



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC CIVIL APPLICATION NO. 116 OF 2016

ALFRED OCHIENG OPIYO

t/a OCHIENG OPIYO & CO. ADVOCATES

APPLICANT

v

MUGANDA WASULWA t/a KEYSIAN AUCTIONEERS RESPONDENT

RULING

1. This ruling could not be delivered on 31st May 2018 as scheduled because the Court was away on other official engagements.
2. The firm of Letangule & Co. Advocates instructed Muganda Wasulwa t/a Keysian Auctioneers (Respondent auctioneer) to execute a decree which the law firm had secured for its clients against Telkom Kenya Ltd.
3. The Respondent auctioneer executed the instructions but it appears that the firm of Letangule & Co. Advocates did not pay it for the services rendered.
4. On 2 December 2013, the Respondent auctioneer caused a bill of costs to be lodged against the firm of Letangule & Co. Advocates.
5. The applicant firm of advocates acted for the Respondent auctioneer in the taxation process.
6. The bill was taxed on 9 July 2014 at Kshs 77,195,821/-.
7. Letangule & Co. Advocates did not pay the taxed costs, and the Respondent auctioneer therefore commenced garnishee proceedings against it.
8. Those proceedings were compromised on 25 January 2016 when the Respondent auctioneer and the firm of Letangule & Co. Advocates agreed that the Respondent auctioneer would be paid Kshs 8,000,000/- in full and final settlement in lieu of the taxed costs of Kshs 77,972,151/-.
9. On 23 March 2016, the applicant lodged an advocate/client bill of costs against the Respondent auctioneer.
10. The bill was canvassed by the parties through extensive written submissions.
11. On 14 March 2018, the taxing officer taxed the applicant's bill at Kshs 1,811,795/- and a certificate of taxation was duly issued.
12. The Respondent auctioneer was aggrieved by the taxation, and on 26 March 2018, its advocates wrote to the Taxing Officer seeking reasons for the taxation, for purposes of making an appropriate decision.
13. The Taxing Officer responded on 27 March 2018, informing the Respondent that the reasons for the taxation had been outlined in the taxation ruling.
14. On 4 April 2018, the applicant moved Court (first application) under certificate of urgency seeking orders

1. ...

2. **THAT** the Certificate of Costs issued by this Honourable Court be deemed as a Judgment and Decree entered in the sum of Kenya

Shillings One Million Eight Hundred and Eleven Thousand Seven Hundred and Ninety Five (Kshs 1,811,795/-).

3. **THAT** costs for this application be provided for.

15. When the application was placed before the Duty Court on 5 April 2018, the Court directed that it be served upon the Respondent for *inter partes* hearing on 12 April 2018.

16. On 10 April 2018, the Respondent auctioneer filed an application (second application) seeking orders

1. **THAT** the decision of the taxing master in this matter is arising from the Advocate Client Bill of Costs dated 22nd March 2016 between the parties herein made on 14th March 2018 which was taxed in the sum of Kshs 2,111,795.00 (less deposit made of Kshs. 300,000.00) be set aside and or varied in terms of item 1 of the Bill of Costs.

2. **THAT** costs of this application be provided for.

17. When the first application came up for hearing on 12 April 2018, the applicant indicated that he was ready to proceed with both applications.

18. The Respondent auctioneer however indicated that he was not ready to proceed with the first application because of the second application.

19. The Court directed that both applications would be heard on 2 May 2018.

20. On 2 May 2018, the Court dismissed the first application because the advocate who was holding brief declined to prosecute it after the Court declined to place the file aside to await the attendance of Mr. Opiyo.

21. The said advocate, Mr. Kabene also declined to respond to the second application citing lack of instructions, despite sitting through the hearing.

Evaluation of the second application

22. The Court notes from the Ruling of the Taxing Officer that the mother file from which these proceedings emanated from appear to have gone missing.

23. The parties therefore ought to have given the Court a fuller and coherent background to the dispute in the affidavits.

24. The applicant filed a notice of preliminary objection to the second application contending that it was filed out of time as contemplated by Rule 11(2) of the Advocates Remuneration Order.

25. The Court is therefore confronted with 2 primary questions, and these are firstly, whether the Reference was filed within the prescribed timelines.

