



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU

MISC. APPLICATION NO. 230 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

WYCLIFFE CHITAYI MUHALYA.....APPLICANT

- *Versus* -

DOROTHY AWITI OMBOTO T/A DAO ASSOCIATES.....1ST RESPONDENT

WILFRIDA A OSODOT/A WILFRIDA A OSODO ADVOCATES...2ND RESPONDENT

RULING

Before me is a chamber summons dated 19th July, 2016 filed by the applicant WYCLIFFE CHITAYI MUHALYA who is the Claimant in Cause No. 83 of 2013. The application arises out of the taxation of advocate/client bill by the Deputy Registrar who ordered the Applicant to pay DOROTHY AWITI OMBOTO T/A DAO ASSOCIATES, the 1st Respondent the sum of Kshs.151,680 and WILFRIDA A OSODO T/A WILFRIDA A OSODO ADVOCATES, 2nd Respondent, the sum of Kshs.60,595. The Applicant seeks orders setting aside the ruling of the Taxing Master delivered on 27th May 2016 and for the court to direct that the Bills dated 10th and 12th August 2015 be taxed afresh by a different taxing Master.

The grounds upon which the application is anchored are that:

1. The Taxing Master delivered a Ruling *vide* the Bill of costs of the Respondents dated the 10th and 12th days of August 2015 respectively on the 27th day of May 2016.
2. The Applicant sought reasons for the decision informing the Ruling and has not been satisfied by the same as provided by the Taxing Master.
3. In particular, the Bill of Costs by the 1st Respondent should have been taxed under Schedule 6(B) (a) of the **Advocates' Remuneration Order**.
4. The Applicant objects to the items taxed under 5, 6, 7, 8, 9, 10 and 18 of the 2nd Respondent's Bill of Costs.

The Application is supported by the affidavit of the applicant sworn on 18th July 2016 in which he deposes that the two firms of advocates represented him in Cause No. 83 of 2013 and thereafter filed their respective bills of costs for taxation. He deposes that he was dissatisfied with the ruling of the Taxing

Master which were hand-written and applied for reasons in writing as required under paragraph 11(2) of the Advocates Remuneration Order. He deposes that by letter dated 6th July 2016 the Taxing Master directed him to file an application and his application herein has been filed pursuant to the said directions of the Taxing Master.

In the submissions in support of his application the applicant states that he instructed Wilfrida A Osodo T/A Wilfrida A Osodo Advocates to represent him in Kitale CMCRC No. 1755 of 2003 at an agreed fee of Kshs.80,000 which he paid in full. Upon successful completion of the case which ended with his acquittal, he instructed the said advocates to file suit against his erstwhile employers who was the complainant in the criminal case for a claim of unlawful arrest and confinement, wrongful dismissal and defamation. He was directed to pay advocates fees of Kshs.86,400. He was advised by the said advocates that his erstwhile employer will meet the rest of the costs of the suit.

The Applicant submits that before the case was concluded his counsel was appointed as a Judge of the High Court on 13th December 2013 and promptly informed him that she will no longer be able to pursue his case. The Judge introduced him to Ms. Dorothy A. Omboto as the counsel taking over her office as a partner and that Ms. Omboto would handle his case. His understanding was that the two were in partnership and there was no further discussion of advocates fees. He was only required to pay an additional Kshs.6000 to Ms. Omboto in addition to the earlier fees of Kshs.86,400. He further submits that there was no discussion of setting off legal fees from decretal sum.

The applicant submits that the issue of legal fees arose when he asked for release of decretal sum after he learnt that the settlement cheque had been received by his advocate from his former employer Kenya Seed Company Advocates. That is when he was given an unsigned piece of paper by Ms. Omboto in which it was indicated that he was entitled to Kshs. 490,570 out of a cheque of Kshs.934,480 received by the Advocate. By then he had been paid Kshs.547,300 by the advocate.

