



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 119 OF 2013

STEVE KITHI NGOMBO T/A STEVE KITHI & CO. ADVOCATES.....APPLICANT

VERSUS

BERNARD ONKUNDI OTUNDO.....RESPONDENT

RULING

The respondent was retained by the applicant to act in a transaction involving the sell of Plot No. Kilifi/Mtwapa/403. The sale price was Kshs.33,500,000/=. The sale agreement was signed on the 21st of July 2011. The record shows that the respondent subsequently filed his bill of costs against each of the persons registered as one of the proprietors of the land. The applicant was one of the six purchasers in the transaction. The respondent's bill of costs was drawn at Kshs.2,784,473/=. The taxing master taxed the bill at Kshs.756,041,000/=. The taxation was done ex-parte and is the subject of the current application.

In his application dated 28.1.2015 the applicant is seeking orders that this Honourable court be pleased to enlarge the time for filing of the objection to the taxing officer's decision delivered on 5.3.2014 under Rule 1(i) of the Advocates Act, that the taxation herein be consolidated and heard together with Malindi High Court Misc. Cause No. 4 of 2014, that this court re-assess the fees due to the Advocates in respect of the bills of costs and make its findings. In the alternative, the bill of costs be remitted to a different taxing master. The application is supported by the applicant's affidavit sworn on 28.1.2015.

The respondent filed grounds of opposition as well as a replying affidavit sworn by Stephen Kithi Ngombo on 12th February, 2015. Parties agreed to determine the application by way of written and oral submissions. Mr. Masese, counsel for the applicant submit that the respondent was appointed to act for the applicant jointly with five other parties. There was only one sale transaction and only one instrument of transfer was prepared. There was only one title deed issued in favour of the six (6) purchasers. The applicant contends that the bill of costs as drawn was defective as it is against only one purchaser. The purchaser is a tenant in common with five others and his entitlement is only 1/6th, share of the purchased land. There was an error as the taxing master taxed the bill against the applicant. The bill of costs ought to have been struck out.

The applicant's counsel further maintains that there are other bills of costs pending taxation against the other purchasers. The bills are drawn at about Kshs.2.6 million and if taxed as drawn, the respondent will receive about Kshs.16 million against a purchase price of Kshs.33.5 million. There was only one transaction. This will lead to six (6) bills of costs and six (6) certificates of costs. Counsel further contends that the applicant was not served with the bill and he did not participate in the taxation. Taxation was scheduled for 22.1.2014 but the court was not sitting. Parties were advised to take fresh

dates. On 11.2.2014 taxation proceeded ex-parte. On 19.3.2014 the applicant requested for the reasons for the taxation but none has been given by the taxing master. The alleged service was done through G4S Company. Counsel relies on several authorities.

Mr. Kithi, counsel for the respondent vehemently opposed the application. Counsel maintains that the applicant was duly served with the bill of costs but did not attend in court on 22.1.2014. The applicant was once again served for the taxation on 11.2.2014 but still didn't attend court. There is no explanation for non attendance. An affidavit of service was duly served. Counsel further maintains that the Deputy Registrar in her Ruling at page three gave her reasons for the taxation. The request for such reason was made on the last day pending filing of a reference. This was simply an attempt to enlarge time for filing reference through the back door.

Mr. Kithi further contends that the applicant has filed several applications in relation to the same dispute. The sale agreement did not indicate that the purchasers were buying the land "jointly". There is no proof of joint instructions. The respondent is within his right to raise separate bills against each purchaser. The question of multiplicity of bills cannot be an issue. Before the bills were filled, a fee note was sent on 24.7.2012. One year later the bill of cost was filed after the fee note was not settled. Had the respondent mishandled the transaction, he would have been held responsible to each of the purchasers to the extent of Kshs.33.5 million each. There was no agreement as to who among the purchasers as to who was going to pay the bill.

The main issue for the determination is whether the Deputy Registrar lacked jurisdiction to tax the bills; whether the bills were erroneously taxed and whether the bill should be remitted to the taxing master and consolidated with other bills.

Order 10 of the Advocates (Remuneration) Order, empowers the Registrar, Deputy Registrar or any qualified officer to tax bills. The applicant contends that the bill ought to be struck out as it was drawn against one purchaser and not the entire six joint owners of the property. I do find that since the bill was placed before the taxing master, it was within the court's powers to tax the bill. The applicant does not deny that he is one of the purchasers. There is difference between a bill drawn against one purchaser and another drawn against six purchasers. The jurisdiction of the taxing master to tax the bill is not derived on the proper citation of the numbers of the purchasers. The court was not informed that there were six purchasers instead of one. The applicant should not be seen to be alleging that it was the other purchasers who were to pay the bill. The taxing master did not have all the other bills on the date of taxation. The issue as to whether there should be one bill or six was not raised before the taxing master. I do find that the taxing master had jurisdiction to tax the bill. The request to have the bill struck out is hereby disallowed.

Currently, there are other bills against the other purchasers. The sale agreement shows that the vendor was CREEK MARKETING AND DEVELOPMENT LIMITED while the purchasers were : -

1. BERNARD ONKUNDI TUNDO
2. BARNABAS KIPRONO BWAMBOK
3. KEPHA NYAMONGO OENGA
4. DUNCAN OYARO
5. KENNETH O. ESAU and
6. JAMES KAMBO MUTHUSI

It is clear from the pleadings that the transaction was finalized. The purchasers obtained a loan and charged the property to a bank in order to pay the purchase price. The respondent handled the sale transaction as well as the mortgage transaction. The bill of costs comprised charges for both components

of the work. The taxing officer taxed the drawn bill of Kshs.2,784,473/= at Kshs.756,,041.60. The respondent is seeking a further Kshs.2,784,473/= from each of the other five purchasers. Given the background of the dispute, I do find that the taxing master was within her powers to tax the bill. The taxation is not erroneous. It is upto the applicant to point out the specific areas he is challenging to enable this court to re-evaluate the bill. The presumption has been that the bill ought not to have been taxed at all.

