REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 265 OF 2011

JOHN MAINA MBURU T/A John Maina Mburu & Co. Advocates……PLAINTIFF

VERSUS

GEORGE GITAU MUNENE (Sued as administrator of the Estate of

SAMUEL GITAU MUNENE)…..…….....……1ST DEFENDANT

IAN MUKARO MUNENE…….…….....……...2ND DEFENDANT

JANE GATHONI MUNENE…….....……3RD DEFENDANT

JOAN MUGURE MUNENE…….....…4TH DEFENDANT

RULING

1. John Mburu & Company Advocates are a firm of Advocates practicing as such at Nairobi. In or about April, 2010, the said firm of Advocates (hereinafter "the Respondent") was instructed by the 1st Applicant, as the Administrator of the Estate of the late Samuel Gitau Munene to undertake and offer legal services including the rectification of the grant issued in **succession cause No. 1511 of 2007** and act in a Joint Venture Agreement (JVA) relating to the sub-division and development of L.R. No. 8912, which was a property subject to the aforesaid succession.

2. However, in or about 2011, the Applicants decided to withdraw the said instructions and the parties executed an agreement as to the payment of legal fees to the Respondent. That agreement was christened "***Acknowledgment and Undertaking***" and was executed on 16th February, 2011. In the said Agreement, the Respondent was to be paid Kshs. 1,000,000/- in respect of Joint Venture Agreement (JVA) and Kshs.13,477,000/- for the Succession Cause. The Agreement indicated that the fees payable was ***"subject to negotiation or arbitration between the parties".***

3. Thereafter, the 1st Applicant paid the Respondent Kshs.1,000,000/- but failed to pay the balance of the fees despite demands. Pursuant thereto, the Respondent filed this suit on 14/07/14 and claimed the sum of Ksh. 13,477,010/- as the balance of his fees. The Applicants filed defenses whereby they contended, *inter alia*, that the fees of Ksh. 1,000,000/- in respect of Joint Venture Agreement had been settled and that the sum of Ksh. 13,477,010/- in respect of the Probate and Administration matter was subject to negotiation or arbitration. The Applicants also contended that the sum was exorbitant.

4. On 14th January, 2014, the parties recorded a consent in this suit in the following terms:-

"Order: By consent-

1. **The Plaintiff to file and serve an advocate/client bill of costs herein within (14) days of today.**
2. **Upon taxation of the bill of costs, the matter to be fixed for mention before a Judge.**
3. **Costs in the cause."**

5. Pursuant thereto, the Respondent drew and filed in court an Advocate/client Bill of Costs on 16/01/2014. That bill was taxed before Hon. Wangila who delivered her ruling on 21st May, 2015 assessing the costs at Kshs.21,782,728/-. Aggrieved by the taxation, the Applicants lodged their respective references dated 5th June 2014 and 11th June 2014 respectively. This ruling is in respect of those references.

6. According to the 3rd and 4th Applicants Notice of Motion which was supported by the Affidavit of Jane Gathoni sworn on 5th June, 2014; the taxing master failed to apply the correct principles in taxing the bill of costs; that the court could only reduce the amount of Kshs.13,477,010/- agreed by the parties; ***"that subject to negotiation or arbitration***" that meant the amount was only to be reduced and not increased; that **Rule 13 of the Advocates Remuneration Order** was not applicable in this case as there was an agreement on fees in force and that the amount of Kshs. 1 million agreed on the Joint Venture Agreement was adequate.

7. In their written submissions ably hi-lighted by Mr. Makori, the 3rd and 4th Applicants contended that the value of Joint Venture Agreement was Kshs. 160 million for which the Respondent was entitled to 0.8% fees but had agreed for fees of Kshs. 1 million; that by virtue of **Section 45 of the Advocates Act**, the Respondent was bound by the fees agreement between the parties and that the figure of Kshs. 13.477,010/- in the agreement could only be negotiated downwards. Counsel relied on the cases of **Omulele & Co. Advocates vs. Syncresins Ltd (2013) eKLR** and **D.N. Njogu & Co. Advocates vs. NBK (2007) eKLR** in support of his submissions. Counsel therefore urged that the reference be allowed.

9. As regards the 1st and 2nd Applicants Chamber Summons dated 11th June 2014: the Applicants sought the setting aside of the taxation and for an order that the bill of costs be taxed afresh. The summons was supported by the Affidavit of George Gitau Munene sworn on 11th June, 2014. The 1st and 2nd Applicants contended that; the taxing master had no jurisdiction to entertain a figure exceeding the amount claimed in the suit; that since the amount in the Plaint was based on an agreement by the parties, the amount in the agreement was the ceiling; that the taxing master failed to ascertain the services rendered by the Respondent; that the taxation was based on superficial values; that the Respondent had not claimed any amount in respect of the Joint Venture Agreement in this suit, and the item in respect thereof was wrongly included in the Bill of costs; that the taxing officer erred in holding that the Respondent acted for the Applicants at the time of confirmation which was not the case.

