



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. E018 OF 2021

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014

TAXATION OF ADVOCATE AND CLIENT BILL OF COSTS

BETWEEN

LUBULELLAH & ASSOCIATES.....ADVOCATE/APPLICANT

VERSUS

SWANYA LIMITED.....CLIENT/RESPONDENT

IN

IN THE MATTER OF AN AGREEMENT FOR SALE OF LAND REFERENCE NO. 209/10669/1

(REGISTERED AS GRANT NUMBER I.R. 43343/6) SOUTH B NAIROBI

BETWEEN

SWANYA LIMITED (VENDOR) AND FASTLAN (K) LIMITED (PURCHASER)

RULING

1. This is a Chamber Summons application dated 16/12/2021 brought under paragraph 11 (2) of the Advocates Remuneration Order 2014 for seeking the following orders:

1. THAT the decision/ruling of the Taxing Officer delivered on 25/11/2021 on the Respondent's Advocate-Client of costs dated 8/02/2021 be set aside as it relates to the reasoning and determination pertaining numbers 1,2,23,61,64 and 67 of the Advocate-Client Bill of Costs dated 8/02/2021.

2. THAT the Honorable Court be please to re-assess in the instruction fees due to the Advocate/Respondent in respect of item No. 1 of the Advocate -Client Bill of costs dated 8/02/2021 and make a finding on the same.

3. THAT in the alternative and without prejudice to the foregoing this Honorable Court be pleased to remit the Advocate-Bill of Costs dated 8/02/2021 for review and reconsideration by the Taxing Officer with appropriate directions in respect of items 1, 2, 23, 61, 64 and 67 thereof.

4. THAT this Honorable Court be pleased to adjust the figures and re-assess the costs due to the Advocate/Respondent in the taxation cause as is presented in the Client/Applicant's submissions dated and filed on 18/10/2021.

5. THAT the costs of this application be provided for.

2. The application is premised on the grounds stated in paragraphs 1 to 8 on the face of the application and the annexed affidavit sworn on 16/12/2021 by Abdirizak Roba; counsel from the firm representing the Applicant/Client.

3. Before filing the reference, the Respondent gave Notice of Objection to the Taxing Officer on 3/12/2021 Objecting to the ruling and alerting the Taxing Officer of intention to file a reference. This was nine days after the Taxing Officer delivered their ruling.

4. When the Respondent filed the Chamber summons, he deponed that the Taxing Officer delivered a ruling on 25/11/2021 relating to Items, 1, 2, 23, 61, 64 and 67 of the Advocate-Client Bill of costs dated 8/02/2021. The Application seeks to have the Honorable Court to adjust the figure, reassess the fees due and find the proper sum due to the Advocate/Respondent in the taxation. The Respondent's Advocate-Client Bill Costs dated 8/02/2021 arose out of the instructions that the Applicant/Client gave to the Advocate Client to represent him in a conveyancing transaction for the sale of land reference number 209/106691/1 between Swanya Ltd and Fastlane (K) Limited at a purchase price of Kesh 45,000,000.

5. He deponed that the Taxing Officer delivered a ruling on 25/11/2021 taxing the Respondent's Bill of Costs at Kes 706,434.60 inclusive of VAT and disbursements. Further that the client/applicant objected to the Bill of Costs and filed its Notice of Objection seeking this Honorable Court's intervention with the Taxing Officer's decision. The application was opposed by way of grounds of opposition dated 10/02/2022 by the Advocate-Respondent. He deponed that the Notice of Objection to taxation & the substantive Chamber Summons Application are fatally defective and incompetent since they were filed outside the time permitted by the law and no leave of extension was sought. Further that the Applicant has not applied for extension of time to file the application out of the mandatory timelines. That the Applicant has not given notice to the taxing officer of the items he objects to. Further that no Notice of Objection was filed within 14 days of the delivery of the decision of the Taxing Officer contrary to paragraph 11(1) of the Advocates Remuneration Order. He avers that the client/applicant's Notice of Objection dated 3/12/2021 was filed in February 2022.

6. He contends that the Court lacks jurisdiction to entertain the client/applicant's application nor to grant prayers sought in therein. Further that the client/applicant has not advanced any reasons that would make the court grant a stay nor shown that the Advocates/Respondents will be unable to pay if the reference succeed.

7. Both parties agreed to dispose of the chamber summons by way of written submissions. The respondent /advocate filed his on 10/02/2022 and the applicant filed theirs on 17/02/2022.