It is undisputed that the application has been brought late in the day. The proof of service of the hearing notice is by the affidavit of service of Alfred Ouma dated 10th February, 2014 filed on 11th February, 2014. He avers that he served the notice via courier services on 28th January, 2014. The draft bill was served in the same manner and the applicant/client has no qualms about it. The respondent/advocate contends that he was not obligated to serve notice of the second hearing date as neither the client nor his advocate attended court the first time. As per **Rule 73(1) of the Advocates (Remuneration)** order a party who has not appeared in person or by advocate needs not be served. It provides that: -

“It shall not be necessary for notice of taxation of costs to be given to a party against whom such costs are being taxed in any case in which such party has not appeared in person or by advocate.”

The circumstances of this matter are such that that the taxing master did not sit on the scheduled date and did not note the appearance. However, the judicial officer handling the matter made an order that a notice should issue. The affidavit of service of **Alfred Ouma**, dated 10th February, 2014, in my view, was proof enough of service. On the other hand, as the taxation proceeded ex-parte, a notice on the date of delivery of the ruling ought to have been issued to the applicant/client. The learned judge in **Rozaah Akinyi Buyu v I.E.B.C. (supra)** found that the explanations and reasons for not filing the reference on time were not plausible yet she was granted an extension of time to file the reference based, inter alia, on the fact that the applicant was not notified of the date of the ruling.

In extending the time, I would treat the application as the filed reference and as the respondent/advocate has filed a response it would justify its treatment as such. This would then save judicial time. The applicant/client is requesting this court to interfere with the decision of the taxing master. Taxation is an exercise in judicial discretion hence to interfere with this discretion it must be shown that the taxing officer erred in principle or the awarded fee is manifestly excessive high or low as to indicate a misapplication of a principle. The court of appeal in **Premchand Raichand Limited & Another vs Quarry Services of east Africa Limited and Another [1972] E.A. 162** held 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, and 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.”

Ringera, J (as he then was) held in **First American Bank of Kenya Limited v Shah and Others [2002]E.A.** that: -

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.”

Was it the applicant/client who individually instructed the respondent/advocate or was it a jointly venture? It is a fact that the sale agreement did not include the term jointly. It is also a fact that one title deed being a 1/6th undivided share for each purchaser was obtained. It is without dispute, based on the documents in the filed bill of costs (paginated as **064 and 203**), that the purchasers advocate, being the respondent/advocate, prepared the transfer document. He was therefore well aware of the type of and quantity of share in the property each purchaser was entitled to. The respondent/advocate has stated that

his obligation to each purchasers would have place a burden on him at a cost of Kshs.33.5 million in the even he was professionally negligent. The whole transaction was pegged on the property purchase price of Kshs. 33.5 million. It is therefore not true that the respondent/advocate would be obligated to each purchaser at the said amount of Kshs.33.5 million. Rather it would have been that he would be obligated to them jointly for that figure of Kshs.33.5 million or in other terms as per the share they were worth. In my view therefore the taxing master failed to consider the 1/6th share as per the title deed on page 024 of the documents supporting the bill of costs. This warrants interference but only to the extent that the taxed bill be on a pro rata basis and for avoidance of doubt, it means that each purchaser ought to shoulder a 1/6th of the taxed bill of costs.

Given the dispute herein, I do find that it is not prudent for this court to re-assess the bill and make a finding on the correct fees payable to the respondent. There was no substantive submissions by either party on the way the taxing master evaluated each and every item. The best way forward is to remit the bill for taxation by a new taxing master and set aside the taxed certificate of costs issued by the previous taxing master. This will give the parties ample time to assess the bills and see what is agreed upon and what is not. It is evident that the respondent did the work and has not been paid so far. Whether the bills will be taxed as one or separately will be decided by the taxing master. The taxing master shall decide as to whether the respondent is entitled to fees from each purchaser for his 1/6 share or from a joint payment. The decision of the taxing master on that issue should be immediately followed by taxation of the bill or bills. Thereafter, any aggrieved party can approach this court by way of reference against the decision of the taxing master. Order 62 of the Advocates Remuneration Orders empowers a taxing master to consider the costs of an advocate where there are two or more defendants. My view is that the same order applies to uncontested matters involving more than one purchaser.

The applicant and his colleagues are now the registered proprietors of the property. The respondent did all the work and there is no evidence that any deposit was paid. It is the same purchasers who failed to respond to the respondent's bills. I do find that whatever the outcome of the taxation, the respondent will still be entitled to some payment. It will only be fair that while the parties are processing the bill or bills, the respondent should be paid part of his fees..

I do hereby allow the applicant's application dated 28.1.2015 in the following terms: -

- i. The applicant to deposit a sum of Kshs.760,000/= in court within fourteen (14) days hereof..
- ii. The finance officer Malindi Court to release a sum of Kshs.500,000/= to the respondent, Steve Kithi Ngombo T/A Steve Kithi Ngombo & Co. Advocates being a deposit of his fees.
- iii. This bill and all other pending bills of costs relating to the same transaction be placed before the Deputy Registrar for taxation.
- iv. For purposes of guidance, the Deputy Registrar should note that each of the purchasers is entitled to 1/6th share of the property and not the entire property.
- v. The issue as to whether instructions were jointly or separately issued shall be determined by the deputy Registrar before taxing the bills.
- vi. Due to his indolence, the applicant shall bare the costs of this application.

Dated and delivered in Malindi this 17th day of March 2016.

S. CHITEMBWE

JUDGE

