



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.519 OF 2013

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

VERSUS

UPWARD SCALE INVESTMENT CO. LTD.....1ST CLIENT/APPLICANT

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

RICHWOOD LIMITED.....3RD CLIENT/APPLICANT

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

RULING

1. The Advocate/Applicant Mwangi Keng'ara & Co. Advocates through a chamber summons brought pursuant to paragraph 11(2) of the Advocates Remuneration Order seeks the following orders:-

- a) THAT pending the hearing and determination of this Reference there be a stay of any further proceedings in this matter.
- b) THAT the Ruling of the Taxing Master dated 10th August 2018 be set aside and the Bill of Costs dated 10th December 2013, be struck out and/or dismissed with costs.
- c) THAT in the alternative, the Advocate/Client Bill of Costs dated 29/11/2013 be remitted back for taxation before any other Taxing Officer.
- d) THAT the costs of this Reference be awarded to the 1st, 3rd and 4th Client/Respondents.

2. The application is premised on grounds (a) – (i) on the face of the application and the same is further supported by the affidavit of Joseph Gitau Mburu sworn on 24th August 2018 to which the Advocate/Client has attached annexure **JGM-1 – JMG-3**.

3. The application is opposed. The Client/Respondent filed a Replying affidavit dated 24th September 2018 sworn on the even date by Mercy Nduta Mwangi annexing several annexures **MNM-1 – MNM-11** thereunder in support of the Respondents position.

4. The taxing master heard both parties and delivered her ruling on 10th August 2018. The Advocate/Client being aggrieved by the taxing master's decision preferred the present application through the Chamber Summons dated 24th August 2018. The Bill of Costs was taxed at Kshs.156, 237 less sum paid of Kshs.61, 000 leaving a balance of Kshs.95, 231.

5. I have perused the application; grounds in support and the Replying affidavit as well as the annexures thereto. The issues arising thereto for consideration can be summed up as hereunder:-

- a) **Whether the Advocate had instructions from the client?**
- b) **Whether the taxing master erred in law and principle while taxing the bill of costs?**
- A) **Whether the Advocate had instructions from the client?**

6. In challenging the taxation of Bill of Costs by taxing master between the Advocate and clients or party and party; the aggrieved party is required to file a reference from the taxing master's decision under paragraph 11 of the Advocates Remuneration order.

7. The Advocate/Applicant faults the taxing master's decision, alleging that she 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. It is further urged that there is an error as the Taxing master proceeded with taxation of the bill of costs, in view of the misjoinder of persons and the joint demand for fees. The Applicant has urged further the Bill of costs filed by the Respondent, the Advocate charged all the Respondents, whereas the work was purportedly done on behalf of the 1st and 4th Respondents and further when the Linmerx Holdings Ltd; Geomax Consulting Engineers; Richhood 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.

8. It is briefly contended by the Advocate/Applicant that there is lack of clarity on whom the Advocate was acting for. The Respondent on the other hand takes issues with the Applicant's arguments pointing out there is no confusion in this matter. It is contended by the Respondent that the issue has already been dealt with and determined by a court of competent jurisdiction. In Hccc No. 14 of 2013 by the retired Hon. Justice Havelock. I have perused the annexed documents to the Respondent's application and I have found, indeed, that issue was exhaustively dealt with. The matter is not only Res judicata but is engaging on the same issue, which if allowed would amount to relitigating on the same issue. There has to be a finality of proceedings and a party who has had his day in court should be barred from relitigating the same issue again. In view of the above I agree with the Respondent that the issue of the retainer was heard, proved and determined. Further in Hccc Misc C.A No. 516 of 2013 Hon. Justice Ogola on 27/6/2014 found the parties herein gave instructions to the Respondent to represent them. This issue was determined and cannot be relitigated. Similarly in Civil Appeal (Appl. No. 83 of 2015) consolidated with Civil Application No.88 of 2015 Upward Scale Investment Co. Ltd vs Mwangi Keng'ara Advocate the 1st, 2nd, 3rd and 4th Respondents in this application were the 1st, 2nd, 3rd and 4th Applicants the issue of retainerhip of the Respondent was upheld in regard to sale, purchase and transfer of parcel of land known as **L.R. No.209/309/1 (L.R. No.92457)** situated along Ngong Avenue Nairobi.

