



**Mwangi Keng'ara & Company Advocates v Baseline Logistics and Investment Company Ltd (Miscellaneous Civil Application E585 of 2021) [2023] KEHC 4082 (KLR) (Commercial and Tax) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**MISCELLANEOUS CIVIL APPLICATION E585 OF 2021**

**DO CHEPKWONY, J**

**APRIL 25, 2023**

**IN THE MATTER OF: THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA AND THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 1962 (REV. 2017)**

**AND**

**IN THE MATTER OF TAXATION**

**BETWEEN**

**MWANGI KENG'ARA & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**BASELINE LOGISTICS AND INVESTMENT COMPANY LTD ... RESPONDENT**

**RULING**

1. The Advocate/Applicant filed a Chamber Summons application dated April 8, 2022 pursuant to the provisions of Paragraph 11(2) of the Advocates Remuneration Order, and Sections 1A and 1B both of the *Civil Procedure Act* seeking the following order: -
  - a. That the ruling dated March 30, 2022 on Item No 1, instruction fees in the Advocate/Client Bill of costs dated August 6, 2021 be set aside and the assessment thereof be substituted by an order of this Honourable Court allowing Item No 1 as drawn or with an assessment of instruction fees that it deems fit.
  - b. In the alternative, that the ruling dated March 30, 2022 on Item No 1 instruction fees be set aside and the Bill of Costs dated August 6, 2021 be remitted back for re-taxation before any other Taxing Officer.



- c. That the costs of this reference be awarded to the Advocate/Applicant.
2. The application is premised on grounds on its face which are further explicated in the Supporting Affidavit of Mercy Nduta Mwangi, the Applicant herein. In summary, the Applicant's case is that she filed an Advocate/Client Bill of cost dated August 6, 2021 and the same was taxed at Kshs 1,826,168/= and a sum of Kshs 9,569,146/= taxed off. Thereafter, vide a letter dated April 7, 2022, the Applicant objected to the ruling. She adds that the bill of costs emanates from services and representations she offered to the Respondent for the preparation of an agreement for purchase of 55% shareholding in the Purple Saturn Properties and 650.65 Acres in Land Reference No 11288 (Original Number 6772/3). According to the Applicant/Advocate, she duly represented the Client in negotiations leading to the agreement, amendment of the agreement, approval of the same and execution thereof. She added that the agreement shows that the Client/Purchaser's advocate was herself and the value of the property was Kshs 888,768,281.00. She goes on to state that she also represented the client in procuring a bank guarantee for the purchase price and the foregoing was buttressed by the affidavit sworn in support of the bill of cost that was presented to the Taxing Master.
  3. Further, the Advocate/Applicant has asserted that the Taxing Master misdirected herself in failing to appreciate that the purpose of the letter of guarantee was to secure the purchase price of the subject parcel of land and the shares as illustrated earlier. She thus invites the court to make a conclusion that the Taxing Master erred in failing to appreciate that the Advocate/Applicant offered services in relation to the purchase agreement.
  4. In the submissions dated June 13, 2022 and filed by the Applicant in support of her application, she has substantially argued that the Taxing Master erred by failing to ascertain the correct subject matter. She has stated that it was a grave error for the Taxing Master to make a conclusion that there were no documents to support that the Applicant was involved in drafting the agreement. She has also gone ahead to adduce a number of authorities which support the argument that an advocate's fees crystalize once the sale agreement is signed and urged the court to re-tax the Bill of Costs as per Schedule One of the 2014 *Advocates Remuneration Amendment Order*.
  5. The Client/Respondent's filed Grounds of Opposition in rebuttal of the reference which were expunged from the record on July 18, 2022 for having been filed in an unprocedural manner. However, the Respondent indicated that it would wish to oppose the reference vide an affidavit dated December 20, 2021 sworn by Joel Kamau Kibe, wherein the deponent avers that there were no clear and unequivocal instructions by the Respondent and the bill of cost was totally based on presumptions. It avers that in any event, the intended purchase of the shares and named land is subject to a discharge of a court order in Nairobi High Court Civil Case No 230 of 2015, *Kofina Company Ltd -v- Nahason Ngige Nyagah & 20 Others*, which case has never been determined hence the intended purchase never materialized and the advocate cannot base her fees on a transaction that never progressed. Lastly, the Respondent avers that it has never instructed the Applicant as averred and even the advocate did not produce a letter of such instructions. The Respondent has thus urged the court to uphold the Taxing Officer's decision since it correctly considered the evidence on record.
  6. The parties were directed to dispose of the application by way of written submissions whereby the Applicant filed her submissions dated June 13, 2022 while the Respondents are dated July 15, 2022. I have read through the said submissions in consideration of the application and response thereto.



## Analysis and Determination

7. I have read through the grounds set out in the rival affidavits of the parties, the Record, submissions filed by the Applicant and the cited law by the parties in consideration of the Chamber Summons application dated April 8, 2022 ('The Reference').
8. In determining the said application, I am warned of the Taxing Master's discretion under Rule 16 of the Remuneration Order which allows him or her to award costs as it may appear to him or her to have been proper for the attainment of justice or for defending the rights of any party. Thus, in exercise of the same discretion, the Taxing Officer may assess such instruction fees as he/she considers just, taking into account, amongst other matters, the nature and importance of the cause, the interests of the parties, any directions by the trial Judge and or any other relevant matter.
9. Consequently, this Court cannot interfere with such exercise of discretion by the Taxing Master unless it is shown that the Taxing Master acted on wrong principles of law, awarded an amount so low or so high as to amount to an injustice to one of the parties, or that there was a defect in the decision of the case upon merits or that the Taxing Master failed to exercise the discretion judiciously.
10. In addressing the same issue, courts including the court in the case of Lucy Waitira & 2 Others v Edwin Njagi T/A E. K. Njagi & Company Advocates [2017]eKLR, have occasionally opined that a Taxing Officer's decision is not exercised judiciously where a relevant consideration has not been taken into account, or irrelevant considerations have been taken into account and this amounts to an error of principle.
11. In this case, the Advocate/Applicant has invited the court to consider that the Taxing Master failed to exercise her discretion judiciously and committed an error of principle by failing to consider the evidence that was presented before her on the Applicant's involvement in drafting, negotiating, and amendment of the sale agreement so as to calculate the instruction fees. In the Applicant's view, there were emails attached to her affidavit dated September 20, 2021 and December 23, 2021 showing that she actively negotiated the terms of the sale agreement, and conducted due diligence on behalf of the Respondent, and thus rendered the necessary legal services for the Respondent in the transaction. Further, the Applicant has averred that the sale agreement mentions/indicates her as the advocate for the Respondent hence her fees crystalized upon the withdrawal of the instructions and execution of the sale agreement.
12. On the other hand, the Respondent has averred that the Applicant/Advocate did not prepare any of the documents referred to in this matter and specifically the Agreement for Sale of shares and neither was she involved in its preparation so as to justify the Kshs 11 Million bill on the claim she filed herein. It is also averred that the intended sale was subject to the determination of a court matter, Kofina Company Ltd v Nahason Ngige Nyagah & 20 Others, which is still pending in court hence no party has ever received any benefit from the same.
13. I have taken into consideration the Advocate's case that the Applicants key grievances are that the Taxing Master failed to ascertain the correct subject matter in the suit and more specifically, failed to appreciate that the Applicant was involved in negotiations and drafting of the sale agreement. Further that the Taxing Master failed to proceed with the taxation based on the value of the land which was indicated as Kshs 888,768,281.00.
14. Given the rival submissions by the Respondent that it never instructed the Applicant in relation to the sale of the shares and the land, I have considered the affidavit dated September 20, 2021 in which the Applicant says there is overwhelming evidence in support of its case. At Paragraph 2 of the said



affidavit, the Applicant avers that sometimes on November 5, 2015, she was instructed by Mr. Joel Kibe, a Director of the Client herein to handle a transaction relating to the purchase of 55% of shares in Purple Saturn Properties Ltd which was for a total sum of Kshs 888,768,281. The Applicant then attached the Respondent's CR-12 showing Mr John Kibe as a Director.

15. Under Paragraph (3) of the affidavit dated September 20, 2021, the Applicant annexed the sale agreement dated December 4, 2015 showing that the same was signed by both parties to the agreement. Under Paragraph (4), a bank guarantee for the agreed selling price was annexed and under Paragraph (6), the Applicant attached email correspondences showing that she attended meeting for negotiations on the breadth of the guarantee to which she attached under Paragraph (7), the format of the guarantee she proposed to the bank. Under Paragraph (8), the Applicant avers that in exercise of due diligence with respect to purchase of the shares and the land on behalf of the Respondent, she conducted searches to ascertain the Vendor's Company Directors and annexed copies of CR-12s. However, she did not attach copies of Search Certificates.
16. Lastly in her Paragraph (9) of the same affidavit, the Applicant has averred that she provided the legal services in the preparation and approval of transfer of shares and attached the transfers as Exhibits MNM-7.
17. Having perused all the aforementioned evidence, it is my finding that although the Applicant avers that she offered services in approval of the sale agreement, no evidence was attached to support the same. Since there was no express letter of instructions with regard to the transaction, the Applicant ought to have annexed a proof-read version of the sale agreement from which the final copy was made or any communication with the Vendor's advocate on the same subject. The mere indication of the Applicant as the purchaser's advocate under the agreement is not sufficient to infer the Applicant was actively involved in drafting the sale agreement in the absence of a letter of instruction or other communication from which the retainer agreement can be inferred. Thus, without such evidence, I am unable to infer any error on the part of the Taxing Master in holding that the attached e-mails, agreement for sale of shares and other documentations do not have any indication of the Applicant having been involved. In the circumstances presented herein, I agree and find that the Taxing Master exercised her discretion properly and appropriately.
18. In any event, it is a common ground that the sale of the subject parcel of land has never materialized since it awaits the decision to be made vide Nairobi High Court Civil Case No 230 of 2015 which is still pending before court. So that, even if the court was to find that the Applicant was entitled to costs with respect to preparation of the sale agreement, the subject matter would not be informed by the value of the parcel of the land but on the actual work that would have been done.
19. In the case of *Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd* [2019]eKLR, the Court of Appeal upheld an award of Kshs 100,000/= where an advocate was instructed by a purchaser to undertake the purchase transaction which later aborted and the subject parcel of land was allegedly valued at Kshs 8.8 Billion. The claim in that case is not different from the claims made herein so that had the Applicant proved its claim, then the remuneration would have been within the scope approved by the Court of Appeal in *Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd* (Supra).
20. The upshot of the foregoing is that I find the Applicant has not established grounds to interfere with the decision of the Taxing Master issued on March 30, 2022. Consequently, the reference in the Chamber Summons dated April 8, 2022 is hereby dismissed with costs to the Respondent.

It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF APRIL 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

M/S Mwangi counsel for Advocae/Applicant

No appearance by and for Respondent

Court Assistant – Mwenda/Sakina

