



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO.523 OF 2013

MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

UPWARD SCALE INVESTMENT

COMPANY LIMITED.....1ST CLIENT/ RESPONDENT

LINMERX HOLDINGS LIMITED.....2ND CLIENT/ RESPONDENT

RICHWOOD LIMITED.....3RD CLIENT/ RESPONDENT

GATH CONSULTING ENGINEERS.....4TH CLIENT/ RESPONDENT

RULING

1. This ruling is in respect to the application dated 24th August 2018 in which the applicants/clients seek orders to set aside the decision of the Taxing Master made on 10th August 2018 and further, that the Bill of Costs dated 10th December 2013 be struck out and/or be remitted to another Taxing Master for taxation.

2. The application is supported by the affidavit of the 1st applicant's director **Joseph Gitau Mburu**, and is premised on the grounds that:

a) That the Learned Honourable Taxing Master erred in principle and in law in taxing the Bill of Costs whereas Linmerx Holdings Limited, Gath Consulting Engineers, Richwood Limited and Upward Scale Investment are distinct legal persons and as such separate Bill of Costs ought to have been filed against each company separately and taxed separately.

b) That as seen from the Bills filed by the Advocate herein, the advocates charged all the respondents whereas the work was purportedly done on behalf of the 3rd and 4th respondents.

c) That the Learned Taxing Master erred in principle and in law in upholding the advocate's wrongful action of billing for services rendered with no proof of whether she was instructed by any of the parties in the first place.

d) That the Learned Honourable Taxing Master erred in principle and in proceeding with taxation of the Bill in view of the misjoinder of persons and the joint demand for fees. The same ought to have been struck out.

e) That the Learned Honourable Taxing Master erred in principle in taxing the instructions fees without giving any reason founded on the law and in failing to find who among the four respondents was liable on the Bill and in finding that "The amount to be charged per client is the minimum of kshs 160,000/-, since the advocate acted for both parties the amount is reduced by 1/6 to be kshs 133,333 per client".

f) That the ruling does not identify who the two clients are out of the four sued thus the taxing master was overly biased in favour of the advocate.

g) That the Learned Taxing Master erred in law and in fact in allowing instruction fees whereas the advocate did not complete the transaction and the documents she drew were of no value to the client who had to seek alternative representation.

h) That the Learned Taxing Master erred in taxing an exorbitant and exaggerated fee for the instruction fees.

i) That the Learned Taxing Master erred in law and in fact in finding, that the advocate had been paid a sum of kshs 61,000 and in allocating the said amount to general account without bothering to find out who paid the said amount and/or whether the said amount was actually paid and/or illegally taken from sums paid to the advocate on account of a stamp duty.

j) That the certificate of taxation is incapable of execution for want of specification.

3. At the hearing of the application, Mr. Kingara learned counsel for the applicants submitted that the advocate never completed the transaction for the client and that the documents that were drawn were not executed by the parties in which case, no one benefited from the work. It was further submitted that the instructions fees awarded by the Taxing Master is also exorbitant as the Taxing Master did not give reasons for the amount that she awarded to the advocate.

4. Counsel submitted that the taxing master did not specify, who among the four respondents was responsible for paying the taxed costs. It was argued that the certificate of taxation was therefore incapable of execution for want of specification considering that the 4 applicants are distinct legal persons who cannot be held liable for the debt of the others.

5. Counsel cited Schedule 1 of the Advocates Remuneration Order (ARO) which provides for different charges for either the vendor or the purchaser and Rule 29 of Advocates Remuneration Order which provides that:

Where an advocate acts for both vendor and purchaser he shall be entitled to charge as against the vendor, the vendor's advocates charges and as against the purchaser, the purchaser advocates charges- such charges in each case reduced by a sixth.

6. Counsel also faulted the Taxing Master for disregarding the documents filed by the applicants in opposition to the taxation of the Bill of costs.

Respondent's case

7. The respondent/advocate opposed the application through the replying affidavit of **Mercy Nduta Mwangi** advocate, sworn on 1st October 2018 wherein she explains, in detail, the sequence of events and previous court proceedings that led to the filing of the Bill of Costs and the legal work that was undertaken by the advocate on behalf of the clients/applicants herein.