9. In the case of **Henderson vs Henderson ALL. E R (1948-80) at page 378** it was held:-

"The plea of res judicata applies, except in special cases not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgement, but of every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

10. In a situation where a plaintiff had filed several law suits related to the same subject matter, the court of Appeal in **Nicholas Njeru vs Attorney General & 8 others [2013] eKLR** (where the plaintiff had filed several law suits which were related to the same subject matter), the Court of Appeal stated;-

"[28] We agree with the trial Judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over which clan owned the suit property had long been determined."

11. Having considered the submissions by both advocates and upon perusal of the previous decision relied upon by the Respondent, I am satisfied that during the various proceedings before the High Court and Court of Appeal, the issues raised herein by the Applicant were raised, considered and a final decision made over the retainerhip of the Respondent by the parties in this application. I have no doubt that the court is barred from reconsidering the same issue. The Applicant is in view of the above wrong in raising the same issue which he had raised in several law suits in which the same subject-matter was finally determined. I find the Respondent proved in the previous matters that she had been instructed and acted for the Applicant and the issue of there being distinct legal persons do not arise as they were found to have given instructions to the Respondent, nor do the issue of misjoinder arise.

B) Whether the taxing master erred in law and principle while taxing the bill of costs?

12. The Advocate/Applicant contends, the learned honourable Taxing Master erred in principle and in law in taxing the instructions fees without giving any reasons founded on the law and in failing to find who amongst the four Respondents was liable on the Bill and in finding that *"The instruction fees is calculated on the consideration of Kshs.76, 000,000 and upon considering the amount of work involved and documents"*. The instructions fees incurred to Kshs. 800, 000 for each client. It is further contended that the taxing master erred in law and infact in allowing instructions fees whereas the Advocate did not complete the instructions and the documents she drew were of no value to the client who had to seek alternative representation. It is further urged the taxing master erred in taxing an orbitant and exaggerated fees for instructions and further erred in finding the Advocate had been paid the sum of Kshs.61, 000/- and in allocating the said suit to General Account without bothering to find out who paid the said amount and/or whether the amount actually paid and/or illegally taken from sums paid for Advocate as account of stamp duty.

13. The Taxing master in dealing with the Bill of costs before her, was called upon to determine the question of fees in accordance with the Advocates Remuneration order. The work of taxation of the Bill of Costs is solely the role of the taxing master. The issue of what to take off or not is usually supposed to be dealt with before the taxing master, who after consideration of the same comes with the reasonable figure bearing in mind the provisions of the law.

14. On the issue raised, on when an Advocate becomes entitled to instructions fees has been subject of various decisions in Kenya. 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 & Co. Advocates [2012] eKLR** the Court of Appeal followed the principle laid down in the case of **First American Bank vs Shah & others** where it was held:-

"The present court of appeal has on the other hand expressed the view the instruction fee is an independent and static item, chargeable only once and is not affected by the stage the suit has reached.....In my opinion, the full instruction fees to defend a suit is earned the moment a defence is filed and the subsequent progress of the matter is irrelevant to that item of fees."

The Court of Appeal in Kisumu went on to hold; "Lastly we are also of the view that the fact that the advocate did not continue with the case after he was given instructions and he prepared the documents that were filed in court, could not in law have affected his entitlement to the instruction fees."

15. In *Hayanga & Co. Advocate vs Rayal Garden Developers Limited* [2006] eKLR it was held as follows:-

"In the circumstances, as the sale transaction was not completed, the client believes that the advocate should not have been awarded the full instruction fee.....The proper consideration, whether or not the position prevailing in England applies here, is the ascertainment of work actually done vis-a-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 instruction fee, as soon as the said Agreement for Sale was ready."