9. In their written submissions ably hi-lighted by Ms. Thongori, the 1st and 2nd Applicants contended that there were only 3 issues for consideration; on the jurisdiction of the taxing master on the maximum amount claimed, the item on the Joint Venture Agreement and whether she taxed the Bill of costs in accordance with the law, it was submitted that the limit of the claim was Kshs. 13,477,010/- as agreed in the plaint; that the item on Joint Venture Agreement was wrongly taxed; and that there was an error in principle in the taxation. Counsel urged that the summons be allowed as prayed.

10. On his part, the Respondent filed two Replying Affidavits sworn on 27th June, 2014. He contended that there was no dispute as to his having offered legal services; that the only dispute was the quantum of fees payable; that the amount of Kshs. 13,477,010/- was not the upper limit

but the minimum; that by filing their defenses to the suit, the route of negotiation and arbitration had been shut on the Applicants; that the consent to tax the bill of costs was a contract binding on all the parties; that having taken the route of taxation, the Applicants could not again seek to rely on the agreement; that the taxing master had properly exercised her discretion in the taxation and that in the circumstances her decision should not be disturbed.

11. In his written submissions ably hi-lighted by his Counsel Ms. Owuor, the Respondent submitted that by entering into the consent of 14/1/14, the parties had set aside the fee agreement; that in taxing the bill, the taxing master was to be bound by the usual law of taxation and there was no limit to her discretion except as provided for in the law; that the instructions was a block claim and could not be severed; that **Section 49 of the Advocates Act** envisaged amendments of pleadings where the amount taxed is higher than the amount claimed in the Statement of Claim. According to Ms. Owuor, the taxing officer had not made any error of principle to warrant interfering with her decision. She urged that the References be dismissed with costs.

12. I have carefully considered the Affidavits on record, the written submissions and oral hi-lights thereon. I have also considered the authorities referred to by Learned Counsel. These are references on the decision of the learned taxing master dated 21st May 2014 on the Respondents Advocates Bill of Costs dated 15th January 2014.

13. In the case of **First American Bank of Kenya vs. Shah and others (2002) EA 64** at page 69, the court held 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 error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle (see Steel Construction Petroleum, Engineering (EA) Ltd –vs- Uganda sugar factory (1970) EA 141 (Emphasis added).

14. In the leading case of **Joreth Ltd vs**. **Kigano & Associates (2002) 1EA 92,** the Court of Appeal was categorical that a Taxing Officer in assessing costs to be paid to an advocate in an advocate client bill of costs is exercising judicial discretion. That such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law.

15. On the basis of the foregoing, this court cannot purport to replace the discretion of the taxing master with its own. It will have to be satisfied that in taxing the bill and arriving at the impugned decision, the taxing master committed an error of principle or that the amount of fees awarded is excessive to amount to an error in principle or that the taxing master applied the wrong principles of law.

16. The Applicants contended that **Rule 13 of the Advocates Remuneration order** was inapplicable, that there having been an agreement on fees the taxing master was barred by **Section 45 of the Advocates Act** from undertaking taxation to exceed the sum agreed of Kshs.13,477,010/- as that was the maximum sum awardable. The Applicants further contended that the term "***subject to negotiation or arbitration"*** meant that the amount of Kshs.13, 477,010/- contained in the agreement of 16th February 2014 could only be decreased and not increased.

17. My understanding of the term ***"subject to negotiation or arbitration"*** meant that the amount of Kshs. 13,477,010/- agreed by the parties was not conclusive. The parties had not agreed on that sum as the final and conclusive figure. They were open to discussion by way of negotiation or arbitration. It is only after such negotiation or arbitration that the final figure payable by the Applicants could be agreed or arrived at.

18. Indeed that is one of the reasons why Odunga J declined to allow the Respondent's application dated 14th July 2011 for summary judgment. In his ruling of 28th May 2012, the judge

held:-

"By indication that the figure of Kshs. 13,477,010.00 as being subject to negotiation or arbitration; it was a clear manifestation that after such negotiation or arbitration the figure ultimately arrived at could be the same figure or a figure in excess or less than the said amount"

19. This now brings me to the Applicants contention that **Rule 13 of the Advocates Act** was inapplicable and that the amount to be taxed should not have exceeded the sum of Ksh.13, 477,010/- indicated in the parties agreement on fees dated 14h February 2011. Firstly, the wording in the Agreement was very clear that the 1st Defendant had undertaken to pay legal fees to the Respondent or the files he was dealing with as follows:-

" 1) Beta village Ltd Kshs. 1,000,000/-

2) Probate & Administration Kshs. 13,477,010/- subject

to negotiate or arbitration between the parties".