8. She avers that there is overwhelming evidence, through the previous court proceedings, that the applicants had retained the services of the advocate and maintains that the advocate is entitled to recover the legal fees for work concluded in 2011. The respondent's deponent further avers that the instant application is yet again another desperate attempt by the applicants to delay the conclusion of the taxation after many other unsuccessful applications that have had the effect of unnecessarily protracting the taxation process. In this regard the deponent highlighted and listed at least nine (9) previous unsuccessful applications filed by the applicants herein over the same subject matter and attached the rulings thereof to the replying affidavit as annexures "MNM8", "MNM9", "MNM10" and "MNM11".

9. At the hearing of the application, Miss Mwangi, learned counsel for the advocate/respondent submitted that the issue of whether or not the applicants instructed the advocate to act for them is an issue that had already been deliberated upon by this court through several rulings especially the ruling of Justice C. Kariuki delivered in 11th March 2016 which ruling the applicants had not appealed against.

10. On the claim that the advocate is not entitled to the fees because the Deed of Assignment was not executed by the parties, counsel cited the decision in **Hayanga & Company Advocates –vs- Rayal Garden Developers Limited** [2006]eKLR wherein the court considered the issue of the point at which an advocate is entitled to fees upon preparation of an agreement and held that:

“In the circumstances, as the sale transaction was not completed, the client believes that the advocate should not have been awarded the full instructions fee.....The proper consideration, whether or not the position prevailing in England applies here, is the ascertainment of the work actually done vis-à-vis the nature and extent of the instructions. In effect, if an advocate was instructed to prepare an agreement for sale, he would have earned his full instructions fee, as soon as the said agreement for sale was ready.”

11. On whether there was an error in principle in assessing the costs, it was submitted that the taxing masters assessment was below the minimum scales and cannot be said to be exorbitant or exaggerated. For this argument counsel relied on the decision in the case of **George Arunga Sino T/A Jone Brooks Consultants Limited –vs- Patrick J. O & Geoffrey D. O. Yogo T/A Atieno Yogo & Company Advocates**[2012]e KLR wherein it was held that :

“In our view, the Remuneration Order enacted by Parliament, in which the public is represented, and which presents the minimum allowed costs cannot be said to allow such high costs as would affect the public in their quest for justice.”

12. Counsel also highlighted the principles/conditions under which the High Court may interfere with the decision of the Taxing Master.
Analysis and determination

13. I have considered the application dated 24th August 2018, the respondent's response and the rival submissions presented by counsel for the parties herein. The main issue that falls for determination is whether the applicants are entitled to the orders sought in the application. The applicants seek the setting aside of the Taxing Master's decision rendered on 10th August 2018 on five principle grounds namely;

- a) *That the advocate/respondent did not carry out or complete the work/brief for which it was retained by the applicants to conclusion.*
- b) *That the respondent had already been paid the full fees and was therefore precluded from making any further claim for fees.*
- c) *That the documents that the applicants relied upon during taxation were not considered by the Taxing Master.*
- d) *The Taxing Master did not specify the amount payable by each of the applicants.*
- e) *That the amount awarded to the advocate was exorbitant.*

14. I note that the instant application is the exact replica of two similar applications that have already been determined by this court being Misc. Civil Application Nos. 517 and 518 of 2013 (hereinafter “**the earlier applications**”) involving the same advocate/respondent and the same applicants save for the 4th applicant. Apart from the noted difference in the 4th applicant, I note that the application herein is the same, word for word, as the earlier applications and the submissions presented by the parties are equally the same. That being the case, this court does not deem it necessary to go through the analysis and determination of this matter afresh having already rendered itself in the earlier applications. I find that it will be an exercise in futility and total waste of this court’s judicial time to engage in such an exercise. This court is of the humble view that it would have been appropriate for the parties herein to adopt the findings made in the earlier applications and then progress the matter to the next level or consolidate all the applications so that they can be determined as a unit once and for all.

15. In dismissing the earlier and similar applications, this court found that Taxing Master took into account the fact that the advocate acted for the parties and adopted the minimum scale bearing in mind the value of the subject matter. This court further found that having adopted the minimum scale applicable and having given the reasons for the amount awarded following the taxation, there is no reason to interfere with the decision of the Taxing Master.

16. Having stated that this application is the exact replica of the earlier applications, I find no reason to depart from the findings on the earlier applications and I similarly dismiss the instant application with costs to the advocate/respondent.

Dated, signed and delivered in open court at Nairobi this 12th day of March 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kingara for Miirie for the respondent

No appearance for applicant

Court Assistant – Sylvia