that since the matter before the Taxing Master had not involved litigation taxing item 1 of the bill of costs (instructions fees) at Ksh.5,000,000 was unreasonable and excessive in the circumstances. The learned Judge was of the view that the said award was not commensurate to the work done and in the circumstances the Judge ordered that item 1 of the bill of costs be re-taxed before a different Taxing Master on directions given by the Judge.

4 Those are the orders that have provoked this appeal which is premised on Memorandum of Appeal drawn by KTK Advocates where 11 grounds of appeal are set out. It is said that the ruling has no substratum in law; that the reference did not comply with mandatory provisions of law; that the Judge erred by imposing her opinion in the matter; that there was no basis for interfering with the Taxing Master's decision; that an Advocate is entitled to fees even in non-contentious matters; at grounds 6-11 (inclusive):

6. THAT, the Trial Judge erred in law in failing to appreciate that Sports Law as a practice and in particular anti-doping is novel and unconventional within our practice thus such a brief require complex input of time and resources noting that it's a worldwide concept yet unprecedented in Kenya.
7. THAT, the Trial Judge erred in law and in not appreciating that the Taxing Master had pleadings and documents that guided him in reaching his decision bearing in mind that sports law practice remains unprecedented in Kenya.
8. THAT, the Trial Judge erred in law in not appreciating that the Appellant saved the Respondent from losing their main livelihood, being to actively manage Kenyan athletes in Kenya.
9. THAT, the Trial Judge erred in law in failing to appreciate that the Appellant's legal interventions led to the successful lifting of the licence ban against the Respondent by Athletics Kenya.
10. THAT, the ruling violates the existing law and statute.
11. THAT, the ruling be recalled and the Reference dismissed.”

5. It is proposed that we allow the appeal, set aside the impugned ruling and dismiss the reference.

6. The appeal came up for hearing before us on a virtual platform on 28th June, 2021. Learned counsel Mr. Donald Kipkorir instructed by the appellant KTK Advocates appeared for the appellant while learned counsel Mrs Brenda Olembo appeared for the respondent. Both sides had filed written submissions and what was left was a highlight of the same.

7 Mr. Kipkorir referred to an instructions letter and submitted that suspension of the respondent's licence had the effect of destroying the careers of many athletes in Kenya. Counsel submitted that bill of costs had been taxed at about **Ksh.8,000,000** which the appellant had accepted but that the reference before the Judge was couched as an appeal, not a review. He prayed that the decision of the Taxing Master be upheld.

8. Mrs. Olembo submitted that the Judge was right to refer the matter for taxation afresh as the appellant had been awarded more than it deserved. Counsel submitted that lifting of suspension of the respondent's licence was through the intervention of other parties, not the appellant. In any event, stated learned counsel, suspension of its licence was for 6 months and lifting of suspension was after the 6 months had run out. Counsel submitted that the Taxing



Master had ignored the respondent's objections to the way item 1 of the bill of costs was being dealt with, the scope of work having been not more than exchange of correspondence. Citing the case of *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR counsel submitted that an advocates fees must be commensurate to the work done.

9. Mr. Kipkorir, in a brief rejoinder, submitted that the fee note presented by the appellant was not a final one and the appellant was entitled to the fees awarded to the appellant by the Taxing Master.

10. We have considered the whole record and submission made.

The application before the Judge was brought under Rule 11(2) of the *Advocates (Remuneration) Order*, Section 3A of the *Civil Procedure Act* and all other provisions of law.

The said Rule 11(2) provides:

"(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

11. The learned Judge considered the material before her and found, on item 1 of the Advocate/ Client bill of costs, that services offered by the appellant to the respondent consisted of drawing letters, emails and receiving and perusing the same. The Judge made the finding at paragraph 8 of the ruling:

12. In as much as I agree that an Advocate is entitled to compensation for the work done, the Advocate's fees should not be too excessive as to inhibit access to justice and the same should be commensurate to the work done. The instructions to the Advocate were to act in lifting the suspension of the Client with the Athletics Kenya and the nature of work done involved writing and perusal of correspondences and in so doing he had of course to peruse the laws, so that he could have a case for the lifting of the suspension. In case of *First American Bank of Kenya vs. Shah and Others* the court held that, "the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity/of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary."

13. The Judge found that although a Taxing Master is empowered to exercise discretion in assessing instructions fees that exercise must be applied in a manner which is just and fair considering the circumstances of the case. The Judge considered that there was on record a fee request note for US\$20,000 by the appellant to the respondent and the award of Ksh. 5,000,000 as instructions fees was excessive in the circumstances.

14. The final order by the Judge was that the bill of costs be remitted to a different Taxing Master for taxing item 1 of the bill of costs afresh.

15. In view of the position we take in this appeal the less we say here the better so as not to entangle the hands of judicial officers who will deal with the matter at the High Court.

16. As observed by the Judge the instructions given by the respondent to the appellant led to no more than an exchange of correspondence. We have looked at the whole record. There is no written opinion by the appellant to its client, the respondent, and nothing more came apart



from a demand letter and reminders. The appellant finally presented a fee note dated 15th October, 2015 asking for “instruction fees ... US\$20,000.00”. This would translate, in Kenya Shillings, to a sum much less than what the Taxing Master awarded as instructions fees.

- 17 The respondent objected to the award in taxation as required by the Advocates (Remuneration) Order and the Judge was entitled to deal with the reference that was filed by the respondent objecting to the award by the Taxing Master. There is no substance in the grounds of appeal that challenge the jurisdiction of the Judge on the reference that was filed before her. We also find no merit in the other grounds of appeal.

This appeal is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

DEPUTY REGISTRAR