20. Nowhere in the entire document was there an indication that the said fee was either the minimum or the maximum. The figure was left to both parties to negotiate or arbitrate. In my view, by there being no indication that the figure was the maximum or ceiling, it cannot be correct to state that the said figure was the maximum. The use of the words "subject to negotiation or arbitration" left it open to either of the parties to negotiate the figure downwards or upwards. Accordingly, it is not correct to argue that the taxing officer did not have jurisdiction to award an amount in excess of the figure of Kshs.13,477,010/- indicated in the Agreement of 16th February, 2011.

21. Together with the foregoing was the submission that the taxation offended the provisions of **Section 45 of the Advocates Act and Rule 13 of the Advocates Remuneration Order. Section 45 of the Advocates Act** provides:-

"45(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 contentions business make an agreement fixing the amount of the advocate's remuneration in respect thereof;***
b. **…**
c. **…**

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."

Rule 13 on its part provides:-

"13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client applies for taxing of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bills of costs before proceedings with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form."

22. I agree with the submissions of Ms. Thongori on the application and effect of **Section 45 of the Advocates Act**. Where there is a fee agreement between an Advocate and clients, there is no jurisdiction to tax a bill of costs. The decision of **D. N. NJOGU & Co. Advocates vs. NBK (2007) eKLR** is instructive in this regard. In that case, Warsame J, as he then was, held:-

"If two parties willingly agree to conceive an idea and the same is put into writing, signed accepted and executed by the parties, then the court can only be called to intervene in distinct situations……..

It is provided under section 45(6) of Cap 16 that where there is an agreement, the costs of an advocate shall not be taxed unless there is fraud, illegality and/or coercion in the agreement……"

23. I fully agree with that exposition of the Law. However, in the case before me, there was no agreement as such by which **Section 45** aforesaid would apply. Firstly, as I have already found the agreement of 16/2/11 was not certain. The same left the issue of the final figure payable as fees open to negotiation or arbitration. When there was no agreement, the Respondent came to court. Secondly, the parties themselves entered into a consent to refer the matter to taxation as recorded on 14th January, 2014. By referring the matter to taxation, the parties in effect set aside the agreement of 16/2/11 and there could be no further reference to that agreement. Finally by entering appearance and delivering defences in this suit, the door to negotiation or arbitration of the fees in terms of the agreement was firmly shut on the Applicants. Accordingly I hold that the taxation of the Respondents bill of costs did not breach **Section 45 of the Advocates Act.**

24. As regards the jurisdiction of the taxing master in that taxation, once the matter was referred to the taxing master by the consent of the parties and by an order of the court, the taxing master was subject to the general law and principles regarding taxation of costs under the law. In this regard, I hold that there was no breach of **Rule 13 of the Advocates Remuneration Order** by the taxing master as argued by the 3rd and 4th Applicant. Indeed, I agree with Ms. Owuor's submission that once the bill of costs dated 15th January 2014 was presented before her for taxation, the taxing master was a liberty to tax the same in terms of **Section 49 of Cap 16**. Accordingly, the taxing master could increase or decrease the sum contained in the plaint depending on how she exercised her discretion in assessing the costs. Further, the value of the subject matter was not the sum of kshs.13,477,010/- claimed in the Plaint but the services offered by the Respondent.

25. The Applicants submitted that the taxing master exceeded her jurisdiction when she taxed Item No. 2 in respect of the Joint Venture Agreement. They contended that the fee in respect thereof was Kshs. 1 million which had been paid and acknowledged by the Respondent. The Respondent on his part argued that, since the instructions by the Applicants was in block, the instructions in respect of the Joint Venture Agreement could not be severed from those touching on the Probate and Administration files.

26. I have looked at the Bill of Costs dated 15th January 2014. Item No. 2 was in respect of the Joint Venture Agreement. I have also perused the agreement dated 16th February, 2011. It is clear from the said agreement that the same was fees in respect of two categories of instructions. Firstly, services offered in respect of Beta Village Ltd (Joint Venture Agreement) - being Kshs. 1,000,000/- and secondly, files in relation to Probate and Administration being Kshs. 13,477,010/-. The latter amount was made subject to negotiation or arbitration between the parties. The amounts payable in respect of the two services was indicated separately. This, in my view, meant that the issue and/or instruction on Joint Venture Agreement was separate from the issue of Probate and Administration.