16. The Applicant in support of his position, that an Advocate do not become entitled to instructions fees if full engagement is not carried out, relies on the case of *Mayers & another vs Hamilton & others, OPA Pharmacy Ltd vs Howse & McGeroge Ltd Kampala HCMA No. 13 of 1970* which is distinguishable from the present authorities relied upon by the Respondent, in that it relates to suits and proceedings in court, whereas the matter subject of taxation before taxing master herein relates to non-contentious matters which are regulated by **section 44 of the Advocates Act** which provides:-

"(2) An order made under this section in respect of non-contentious business may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode or partly in another, and may regulate the amount of remuneration with reference to all or any of the following, among other, considerations, that is to say—

- (a) The position of the party for whom the advocate is concerned in the business, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, and the like;
- (b) The place where, and the circumstances in which, the business or any part thereof is transacted;
- (c) The amount of the capital money or rent to which the business relates;
- (d) The skill, labour and responsibility involved therein on the part of the advocate;
- (e) The number and importance of the documents prepared or perused, without regard to length."

17. The taxing master in taxing the Bill relied on the case of *Paul Semogerere & Olum vs Attorney General – Civil Application No.5 of 2001 (unreported)* where the Court held:-

"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has no balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."

18. Further in the case of *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* (2006) eKLR *Ojwang, J* (as he then was) expressed himself *inter alia* as follows:

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him."

19. I now turn to consider whether the Applicant has demonstrated an error of principle and law in the tabulation of the instructions fees. It is contested by the Applicant that the instructions fees as taxed is exorbitant and exaggerated. In the taxing master's ruling dated 10th August 2018, the taxing master referred to the Agreement to subscribe for shares which showed the value of the contract as Kshs.76,000,000 as against the Employer (1st client) and the Consultant (3rd client). The taxing master taxed the fees per each of them to Kshs.760, 000 which is 1% of the value of the subject matter but increased the same to 800,000/-. The taxing master ended up reducing the Respondent's initial claim of Kshs.2, 280,000 to 800,000 per client. **Section 44(2) of the Advocates Act** deals with remuneration of Advocate for non-contentious matters, such as the matter, that was before the taxing master, in which it provides scale fees shall be calculated on the basis of

the amount set out in the deed of the purchase price.

20. The Taxing master in taxing the Bill of Costs applied schedule V Part II providing for fees in respect of Business the remuneration for which is not otherwise prescribed and where other relevant factors are to be considered in determining the fees. I have considered the taxing master's ruling subject of this reference and I find that the taxing master did not make any misdirection in assessing the instructions fees neither is the same exorbitant or exaggerated as the taxing master applied less than the minimum scale fees. I find as there was no agreement as to the fees, the taxing master followed the provisions of the law to the letter and awarded the minimum fees that is prescribed in the Advocates Remuneration order and made no error. In view of the above I find no basis for this court to interfere with the taxing master's decision as the decision was not based on an error of principle nor was the fees awarded manifestly excessive nor was it based on the wrong provisions of the law as to justify an inference, that it was based on an error of principle. The question of quantum on the other hand, are regarded as matters, which the taxing master are suitable to deal with, and the court should not interfere with except in exceptional cases. The exceptional circumstance has not been demonstrated herein to justify any interference.

21. Having considered all the pleadings, authorities and submission's by both parties, I find no basis or evidence that has been put forward by the Applicant, demonstrating that there was an error of principle or the costs allowed were manifestly excessive as to justify interference. I have noted the taxing master also noted and correctly so, the issues raised by the Applicant are issues which had previously been dealt with in previous suits by court of competent jurisdiction and final determination made. I therefore find that the taxing master was within her discretion and mandate to tax the bill of costs as she did. I am satisfied the application has not established any error of principle on part of the taxing master to justify reassessment or setting aside of the taxing master's decision of 10/8/2010.

22. The upshot is that I uphold the Taxing master's decision of 10/8/2010 and dismiss the Applicant's chamber summons dated 24th August 2018 with costs to the Respondent.

Dated, signed and delivered at Nairobi this 28th day of February, 2019.

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J .A. MAKAU

JUDGE