



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO E021 OF 2021**

**HAKIKA TRANSPORT SERVICES LIMITED.....CLIENT/APPLICANT**

**VERSUS**

**ISAAC ONYANGO & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT**

**RULING**

1. By its Chamber Summons dated and filed in court on 24<sup>th</sup> March 2021, the Client/Applicant challenges the Taxing Master's award in *ELRC Miscellaneous Application No 4 of 2020* granted on 29<sup>th</sup> October 2020 together with Certificate of Costs issued on 3<sup>rd</sup> November 2020.
2. The Chamber Summons is supported by an affidavit sworn by the Applicant's Director, Abdulhakim Abeid and is based on the following grounds:
  - a) The Applicant opposes the drawing and charging of the Bill as parties had agreed on a global fee of Kshs. 200,000, which amount had been acknowledged by the Respondent and duly paid;
  - b) The Taxing Master failed to consider the evidence adduced that the agreed fees had been paid and proceeded to tax the same;
  - c) The Respondent will benefit twice if the Certificate of Costs stands and this will amount to unjust enrichment;
  - d) If the application is not allowed, then the Respondent will proceed to execute the Certificate of Costs.
3. In his affidavit in support of the application, Abdulhakim Abeid states that the Respondent had not sent an official fee note for settlement. He adds that the Bill of Costs was therefore ill conceived, in bad faith and premature.
4. Abeid points out that vide its letter dated 15<sup>th</sup> July 2019 addressed to the Applicant, the Respondent had sent a schedule of outstanding fees in several matters, including *Mombasa ELRC No 731 of 2017: Joseph Mukhwana Masinde v Hakika Transport Services Limited*. The total amount claimed was Kshs. 3,700,000 out of which Kshs. 150,000 was in respect to *Suit No 731 of 2017*.
5. Abeid goes on to state that vide its letter dated 29<sup>th</sup> June 2020, the Applicant had sent a list of matters paid for, including *Suit No 731 of 2017*, as well as copy of the cheque and RTGS confirmation of Kshs. 2,800,00 remitted to the Advocate's account.
6. The Respondent's response is by way of a replying affidavit, sworn by Isaac Onyango, Advocate on 27<sup>th</sup> May 2021.
7. Counsel begins by attacking the substance of the application for lack of factual and/or legal merit as follows:
  - a) The application as filed by the Client is bad in law and is fundamentally defective, the same having been presented as a separate and distinct application, rather than as a reference in the taxation case;
  - b) The supporting affidavit of Abdulhakim Abeid, in support of the application is fundamentally defective, made without authority and/or capacity and ought to be struck out;
  - c) The orders sought are meant to circumvent the provisions of the Constitution and civil process as envisaged under the Advocates Act, the Advocates (Remuneration) Order and the Civil Procedure Act and the Rules thereunder;

- d) The grounds advanced in support of the application are untrue, have no merit and do not meet the threshold for grant of the orders sought;
- e) The application is a mischievous and malicious attempt to circumvent clear and unambiguous provisions of the law, evade an obligation due from the Client to the Advocate and an abuse of the court process;
- f) The application and the prayers sought do not rhyme and/or relate to the facts set out in the grounds in the supporting affidavit;
- g) The prayers sought are meant to entice the Court to commit an illegality by granting orders which breach clear and unambiguous statutory provisions under the Advocates Act;
- h) The application does not meet the ingredients required and the threshold for an application of that nature;
- i) The whole and/or entire purpose of the application is to cause great prejudice and miscarriage of justice to the Advocate;
- j) The Court lacks the jurisdiction to entertain the application and grant the orders sought;
- k) The application, the grounds in support thereof and the facts set out in the supporting affidavit contain blatant misrepresentation of facts.

8. Counsel further states that during the taxation proceedings on 20<sup>th</sup> August 2020, the Client did not raise the issues being raised in this application and neither did the Client object to the taxation nor request for any issue to be referred for determination by a Judge as required under the Advocates Act and the Advocates (Remuneration) Order.

9. Counsel points out that the Client's Advocate sought and was granted, time to file written submissions and/or appropriate response to the Bill, which was never filed.

10. Counsel takes the view that the Client is barred from raising an objection and/or issues, which were not raised during the taxation.

11. Counsel denies having agreed to a global figure in fees, which he terms as a smudge on his reputation and professional standing. He states that the allegation insinuates that he had committed and/or was agreeable to committing the professional misconduct of undercutting on fees.