27. In paragraph 4 of the plaint dated 13th July, 2011, the Respondent himself pleaded that his claim was in respect of legal services offered on instructions given by the Applicants to, *inter alia;*

> "(***i) Rectification of the grant issued in Succession***
>
> ***Cause No. 1511 of 2007.***

(ii) A Joint Venture Agreement relating to the sub-division and development of L.R. No. 89/2 being properly subject matter of the succession cause afore stated".

28. Further, the Respondent admitted in the Plaint of having been paid Kshs. 1,000,000/- and pleaded that there was a balance of Kshs. 13,477,010/- which was then the subject of this claim.

29. To my mind, the cumulative effect of what is set out in paragraphs 27 and 28 above, is that there were separate instructions in respect of which, there was separate fees agreed upon. The fees on the Joint Venture Agreement was agreed at Ksh. 1 million and was not subject to any negotiation as was for the Probate and Administration files. It is clear that upon paying the Respondent Ksh. 1 million, the Applicant's did not make any further payment. This may have been caused by the clause ***"subject to negotiation or arbitration."*** Appearing next to the fees of Kshs.13,477,010/- appearing on the Probate and Administration files. In this regard, I am of the view and so hold, that the fee on the Joint Venture Agreement had been agreed with finality in the fee agreement of 16th February 2011.

30. In this regard, taking into consideration the terms of the fees agreement dated 16th February, 2011, the conduct of the parties and the Respondent's claim as set out in the Plaint dated 15th July, 2011, the fees on Joint Venture Agreement was not in dispute and was not open to be referred to taxation. Accordingly, I agree with the Applicants that the item No. 2 of the Bill of costs was wrongly included in the bill and was not subject to taxation. I accordingly strike out the said item and the sum of Ksh. 2 million awarded to the Respondent by the taxing master.

31. The final complaint by the Applicants was that the taxing master failed to apply the principles of taxation and that the sums awarded were not justified. Under **Schedule VI of the Advocates Remuneration Order clause (1),** it is provided in the proviso that:-

> ***"(i) the taxing officer , in the exercise of this discretion shall take into Consideration……the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduction of the proceedings, a direction of the trial judge, and all other relevant circumstance".***

32. Looking at the ruling, it is clear that the taxing master was alive to the foregoing principles. She considered the value of the subject matter as presented to her, the complexity involved, the duty and the care on the part of the Respondent, in arriving at the figures she awarded. The Applicants complained that the taxing officer misapprehended that the Respondent acted at the time of confirmation yet the grant had been confirmed. In the ruling the taxing master stated:-

"He acted, at the time of confirmation of grant only and did not pay any other role."

33. I have noted that that is not what was submitted by either the Applicants or the Respondent before the taxing master. To my mind, this was an honest mistake in that all the submissions before her indicated that the Respondent acted in respect of the rectification of the grant to include some property. I will not fault the taxing master on this as it is not clear how this affected her discretion in awarding the costs. The duty and care to be undertaken at confirmation and rectification in my view is the same.

34. As regards the case of Jane **Gathoni Muraya vs.Abuodha & Owino Advocates Misc. Apl. No. 439/10 (UR)** relied on by the 1st and 2nd Applicant, that case is not applicable herein. In that case, the Advocate acted on behalf of only one (1) beneficiary to preserve the estate and for provision for three minor dependants. The court also found that even if that beneficiary was successful he would only be entitled to a portion of and not the whole of the estate. In the present case, the instructions to the Respondent although at the rectification stage, encompassed all the beneficiaries and therefore the entire estate.

35. In the circumstances, I do find that there was no error of principle committed by the taxing master. Further, the amounts awarded were reasonable and not excessive in the circumstance of the case. I find nothing to permit this court to interfere with the discretion of the taxing master.

36. Accordingly, the Applicants' are only successful in respect of item No. 2 on the Joint Venture Agreement. Accordingly, the references are dismissed and the taxation of the taxing master dated 21st May, 2014 varied accordingly.

37. As regards the increment of the amount by ½, I see nothing unusual with that. This was an advocate client bill of costs. Under Schedule VI clause B, it is provided that the amount provided for or awarded shall be increased by one half (½).

38. In this regard, the taxation of the taxing master dated 21st May 2014 is varied as follows:-

a) Total amount awarded		**Ksh. 13,122,125**
Less Item No.2.		**Ksh. 2,000,000**
Amount of taxation		**Ksh. 11,122,125/-**
b) Increased by ½	**=**	**Ksh. 5,561,062.5**
Total	**=**	**Ksh. 16,683,187.50**
c) V. A. T 16%	**=**	**Ksh. 2,669,310**
Grad Total	**=**	**Ksh. 19,352,497/50**

39. Accordingly, the taxation of the Respondent Bill of Costs of 5th January, 2014 is maintained at Ksh. 19,352,497/50. The Applicants having been only partially successfully, I will award no costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY 2015.

A. MABEYA

JUDGE