8. The parties' respective submissions mirror the depositions in their sworn affidavit and the Grounds of Opposition filed by the Advocate/Respondent. The client/applicant, is seeking the setting aside of the taxing officer's decision of 25/11/2021 and or have it recommitted for review and reconsideration for six items numbered as 1, 2, 23, 61, 64 and 67. The client has also asked the court to readjust and re-assess the costs due to the Advocate/Respondent. He contends that the taxing officer made errors of principle which are amenable to review and/or setting aside. Further that the deputy registrar failed to consider the fact that the applicant/respondent had paid a substantial part of the instruction fees and despite evidence showing so.

9. The applicant-client on items 23, 63, 64 and 67 avers that the taxing officer made an error of principle since there was no evidence provided by the respondent/advocate to show that they had made the payments for land rates, and stamp duty declaration, assessment and payment but the applicant has adduced evidence to show that they had paid for these items.

10. On the issue of time the applicant contends that they filed and served the notice of objection within the 14 days as provided in law and this was on 3/12/2021. Further that they wrote to the taxing officer on 15/11/2021 requesting for a certified copy of the ruling which would provide the reasoning behind the ruling. The letter was never responded to and the ruling was also not provided so the applicant obtained an uncertified copy on 20/12/2021 and then filed the reference on 23/12/2021. They contend that time starts to run for filing of a reference once the taxing master furnishes the objector with a certified copy of the ruling containing their reasons for the taxation.

11. He relied on the following cases ***BMbai Associate Advocates v Clerk, Kiambu County Assembly & Another [2017]eKLR, Joreth Limited v Kigano and Associates [2002] E.A 92., Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 762 and Arthur v Nyeri Electricity Undertaking [1967] E.A 492 and Labh Singh Harman Singh Ltd v Attorney General & 2 Others (2016) eKLR.***

12. Advocate/Respondent in their grounds of opposition contend that the application is defective for not stating grounds upon which it is brought at its foot the applicant/client only filed a letter requesting for reasons on 3/12/2021 which is not he contends is not a Notice of Objection. Further that this court has no jurisdiction to entertain this reference application nor to grant an order for stay of execution. He avers that the application has been brought out of time and without leave of court as required and there is not application for extension of time as the law requires. Further that this court does not have jurisdiction to disturb the certified costs since the mandatory procedure to challenge an order on taxation has not been followed. In their submissions they relied on several cases to argues the case. They sought to show that the application is incompetent and fatal and secondly that the court lacks jurisdiction to entertain a defective application. They relied on several cases some of this include; ***Martin Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited [2017]eKLR, Attorney General v Kenneth Kiplagat (2010) eKLR, Machira & Co. Advocates v Arthur K. Magugu & Margaret Wairimu CA 199/2002 [2012] eKLR and First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others [2002].***

ISSUES AND ANALYSIS

13. The following are the issues that arise in my opinion

a. Whether the reference is incompetent for being filed contrary to paragraph 11 of the Advocate's Remuneration Order

b. Whether the Taxing Master had erred in principle and in law

a) Whether the references is incompetent for being filed contrary to paragraph 11 of the ARO

14. The Advocate/Respondent contend that the applicant filed the instant reference out of time contrary to paragraph 11 of ARO. They submitted that the Taxing Officer delivered his ruling on 8/4/2019 and the applicants Reference was filed on 24/4/2019 that amounts to a period of 16 days contrary to the 14 days provided for.

15. It is clear under the Advocates Remuneration Order that after the taxation of the bill of costs, the procedure for the challenge of the results therefrom is provided under Paragraph 11 of the said Order which provides:

(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.

Paragraph 11(4) of the ARO further provides:-

“The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

16. It is therefore apparent from the above provisions of the law that the timelines for filing a reference is a period of 14 days, in this instant case the Respondent contends that the applicant waited for much longer over 20 days and therefore since the applicant hasn’t requested the court to enlarge the said time, the application ought to be dismissed.

17. It is not in dispute that the ruling by the Deputy Registrar was delivered on 25/11/2021. It is also not in dispute that the applicant herein did not file its reference within the stipulated period. The Applicant’s advocate in his submissions has explained the inordinate delay arising from not obtaining a certified copy of the decision from the deputy registrar despite sending a letter on 3/12/2021.

18. I have gone through the file. There is a letter by the applicant’s counsel requesting for a copy of the ruling/reasons on the taxation of the bill of costs rendered on 25/11/2021. There is no response from the Deputy Registrar. However, the court records show that the ruling was delivered in the presence of counsel for the applicant-client, Mr Oginga was present holding brief for Mr Abdirazak for the respondent who is the client-applicant in the instant suit. With the presence of the counsel he must have been aware of what the taxing master’s reasons were. In her ruling on 25/11/2021 she stated as follows:

“Having carefully perused the bill of costs, the supporting documents attached and the court record, the subject of the bill of costs was in the nature of non-contentious business...and is correct in using the said schedules...”