The Applicant states that he filed a complaint to the Law Society of Kenya (LSK) which was not responded to even after he sent reminders. He then filed a complaint with the Commission on Administrative Justice who intervened and the LSK instructed DAO & Associates to file a bill of costs which is the subject of the present application.

Neither Dorothy Awiti Omboto T/A DAO Associates, the 1st Respondent nor Wilfrida A Osodo T/A Wilfrida A Osodo Advocates filed submissions after having been given an opportunity to do so on 24th January, 2nd March and 21st March 2017.

When the application came up for directions on 24th January 2017 I directed parties to proceed by way of written submissions. I further directed that both firms of advocates should file copies of practicing certificates of the advocates handling the case as there were submissions filed on behalf of Wilfrida A Osodo Advocates yet upon inquiries by the court no confirmation was made as to whether the firm is in operation or was wound up upon appointment of Wilfrida A Osodo as a judge.

I will however take into account the submissions made by both parties on the bill during the taxation of the bill before the Deputy Registrar.

In the submissions for DAO & Associates it is argued that the Applicant has not denied instructing two different firms of advocates to act for him in Cause No. 83 of 2013 and that both law firms are entitled to fees as decided by **HPG Waweru J.** in Misc. Appl. No. 6161 of 2006 **Kenya Tea Development Agency Ltd v J.M. Njenga & Co. Advocates** where he stated-

"...a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instructions fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer's discretion to increase or(unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates..."

DAO & Associates further relied on the decision of **F. Azangalala J.** in **Misc. Appl. No. 942 of 2005 D. Njogu & Company Advocates v Panafcon Engineering Limited** in which he stated-

*'Although the decision in that case would appear to contradict the decision of the Court's earlier decision in **Mayers and Another –vs- Hamilton and Others [1975] E.A. 13**, in reality there is no contradiction. At page 16 of that case their Lordships stated as follows:-*

'I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is necessary to realize that an advocate will not ordinarily become entitled at the moment of instruction to the whole of the fee which he may ultimately claim. Suppose for example, that within a few minutes of receiving instructions to defend a suit, an advocate were informed that the plaintiff had decided to withdraw. The advocate would as I see it be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done (Underlining mine).'

TO MY MIND IT IS CLEAR THAT ON BEING INSTRUCTED AN ADVOCATE IS ENTITLED TO THE MINIMUM INSTRUCTION FEE. The figure may be increased at the discretion of the Taxing Master.

*The High Court is bound by those Court of Appeal decisions. Ringera J as he then was in **First American Bank of Kenya –vs- Shah and others [2002] 1E.A. 64** followed the decision of the court of Appeal in **Joreth Ltd –vs- Kigano and Associates (Supra)**.*

The submissions filed on behalf of Wilfrida A Osodo Advocates in support of its Bill of Costs are a duplication of the Submissions of DAO & Associates. This is quite telling because the court questioned the existence of the said firm and sought copies of the practicing certificates of the advocates practicing therein which have not been supplied. It is not lost to the court that all documents filed on behalf of the firm of Wilfrida A Osodo Advocates including the Bill of Costs are signed on its behalf.

Determination

I have carefully considered the application together with the grounds and affidavit in support thereof. I have further considered the submissions filed on behalf of the Respondents and the authorities cited therein.

The issue for determination is whether both Respondents are entitled to the sums taxed in their favour by the Taxing Master and the twin issue is whether the Respondent law firms practice separately or if the 2nd Respondent took over the 1st Respondent upon appointment of the sole partner as a judge.

The Respondents did not file any replying affidavit or grounds or opposition to the chamber summons filed by the Applicant. They also failed to file submissions as directed by the court.

Paragraph 62A of the Advocates Remuneration Order provides for costs upon the change of advocates as follows-

62A. Costs where there has been a change of advocates

(1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.

(2) On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party

taxing the bill shall not obtain indemnity for costs which he has not paid.

(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.

The present application questions the filing of separate advocate/client bills of costs in respect of this case by the 1st and 2nd Respondents and the award of both bills by the Taxing Master.

