



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC MISC. NO. 599 OF 2012

KIGANO & ASSOCIATES ADVOCATES.....ADVOCATE

VERSUS

SAMUEL MUNDATI GATABAKI.....CLIENT

RULING

The advocate being dissatisfied with the ruling of the taxing master dated 29/11/2013 has filed an application dated 16/12/2013 objecting to the taxation on grounds that the taxing master failed to appreciate that instruction was given to the advocate by the client; failed to evaluate the evidence and submissions; based his reasoning on technicalities and not the substance thereof; and failed to appreciate and/or invoke the overriding objective of the law and to render substantial justice.

In the supporting affidavit sworn by Muturi Kigano, Advocate on 16/12/2013, counsel deposed that he received oral instructions from the client to carry out conveyance transactions. He deposed that the taxing master's finding that the undated and unsigned documents, including a power of attorney and sale agreements did not signify instructions, is unfounded. It is counsel's disposition that the said documents were prepared upon instructions from the client but are undated and unsigned because the transaction fell through, in that, the client declined to execute them when they were sent to him for signature. He deposed further that the said documents demonstrate that the client lost interest in the transaction after giving instructions. Counsel referred the court to e-mail correspondence, annexed to his affidavit, deposing that the taxing master ought to have made an inference that indeed instructions had been given. Counsel also deposed that the taxing master based his finding on mere technicalities thereby defeating the provisions of Article 159(2)(d) of the Constitution.

The advocate filed submissions dated 24/4/2014 in further support of his application. Counsel reiterated his position submitting that he is entitled to fees irrespective of whether the transaction is complete. It was counsel's submission that in law an advocate earns his fees upon receiving instructions including oral instructions. In support of these submissions, counsel cited the cases of **Lydia N. Wang'ondy v Kamere & Co. Advocates NRB HCCC No. 1677 of 1994** where the *court took judicial notice of the fact that litigants do not give their lawyers instructions in writing to act.*

Determination

This application is unopposed. Notably also, is that the bill of costs before the taxing master was not opposed. There is an affidavit of service on record sworn by Richard Githinji Kingori, a litigation clerk with the Applicant's firm detailing the manner in which the client was served. The said clerk deposes that he went to the client's residence on diverse dates at different times but was unable to serve the client in person. Consequently, he pasted on the gate the copies of the notice of objection together with the hearing notice. In view of this affidavit, I am satisfied that service upon the client was effected.

The issue for determination is whether the advocate had instructions to carry out conveyance transactions on behalf of the client. It is the Advocate's submission that he was instructed orally to render his legal services in the transfer of five properties to his 2 daughters, and also draft a power of attorney where the client's daughters would donate powers to the client for purposes of executing the conveyance documents. In support of his bill, the advocate annexed copies of Lease Agreements for 2 properties drafted by the firm of Mohamed Madhani Advocates and correspondence between the firms two forwarding and acknowledging receipt of the lease agreements. The advocate also availed a print out of email correspondence, between the firms and more significantly, an e-mail from Wangari Gatabaki, a daughter of the client to the advocate. The content of the e-mail is in respect to lease agreements for the purchase of one of the properties subject of the taxation.

The taxing master found that he was at loss on what to tax and for what basis since all the documents relied on by the advocate were undated, unsigned and unexecuted. The taxing master also found that the email correspondence did not show when the advocate was instructed and the parameters of his instructions. In the submissions in support of the reference, the advocate submitted that the documents were unsigned because the client declined to execute them when they were sent to him for signature.

The nature of conveyance transactions is that advocates exchange lease/sale agreements for scrutiny before dating and execution by their clients. I have perused the lease agreements drawn by various firms, the correspondence between the advocates forwarding the said agreements and e-mail correspondence and taken note that they all refer to the transfer of properties to the client's daughters. It is a fact that there was no written retainer between the advocate and client, but instructions can be inferred from the conduct of the parties. My respectful view is that the taxing master erred in finding that there were no instructions given to the advocate. I am in agreement with the decision by Njagi J. in the case of **NRB HCCC No. 416 of 2004 Nyakundi & Company Advocates v Kenyatta National Hospital Board** where he explained that a retainer need not be in writing, unless, under the general law of contract, the terms of the retainer or the disability of a party to it make writing requisite. At paragraph 103, the Judge stated:

Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case...

The advocate prays for an order allowing the amount as stated in the bill. It is noteworthy that the bill has not been taxed in view of the finding of the taxing master. This court has since found that there was an error on the part of the taxing master. Can the court allow the bill without going through the taxation process? The **Advocates (Remuneration) Order** provides for the remuneration of advocates by their clients and the taxation thereof. Section 10 therein expressly states who shall be the taxing officer, to wit, the Deputy Registrar of the High Court or such other qualified person appointed by the Chief Justice. The High Court, at Section 11, does come in when there is an objection to the finding of the taxing officer and specifically of the items an aggrieved person objects. **Section 51(2) of the Advocates Act** is also relevant as it further elaborates the duty of the court in matters of taxation. The section reads:

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs

This section expressly states that the court adopts as judgment of the court a bill that has been taxed and a certificate extracted, which is not set aside or altered and in instances where retainer is not in dispute.

This section informs the court that unless a bill is taxed, the amount therein cannot be allowed.

The upshot is that I set aside the ruling by taxing master and direct that the bill be taxed by another taxing officer. I make no order as to costs.

Dated, Signed and Delivered this 25th day of June 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Advocate

.....For the Client

..... Court Clerk

L.N. GACHERU

JUDGE