26. Secondly, the Court is called upon to determine whether the Taxing Officer erred in law by assessing the costs on the taxed costs of Kshs 77,972,151/- instead of the compromised settlement of Kshs 8,000,000/- (the anchor ground presented by the Respondent auctioneer was that the value/subject matter upon which the applicant's fees should be assessed was the Kshs 8,000,000/-).

Was the Reference filed within time?

27. Rule 11(2) of the Advocates Remuneration Order envisages a dissatisfied party giving a notice of objection to the Taxing Officer within 14 days, and the Taxing Officer is required to give reasons as to the taxation forthwith to the objector.

28. The Respondent auctioneer notified the Taxing Officer of his objections through a letter dated 26 March 2018, and the Taxing Officer responded on 27 March 2018 indicating that the reasons sought were included in the ruling on taxation which had been delivered on 14 March 2018.

29. The Respondent auctioneer then filed the application under consideration in Court on 10 April 2018. The Court has keenly perused the Ruling by the Taxing Officer and the grounds upon which the Reference is grounded.

30. The anchor ground relied on by the Respondent auctioneer was raised before the Taxing Officer and she made a reference to the same in her ruling of 14 March 2018.

31. In the view of the Court therefore, time started running on 14 March 2018 and the Respondent moved Court outside the prescribed time.

32. No leave was sought to enlarge time.

33. On that ground, and finding comfort in *Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Ltd* (2012) eKLR, the Court finds that

the Reference is incompetent.

34. On the assumption that the Court may have reached the wrong conclusion on the limitation question, the Court will examine the application on the merits.

Merits of the application

35. On 2 December 2013, the Respondent auctioneer through the applicant lodged a bill of costs in High Court Misc Appl. No. 1160 of 2014, *Muganda Wasulwa t/a Keysian Auctioneers v Letangule & Co. Advocates*.

36. The applicant caused the bill to be taxed at Kshs 77,195,821/- on 9 July 2014.

37. In the course of time, the Respondent auctioneer decided to act in person and filed a *Notice to Act in Person* on 22 January 2016 and on 25 January 2016, he entered into a consent with Letangule & Co. Advocates compromising the taxed bills at Kshs 8,000,000/- (from Kshs 77,195,821/-).

38. When the parties appeared before the Taxing Officer, the Respondent auctioneer's primary contention was that the Taxing Officer should tax the instruction fees on the consent compromise sum of Kshs 8,000,000/- and not the initial sum of Kshs 77,195,821/-.

39. The applicant however maintained that he successfully executed his instructions and had the bill against Letangule & Co. Advocates taxed at Kshs 77,195,821/- and that was the correct sum to assess instructions fees.

40. It is not in dispute that at the time the Respondent auctioneer was instructing the applicant to tax the bill against Letangule & Co. Advocates, there was a definite and known amount of money owing and due from Letangule & Co. Advocates.

41. The amount was Kshs 77,195,821/-.

42. Because the firm of Letangule & Co. Advocates failed to pay the Kshs 77,195,821, the Respondent auctioneer moved to execute through garnishee proceedings.

43. On 25 January 2016, the Respondent auctioneer agreed to compromise the costs at Kshs 8,000,000/- instead of the taxed amount of Kshs 77,195,821/-.

44. By this time, the Respondent auctioneer had debriefed or parted ways with the applicant.

45. Should the Respondent auctioneer then be allowed to pay the applicant based on the compromised amount?

46. In my view, that would not only amount to using the technicalities of the law to deny the applicant what was due to him after delivering on his instructions, but unconscionable as well.

47. The applicant acted upon the Respondent auctioneer's instructions and had the bill of costs taxed at Kshs 77,195,821/- and a certificate of taxation was issued.

48. Because it is the Respondent who decided to compromise the costs at Kshs 8,000,000/-, long after the applicant had substantially carried out his brief, he cannot deny the applicant the fruits of his professional labour.

49. This is a case where shylock must have his pound of flesh.

50. The Court therefore finds no error of law or principle on the part of the Taxing Officer when she concluded that the applicant successfully concluded his instructions at the point when the Bill of Costs was taxed at Kshs 77,195,821/-.

51. The Court finds no merit in the application dated 9 April 2018 and orders that it be dismissed with costs.

Delivered, dated and signed in Nairobi on this 13th day of June 2018.

Radido Stephen

Judge

Appearances

Ochieng Opiyo & Co. Advocates for applicant

Mr. Otieno instructed by Brian Otieno & Co. Advocates for Respondent

