REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 591 OF 2014

(CONSOLIDATED WITH HIGH COURT CIVIL MISC. APPL. NO. 593 OF 2014)

THE ADMINISTRATORS OF THE ESTATE OF

SIMON MOKUA GICHURU.....APPLICANTS

VERSUS

AMELI INYANGU & PARTNERS ADVOCATES.....RESPONDENT

RULING

1. H.C. Civil Misc. Appl. No. 591 of 2014 and H.C. Civil Misc. Appl. No. 593 of 2014 were consolidated on 5th September, 2016. In each of the files, the Applicant has brought an application under Rule 11(1, 2 & 4) of the Advocates (Remuneration) (Amendment) Order 2014. Principally, the orders sought in both matters are:

a) That the court be pleased to vary and/or set aside the taxing officers ruling relating to all the items of the Advocate/client Bill of Costs.

b) That the court be pleased to re-assess the entire Bill and specifically all the items under the Advocate/client Bill of costs.

c) That in the alternative, the court be pleased to remit all the items under the Advocate/client Bill of costs for taxation before a different taxing master.

2. The background to this matter is that the Respondent, the firm of Ameli Inyangu Advocates represented the estate of the Late Simon Mokua Gichuru in the sale transaction of Land Reference No. 2/421 (original No. 2/1888/2) which was sold to Home Bay properties limited for the sum of Kshs.148,000,000/=. Prior to this sale, there had been failed attempts to sell the property to other interested parties. After the sale transaction to Home Bay Properties Ltd, a dispute arose between the Applicants and the Respondent over the fees payable to the Respondent's firm of Advocates. According to the Applicants' affidavit and further affidavit, it was mutually agreed between them and the Advocates that the fees payable was 1% of the purchase price. That following the dispute, the Advocates advised that the proceeds of sale or any portion thereof would not be released until the fees payable is properly ascertained. The Advocates proceeded to file three separate Advocate/client Bill of costs in Misc. Civil Appl. No.591 of 2014, No.592 of 2014and No. 593 of 2014. The contention by the Applicants is that the Advocates filed three separate Bills of costs in respect of a single transaction of the sale of the property herein; that the Bills of costs were grossly exaggerated and that fees were claimed for service not

rendered.

3. The Taxing master was castigated for exercising her discretion un-judiciously; taxing the Bills under Schedule 5 of the Advocates Remuneration Order, 2009 instead of Schedule 1 thereof ; unilaterally and without any basis allowing costs of alleged meetings and failing to consider the Applicants objection to the Bill as contained in the replying affidavit. It is further stated that the costs taxed are manifestly excessive and that the taxing masters ruling was premised on fundamental errors of principle. The Applicants further stated that the taxing master's letter which gave the reasons for her decision was received by way of post on 13th June, 2014 and the references made filed within 14 days as provided for by the law.

4. The application is opposed. It is stated in the replying affidavit that the references herein were filed outside the 14 days period provided for under paragraph 11 of the Advocates' Remuneration Order and without the leave of the court. It is further stated that there was no agreement on the fees between the Applicants and the Respondent. That upon conclusion of the instructions the Respondent presented to the Applicant an itemized bill of Ksh.8,730,000/= excluding VAT but the Applicants failed to pay or even state what amount they deemed reasonable and instead lodged a complaint at the Advocates Disciplinary Tribunal alleging professional misconduct. According to the Respondent, the three bills presented to the court in respect of the property the subject matter herein were for separate instructions, hence the separate fees charged. It was further stated that there was no error of principle on the part of the taxing master and that the applications herein should be dismissed with costs.

5. The references were argued by way of written submissions. I have considered the said submissions.

6. On whether the Notice of objection to the taxation was filed within time, the timelines are provided for by paragraph 11 (1) (2) of the Advocates Remuneration Order which states as follows:

> **"(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**
>
> **(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."**

7. The Applicants have exhibited a Notice of objection to the taxation which on the face of it reflects that the same was filed on 7th January, 2016. The same has a court stamp for the said date. Also exhibited is a copy of the payment receipt with the same date. There is also a follow up letter by the Applicants which bears the court stamp as received on 9th May, 2016. The copy of the said letter which is in the court file bears notations made by the taxing master which are also dated 9th May, 2016. By a letter dated 12th May, 2016, the taxing master informed the Applicants that the reasons for the ruling where as per the ruling dated 11th December, 2015. Although the Respondent's side has alluded to the notice of objection having been backdated, this appears to be mere speculation that is not supported by any evidence.