12. On its face, the Client's application is brought under Rule 11(1) & (2) of the Advocates (Remuneration) Order, Sections 1A & 3A of the Civil Procedure Act and Article 159 of the Constitution.

13. The Client does not object to any particular item in the Bill of Costs but rather, faults the Taxing Master for taxing the Bill in the first place, because there was an agreement on fees between the parties.

14. Rule 11(1) & (2) of the Advocates (Remuneration) Order sets out the procedure for objecting to the decision of a Taxing Officer. It requires the objector to give written notice to the Taxing Officer of the items of taxation to which he objects. The Taxing Officer is then required to record and forward to the objector the reasons for his decision on those items, upon which the objector may apply for revision, setting out the grounds of objection.

15. For some reason that was not clear to the Court, the Client side-tracked the file in which the impugned ruling was made and chose to proceed under the cover of a fresh file. The obvious effect of this is that this Court was denied the opportunity to see the proceedings before the Taxing Master and could not therefore tell whether the subject of the present objection was in fact raised before the Taxing Master.

16. As held in ***Kenneth Kiplagat T/A Kiplagat & Associates v National Housing Corporation [2005] eKLR*** an issue that is not raised before the Taxing Master cannot be the subject of an objection at reference.

17. The Client asks the Court to ignore procedural technicalities and aim at substantive justice, as commanded by Article 159 of the Constitution. This is all very well but not every rule of procedure can be side stepped, without rendering substantive injustice to the opposing party.

18. In his written submissions filed on 7<sup>th</sup> July 2021, the Advocate/Respondent made reference to the decisions in ***Ufundi Co-operative Savings and Credit Society v Njeri Onyango & Company Advocates [2015] eKLR*** and ***Kakuta Maimai Hamisi v Peris Tobiko & others [2013] eKLR*** where it was held that Article 159 of the Constitution was not intended to be a magic bullet or a general whitewash for all litigation defaults.

19. The Client's application turns on the question whether there was an agreement on fees between the parties, capable of defeating the Bill of Costs filed by the Advocate. The Client referred to the decision in ***Njogu & Company Advocates v National Bank of Kenya [2016] eKLR*** where the Court of Appeal cited, with approval, the following holding by **Warsame J** (as he then was) in the matter giving rise to the appeal:

***"...when an Advocate makes a champertous agreement with his client, the Advocate is more guilty, for he knew the contract stipulated terms contrary to the essence and existence of the Advocates Act. If he recovers and gets work on the strength of an***

***illegal contract, which provides the fees payable, then he has regulated his fee note to that contract.....a party cannot sustain a cause of action by showing that he participated and sanctioned an illegality, which had the effect of giving undue advantage. In such circumstances the court cannot come to his aid to wriggle out of that relationship.”***

20. In pursuing its argument that the Advocates’ fee note was regulated by an agreement between the parties, the Client submits that there was an oral retainer agreement by which the Advocate had agreed to represent the Client in a number of labour disputes.

21. The Client further submits that the parties had agreed that the amount payable in respect of each matter would be Kshs. 200,000. The Client relies on a schedule of outstanding fees in several matters, including *Mombasa ELRC No 731 of 2017: Joseph Mukhwana Masinde v Hakika Transport Services Limited*.

22. On his part, the Advocate denies the existence of any such agreement and states that the aforesaid schedule constituted only partial and not final fees payable to him by the Client.

23. I am aware that a contract on fees may be construed from a series of correspondence between an advocate and a client (see *Maimai Hamise v Peris Tobiko & others [2017] eKLR*). By his letter dated 15<sup>th</sup> July 2019, the Advocate sent a schedule of fees to the Client. There was however no response from the Client until 19<sup>th</sup> June 2020, when the Advocate lodged and served his Bill of Costs.

24. In an apparent response to the Bill of Costs, the Client made payment to the Advocate on 26<sup>th</sup> June 2020, close to a year after receipt of the schedule of fees. The reasonable explanation is that the payment made by the Client was on account of the Bill of Costs, rather than the schedule of fees, on which the Client chose not to comment. In the circumstances of this case, I find that there was no exchange of correspondence between the parties that could constitute an agreement on fees.

25. That said, the sole ground upon which the Client seeks to challenge the award by the Taxing Master dissipates, with the result that the application dated 24<sup>th</sup> March 2021 is disallowed with costs to the Advocate.

26. It is so ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Noor for the Client/Applicant

Mr. Onyango for the Advocate/Respondent