In the case of **First American Bank of Kenya v Shah & Others** the court set two tests for reviewing the decision of a Taxing Master, being that the court should not interfere with the Taxing Master's decision on taxation unless first, it is shown that the decision was based on an error of principle, or secondly, that the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.

The Respondents have not denied the applicant's averments that the 1st Respondent took over his case upon appointment of the proprietor of the 2nd Respondent as a Judge of the High Court. They have further not denied that the applicant was informed that the 1st Respondent was taking over the law firm of the 2nd Respondent and will not charge additional fees save for the additional Kshs.6000 which he was charged and he paid. There is further no denial that the applicant was informed that the Respondent in Cause No. 83 of 2013 would pay the advocates fees so that he would not be charged further fees over and above what he had paid.

As deposed and submitted by the Applicant, he paid a total of Kshs. 92,400 while the advocates retained Kshs.270,400 from decretal sum in addition to ksh.123,280 agreed and paid as party and party costs making a total of Kshs. 698,355. This is definitely well beyond what is provided in the Advocates Remuneration Order.

Based on the provisions of paragraph 62A of the Advocates Remuneration Order, the Taxing Master erred in allowing 2 separate bills in respect of Cause 83 of 2013 as there should have been only one bill.

Under Schedule 6 - Costs of Proceedings in the High Court Part B provides as follows-

B — ADVOCATE AND CLIENT COSTS

As between advocate and client the minimum fees shall be—

(a) the fees prescribed in A above increased by 50%;

(b) the fees ordered by the court increased by the 50%; or

(c) the fees agreed by the parties under paragraph 57 increased by 50%, as the case may be and the increase to include all proper attendances on the client and all necessary correspondence.

In this case the Party and Party Bill was taxed at Kshs.123,280. The Taxing Master should therefore have increased this sum by 50% as provided in Schedule 6 which would come to a total sum of Kshs.184,920. From this should have been deducted the sum already paid by the applicant being Kshs.92,400 to leave a balance of Kshs.92,520. This means that the payment from Kenya Seed Company Advocates and from the Claimant being a total of Kshs.215,680 was already in excess of what the Respondents were entitled to charge being Kshs.184,920. The sum deducted from the decretal sum should therefore be refunded to the Applicant as there was no agreement between the Applicant and the Respondent for payment in excess of the scale fees.

Conclusion

From the foregoing I find that the Taxing Master erred in allowing two separate bills from the two Respondent firms which represented the Applicant to be taxed instead of one consolidated bill and secondly for taxing a fresh bill instead of adjusting the Party and Party Bill already taxed by 50% as provided under Part B of Schedule 6 for Advocate/Client Bills. The consequence is that the taxation led to a manifestly excessive bill that justifies interference by this court. Secondly the taxation of two separate bills was an error of principle that on its own further justifies this court's intervention.

The effect of the taxation is that the Respondents were paid fees by the Applicant in the sum of Kshs. 92,400, then paid by Kenya Seed Company the sum of Kshs. 123,280 and again paid themselves a further sum of Kshs. 270,400 from the decretal sum when they were only entitled to Kshs.184,920 in total.

In conclusion therefore, I set aside the decision of the Taxing Master in its entirety and substitute therefore one consolidated bill for the two firms of advocates taxed at Kshs.184,920 less Kshs.92,400 paid by the Applicant and Kshs.123,280. The net effect is that DAO & Associates owes the Applicant the sum of Kshs.270,400 withheld from the decretal sum received on the Applicant's behalf from Kenya Seed Company Ltd. I therefore order that DAO Associates refunds to the Applicant the sum of Kshs.270,400 unlawfully recovered from the decretal sum due to him.

The said sum shall be a debt recoverable by execution. Should the same not be paid within 30 days it shall attract interest at court rates of 14% with effect from the date of ruling.

The applicant had sought orders of fresh taxation by a different Taxing Master. I find this unnecessary as the Party and Party Bill had already been taxed and the Advocates Remuneration Order sets the formula for deriving the Advocate/Client Bill by an addition of 50% to arrive at the correct bill.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE