



REPUBLIC OF KENYA



Mwangi Kengara & Co Advocates v Suri & another (Environment & Land Miscellaneous Case E097 of 2021) [2023] KEELC 17019 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E097 OF 2021**

OA ANGOTE, J

APRIL 20, 2023

BETWEEN

MWANGI KENGARA & CO ADVOCATES APPLICANT

AND

AVTAR SINGH SURI 1ST RESPONDENT

BIASHARA HOLDINGS LIMITED 2ND RESPONDENT

(Being a Reference from the Ruling on Taxation of Advocate's Bill of Costs by the learned Taxing Officer, Honourable I.N Barasa (DR) dated and delivered on 23rd February 2022)

RULING

Introduction

1. Before the Court for determination is the Respondents' Chamber Summons dated 9th March 2022 and brought under Section 1A, 1B, 3A of the [Civil Procedure Act](#), Rule 11(2) of the [Advocates Remuneration Order](#) and all other enabling provisions of law. The Respondents are seeking for orders that:
 - a. The Court be pleased to vacate and set aside in its entirety the ruling and reasoning of the learned Taxing Officer Honourable I.N Barasa (DR) dated and delivered on 23rd February 2022 taxing the Advocate/Applicant's Bill of Costs dated 7th May 2021 at Kshs. 525,778.70.
 - b. The Court be pleased to strike out in its entirety the Advocate/Applicant's Bill of Costs dated 7th May 2021.
 - c. In the alternative to prayer (b) above, the Court be pleased to remit the Bill of Costs dated 7th May 2021 for reassessment of the quantum of total fees and disbursements chargeable before the Taxing Officer or a different Taxing Officer with appropriate directions thereof.



- d. Costs of the application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by the 1st Respondent (hereinafter ‘the Client’) and director of the 2nd Respondent, Avtar Singh Suri, who deponed that the amount as taxed in the bill of costs was excessive and untenable.
 3. According to the 1st Respondent, the taxing officer misdirected herself and arrived at a decision that was both erroneous and unreasonable; that the taxing officer awarded instruction fees of Kshs. 448,437.50 while the three bills filed before the Court, that is Msc E097, Msc EO98 and Msc 099 were in respect to one instruction and not several as stated by the Advocate.
 4. It was deponed that there were agreements for fees dated 4th September 2020 and 2nd December 2020; that the agreements were signed by the Advocate and set the full and final fees payable at Kshs. 450,000 and that as a result, the matter was outside the purview of taxation as per Sections 45 and 48 of the Advocates Act.
 5. It is the client’s case that the retainer and the transaction leading to the bill of costs was ongoing; that the parties had agreed to everything except what the Advocate referred to as the discharge of charge; that the 1st and 2nd Respondents are the same person and that the advocate withdrew two bills against him personally and sustained the one against the company.
 6. Additionally, it was deponed, the company being a family company was exempt from certain transactional requirements such as stamp duty and consent; that the Advocate grossly overvalued the properties and that the property in Loresho is worth Kshs. 49,000,000 while the one in Runda is worth 34 million.
 7. The 1st Respondent deponed that it was therefore incorrect to claim that the property in Runda was valued at Kshs. 200,000,000; that no stamp duty was charged in the transaction as it was between a person and his company and that the Advocate cannot charge the Client for discharge of charge that she did not undertake because the same was done by the Bank of Baroda.
 8. The Advocate filed a Replying Affidavit in which he deponed that there was no fees agreement between him and the Client touching on the services rendered in relation to the discharge of further legal charge over Title No. Nairobi/Block 90/223 (hereinafter ‘the suit property’) and that no agreement was produced during the taxation of the Bill of Costs.
 9. She averred that the bill of costs in question was for legal services rendered to the Client in respect of a discharge of charge; that on or about 15/12/2020, the Client instructed her firm to prepare a transfer of the suit property to the 2nd Respondent and that she booked the transfer for registration at Ardhi House on 30/12/2020.
 10. According to the Advocate, on 7/1/2021, she was informed that the transfer could not be registered due to a legal charge of Kshs. 200,000,000 which was yet to be discharged; that she acted for the Client in construing/approving the Discharge of Further Charge that was prepared by the bank’s advocates and that she presented it for stamp duty assessment.
 11. In conclusion, the Advocate deponed that she fully performed the services as instructed by the Client and rightfully earned the fees as taxed in the bill of costs in question.

Submissions

12. It was submitted by the Respondents that where there is an agreement for fees between an advocate and client, there is no need for taxation. The Respondent submitted that the taxing officer had in ELC



- Misc E098 and ELC Misc E099 Mwangi Keng'ara & Co. Advocates vs Avtar Singh Suri and Biashara Holdings Limited found that the agreements between the Client and Advocate in this case were valid.
13. Consequently, it was submitted, the bill of costs should not have been taxed. Section 45 of the [Advocates Act](#) and the case of [Njogu & Company Advocates vs National Bank of Kenya Limited](#) [2016] eKLR were relied upon.
 14. It was submitted that a suit for recovery of costs due to an advocate should be brought thirty days after the bill of costs has been delivered to the client.
 15. Counsel for the Respondents relied on Section 48 of the [Advocates Act](#) and the cases of *Republic vs Public Procurement Administrative Review Board & Another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & Another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV)* [2019] eKLR and [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others](#) [2013] eKLR.
 16. The Respondents submitted that the transaction that is the subject of the bill of costs was not over and the same issue. Relying on Rule 62A of the Advocates Remuneration Order and the cases of [Gichuki King'ara & Company Advocates vs Mugoya Construction & Engineering Limited](#) [2010] eKLR, [Ratemo Oira & Company Advocates vs Magereza Sacco Ltd](#) [2016] eKLR and [Commercial Bank of Africa Limited vs Lalji Karsan Rabadia & 2 others](#) [2012] eKLR, the Respondent submitted that the bill is immature, extortionist and that a proper bill should be drawn when the current advocates complete the transaction.
 17. It was submitted by the Respondent that the suit property is valued at Kshs. 34,000,000 and not Kshs. 200,000,000 as stated by the advocate in the Bill of Costs; that the Advocate erroneously stated that she applied for stamp duty exemption while stamp duty exemption happens by operation of the law and that the discharge of charge was undertaken by the bank and not the Advocate as claimed.
 18. In conclusion, the Respondent invited the Court to take note of the fact that the bill of costs was filed under the 1962 Remuneration Order and not the 2014 Remuneration Order.
 19. The Advocate submitted that the bill of costs was filed against Avtar Singh Suri and that Biashara Holdings Limited was added to the suit without the leave of the Court. The Advocate urged that the 2nd Respondent be struck out from the pleadings.
 20. The Advocate submitted that the bill of costs was brought under Paragraph 13(3) of the Advocates Remuneration Order which does not prescribe the giving of a thirty-day notice. It was submitted that proceedings under Section 48 of the [Advocates Act](#) which was relied upon by the Respondent are different and not applicable in the instant case. The case of [M G Sharma vs Uburu Highway Development Limited](#) [2001] eKLR was relied upon.
 21. The Advocate submitted that the agreements on fees that were relied upon by the Respondent related to services in relation to the transfer of: shops at Loresho, Nyali house and a vacant plot in Runda and that the agreements did not refer to services for the discharge of charge over the suit property.
 22. She averred that the bill of costs explicitly states that she was not charging fees for the transfer of the suit property but rather for a discharge of charge; that the registration of the discharge of charge was concluded once the entry was made in the register and that she did not consider the registration of the discharge of charge as part of the registration of the transfer as alleged.
 23. The Advocate submitted that no agreement had been presented before the Court in relation to fees for the discharge of charge. Additionally, she submitted that Section 45 of the [Advocates Act](#) that was



- relied upon by the Respondent related to contentious business while the discharge of charge fell under non-contentious business which was regulated by Section 44 of the *Advocates Act*.
24. The Advocate submitted that this matter was not consolidated with ELC Misc E098 and E099. Consequently, it was submitted that the findings therein are of no consequence to this matter.
 25. It was pointed out that the case of *Njogu and Company Advocates (supra)* was distinguishable from the current one as there was an agreement on fees in that case while in this one, there is none.
 26. It was submitted that the taxing officer in her ruling dated 23rd February 2022 found that there was no agreement relating to the services that were the subject of the bill of costs. The cases of *Evans Otiemo Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR and *National Bank of Kenya Limited vs Otiemo Ragot & Company Advocates* [2020] eKLR were relied upon. According to the Advocate, the burden was on the Respondent to prove the existence of the agreement and such burden was not discharged.
 27. The Advocate maintained that she performed work and was entitled to charge for the same and that the taxing officer rightfully found that she was entitled to charge and that the discharge of the charge provided for the subject matter as Kshs. 200,000,000.