19. I therefore find that the delay in filing the reference has not been explained. Bearing in mind that the Notice of Objection to decision on taxation had sought reasons and the Client annexed the same Ruling which had no additional reasons, the court was unable to comprehend the rationale of having awaited a certified copy of the Ruling. They did not at any one time contend that the said reasons were not sufficient for purposes of filing their Reference.

20. The court therefore associates itself with the holding in the case of *Evans Gaturu Thiga vs Kenya Commercial Bank Limited [2011] eKLR* in which it was held as follows:-

“...Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent...”

21. This was the same position held in the cases of *Ahmednasir Abdikadir & Co Advocates vs National Bank of Kenya Limited (2)[2006] EA 5* and *Twiga Motor Limited vs Hon Dalmis Otieno Anyango [2015] eKLR*.

22. Therefore this court finds and holds that since the reasons were contained in the Taxing Master’s Ruling, she was not required to furnish other additional reasons unless, of course, there was need for her to have justified her decision further, and which was not the case herein. Indeed, providing the same ruling was merely a formality to comply with the provisions of Paragraph 11 (2) of the Advocates Remuneration Order.

23. On this ground only then I hold that no sufficient cause has been demonstrated to warrant this court to exercise discretion in favour of the applicant-client for filing the reference out of the statutory provided. I therefore uphold the Respondent’s grounds of objection to the effect that the Reference herein is incompetent in relation to Rule 11(1) of the Advocates Remuneration Order.

24. Assuming however that the applicant-client had filed their Reference within the prescribed time, the next issue would be to consider whether or not the said Taxing Master had erred in principle and in law in the manner she assessed the Advocates’ costs.

b). Whether the Taxing Officer erred in principle

25. The second issue is whether the taxing officer erred in principle in her taxation of the material bill of costs. The applicant-client submitted that the taxing officer erred in principle when she taxed though the respondent did not provide any evidence to show they personally paid for land rates, stamp duty declaration, assessment and payment. These according to the applicant should have been excluded since they had adduced evidence showing the applicant paid for the same.

26. I have looked at the impugned part of the taxing officer's ruling. It reads thus:

“ ...This court is therefore not convinced that the Respondent had in fact made payments to the Applicant...Item 57 is taxed...Item 61 and 62 are disallowed as the Respondent has availed proof ...”

27. I note that the Taxing Officer did not address herself to the other items that are related to items 61 and 62 and these are items 63 and items 64 which are not monies paid to the Respondent but for land rates and stamp duty respectively.

28. The principles upon which the taxing officer exercises the discretionary jurisdiction when taxing a bill of costs, and the principles upon which a judge of the superior court exercises jurisdiction to review the discretionary decision of the taxing officer, were outlined by the Court of Appeal in the case of *First American Bank of Kenya v Shah & Others [2002] 1 EA 64* in the following words:

“...I find that on the authorities, 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 so manifestly excessive as to justify an inference that it was based on an error of principle... Of course it would be an error of principle to take into account relevant 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 cause 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. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have effect on the assessment.”

29. In light of the foregoing, and considering that the applicant-client did not submit on the other items in the bill of costs, I will allow the reference in relation to items 63 and 64 whose cost is contested and submitted to have been paid by the applicant -client which the taxing officer erroneously awarded on the wrong principle. The other items namely 1, 2, 23, and 67 are purely costs undertaken by the advocate-respondent in providing legal service to the client I agree with the taxing officer as she has stated in her ruling:-

“ Rule 20(1) of the Advocates Remuneration Order provides as follows:

Scale charges include all work ordinarily incidental to a transaction, and in the case of conveyance, transfer or mortgage shall include.....

d. preparation of approval ordocument

e.

f. obtaining by correspondence.....consent or clearance..

g. correspondence between advocate and client”

30. Because the two items are the only items I am convinced were wrongly awarded, I do not think there is a proper basis for returning the bill of costs to the taxing officer. To do so would only serve to clog the court's diary. I will in my disposal orders set aside the two affected awards and dispose this matter without referring it back to the taxing officer.

Disposal Orders

31. In light of the above findings, the chamber summons dated 16/12/2021 partially succeeds in the following terms:

a. The taxing officer's award in relation to item Number 63 and 64 set aside.

b. The rest of the items shall remain as taxed by the taxing officer.

c. The certificate of costs dated 25/11/2021 is recalled and set aside and a fresh certificate of costs is to be issued in tandem with the disposal orders in this ruling.

d. Because the error giving rise to this reference was caused by the taxing officer, each party shall bear their respective costs of the reference.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF MARCH, 2022

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MOGENI J

JUDGE

In the presence of:-

Mr. Edgar Wendo holding brief for Mr. Lubelellah for the Respondent

Mr. Oginga holding brief for Mr. Abdirizak for the Applicant

Mr Vincent Owuor - Court Assistant