8. The ruling having been delivered on 11th December, 2015 and the notice of objection having been filed on 7th January, 2016 which is a period of 27 days, the objection notice was filed 13 days outside the period provided for by the law. The Applicant's side has relied on Order 50 rule 4 Civil Procedure Rules in regard to computation of time. The said provision stipulates as follows:

> **"4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending,**

delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction."

9. On the other hand the Respondent's side has argued that the Advocates Remuneration Order is a complete code in itself and that the Civil Procedure Rules are not applicable in this case. The Respondent relied on the case of **Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR:**

> **"The appellate jurisdiction of any court is a creature of statue and has to be exercised in accordance with the provisions of the statute creating it. With regard to advocates' bills of costs, we agree with the decision of Ringera J (as he then was) in Machira v Magugu[1] that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under rule 11 to a judge in Chambers."**

10. My view of the matter is that the Advocates Remuneration Order is the one applicable herein. However, the court takes judicial notice of the fact that many offices in Kenya are either closed or do not operate fully during the Christmas and New year period. The delay in filing the notice of objection is not inordinate and is excusable. The period from the date of the letter by the Taxing master dated 12th May 2016 giving reasons for the ruling to the date of the filing of the reference on 13th June, 2016, there was a delay of about two weeks. This delay is also not inordinate.

11. This court is also enjoined by Article 159 of the Constitution to administer justice without undue regard to technicalities of procedure. I will therefore turn to deal with the application on merits.

12. It is not in dispute that the sale was that of one property which was sold to Home Bay Properties Ltd after several failed attempts to sell to other interested purchasers. Were there several transactions relating to the same property including the aborted transactions in which some of them had partially executed agreements? The Respondent's side has argued that the two Bills the subject of the applications herein do not relate to the same transaction but several transactions relating to the same property. On the other hand the position taken by the Applicants is that the Bills emanate from a single transaction for the sale of the property in question.

13. Faced with a similar scenario, the court of Appeal stated as follows in the case of **Joreth Ltd v Kigano [2002] eKLR:**

> **"By the first ground thereof the respondent states that instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct."**

14. In the case at hand the fee for the taking instructions was taxed by the taxing master seven times in total. In this respect the taxing master misdirected herself. The instruction fee ought to have been charged once. As the Bills of costs were filed in separate miscellaneous files, the files ought to have been consolidated or all of them taken into account in order to avoid duplication. The instruction was single and not multiple, separate and distinct instructions.

15. The Applicants have argued that there was an agreement between the parties on the fees payable. I have gone through the 75 annextures exhibited in the replying of Wandia Gichuru sworn on 3rd October, 2015 in opposition to the Bills. I have not seen any agreement. The said annextures mainly comprise of

e-mail communications between the parties. There is nothing in the said e-mails that can be discerned as an agreement that amounts to an agreement as defined under Section 45 of the Advocates Act.

16.The two Bills the subject of the review herein were brought under paragraph No. 13 and Schedule 1 of the Advocates (Remuneration) (Amendment) Order. Paragraph 18 of the Advocates Remuneration Order 2009 provides for fees chargeable in respect of a conveyance which is of a non-contentious matter. Paragraph 18 (a) prescribes for remuneration to be as prescribed in Schedule 1. The taxing master therefore proceeded correctly in respect of the completed sale.

17. Paragraph 18(f) of the Advocates Remuneration Order provides as follows when it comes to incomplete transactions:

> **"In respect of any business referred to in this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift *inter vivos*, assents and instructions vesting property in new trustees, and any other business of a non-contentious nature, the remuneration which has otherwise not been provided for, the remuneration is to be that prescribed in Schedule 5."**

18. Under Schedule V part1, fees are assessed on hourly basis if there is an agreement between the advocate and the client or in the alternative assessed in accordance with part II thereof.

19. For the incomplete transactions, the taxing master was correct in applying Schedule V, save for the inclusion of the instruction fee which had already been taken into account in the sale to Home Bay Properties Ltd. The other issue is that although the taxing master referred to Schedule V and the case of **Joreth Kigano (supra)** there are no reasons given for arriving at the various figures for the items complained of e.g. what was the input of the advocate, the complexity of the matter etc. As stated in the **Joreth Kigano (supra)** case:

> **"the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances."**

20. For the above stated reasons, my conclusion is that the taxing master erred in principle in the areas pointed out in the foregoing analysis. Consequently, I set aside the ruling of the taxing master and remit the Bills for fresh taxation by a different taxing master. The Applications herein are therefore allowed as prayed in terms of prayer No. 2 & 4 of both applications. Costs to the Applicants.

Dated, signed and delivered at Nairobi this 11th day of April, 2017

B.THURANIRA JADEN

JUDGE