Analysis and Determination

28. Based on the foregoing, the following two issues arise for determination:
 - i. Whether the decision of the taxing officer should be vacated.
 - ii. Whether the bill of costs should be struck out or re-assessed.
29. The crux of the Client's case is that the taxing officer misdirected herself in allowing the bill of costs to be taxed yet there was an existing agreement on payment of fees. The advocate denied the existence of the said agreement and stated that the bill of costs was rightfully taxed.
30. Section 45 of the *Advocates Act* provides as follows:
 - “(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-
 - (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
 - (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
 - (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.
 - (2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before



a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

- (a) that the agreement be upheld; or
- (b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
- (c) that the agreement be set aside; or
- (d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.”

31. Section 48 (1) of the *Advocates Act* provides:

“(1)Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.”

32. The Client has relied extensively on the above sections of the law to argue that the taxing officer misdirected herself in finding that there was no valid agreement as to fees.

33. However, I agree with the Advocate that the above sections of the Advocate’s Act do not apply to the instant case because it does not concern contentious business, which is defined as any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court, or any statutory tribunal or before any arbitrator or panel of arbitrators.

34. Secondly, what was before the taxing officer was a taxation of bill of costs. It is not a suit for recovery of costs. Consequently, the issue of 30 days’ notice to the client does not arise.

35. The Client also relied on the case of *Njogu & Company Advocates vs National Bank of Kenya Limited* [2016] eKLR to argue that where there is a valid agreement between the Client and Advocate, the bill of costs should not be entertained by the taxing master. However, it is worth noting that in that case, the Court struck out the application on the grounds that the agreement entered into was illegal. The Court stated as follows:

“In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate’s Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant’s aid as the appellant is estopped by his conduct from seeking the court’s intervention.”



36. The import of the above is that while yes, the Court can uphold agreements between clients and advocates, the same must exist and must be valid/legal. In the instant case, the Client has argued that there were valid agreements for the payment of fees.
37. The Advocate has argued that the agreements were for the transfer of certain parcels of land and not for the discharge of charge that is the subject of the bill of costs. There are two agreements on record. A handwritten one dated 4th September 2020 and a typed one dated 2nd December 2020.
38. I concur with the Advocate that the agreements relate to the transfer of various parcels of land and addition of directors to a certain company. There is no mention of the discharge of charge. Consequently, it cannot be said that there was a valid agreement between the parties on payment of fees for the discharge of charge.
39. In her Ruling, the taxing officer held as follows:
- “I have perused the agreement for legal fees between the applicant and Mr. Avtar Suri dated 4th September 2020 and the instructions dated 2nd December 2020. These agreements do not relate to the services that are the subject of the present advocate-client bill of costs, namely the discharge of charge. Consequently, the applicant’s advocate-client bill of costs is for taxation.”
40. In view of the foregoing, I find that the decision of the taxing officer should not be vacated as she rightfully held that there was no valid agreement between the parties.
41. Having established that the taxing officer rightfully allowed the taxation to proceed, I will now examine whether the bill of costs as taxed by her should be set aside or reassessed.
42. The Client has averred that the bill of costs should have been struck out as: it is exorbitant; it relates to an unfinished transaction and that stamp duty was charged where there is an exemption.
43. In the case of *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court stated as follows:
- “On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
- “where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.”
44. In the case of *Kamunyori & Company Advocates vs Development Bank of Kenya Limited* [2015] eKLR, the Court stated that:
- “Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside (see *Elmandry and Others v. Salim* [1956] EACA 313). As long ago as 1961,



the predecessor of this Court emphasized in *Arthur v. Nyeri Electricity* [1961] EA 492 that “where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional cases.”

45. Two errors in principle have been pleaded by the Client. The first is that the wrong value was ascribed to the subject matter. The Client has averred that the suit property is worth Kshs. 34,000,000 while the Advocate stated that it was worth Kshs. 200,000,000.
46. The Advocate stated that the value of the subject matter in the bill of costs was based on the value of the charge that was to be discharged; that he was acting for the chargor in the transaction and that the taxing officer rightfully followed the scale set out in Schedule 1 and the Second Scale of the Advocates Remuneration Order.
47. The bill of costs was for the discharge of charge and not a transfer in which case the value of the land would have come into play. The Client has not disputed that the charge was worth Kshs. 200,000,000. That being the case, I find that the value of the subject matter as stated in the bill of costs was correct.
48. In view of the foregoing, I find that the Client has not proven any error of principle that would warrant the striking out or reassessment of the bill of costs.
49. The Chamber Summons dated March 9, 2022 lacks merit and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

