



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURT**

**MISC. CIVIL APPLICATION NO.1027 OF 2009**

**GICHUKI KING'ARA &  
ADVOCATES.....APPLICANT**

**VERSUS**

**IMPULSE DEVELOPERS CO.  
LTD.....RESPONDENT**

**RULING**

The Applicant in the Chamber Summons dated 3<sup>rd</sup> May 2010 seeks orders of this court, mainly as follows:-

1. That the decision of the taxing officer of 24<sup>th</sup> March 2010 dismissing the Applicants' objection to the taxation of the Advocates Bill of costs dated 20<sup>th</sup> September 2009, filed prior to the conclusion of H.C.C.C. NO. 648 of 2006 (Impulse Developers Co. Ltd -vs- Ruth Damaris & Others) be reviewed and/or set aside.
2. That alternatively, the decision on the taxation, in so far as it relates to the instruction fees (taxed at Ksh.3,864,750/=), be reviewed or set aside.
3. That this court substitutes the taxing officer's decision with its own decision or in the alternative, do remit the bill for re-taxation before another taxing officer.

The application is premised on 5 grounds stated in the face thereof and supported by the affidavit of William Kabogo Gitau, the chairman of the Applicant, sworn on 3<sup>rd</sup> May 2010, in which he admits the instructions and retainer and depones specifically that the applicant did instruct the Respondent/advocate to file H.C.C.C. NO. 648 of 2006 seeking, inter alia,

- (i) A permanent injunction against the 5 defendants in the suit in respect of the transfer of ownership and possession of L.R. NO 8669/3.
- (ii) A mandatory injunction to compel the 5<sup>th</sup> Defendant in the suit [Charter house Bank Ltd (under statutory management)] to honour an undertaking to finance the Applicant's purchase of the suit property.
- (iii) General damages for loss of the bargain.

The deponent states that after receipt of instructions only a plaint was filed by the Respondent/advocates after which they proceeded to present the contested bill for taxation before withdrawing from acting. Thereafter the Applicant appointed fresh counsel to take over the matter and instructed them to discontinue the entire suit by withdrawing the same. The notice of withdrawal, dated 22<sup>nd</sup> December 2009, is annexed to the Supporting Affidavit as annexure "WKG 3".

In opposing the bill, the new advocates filed a Preliminary Objection dated 16<sup>th</sup> December 2009. Written submissions were filed in the taxation after which the taxing officer delivered the contested decision on 24<sup>th</sup> March 2010.

The Applicant contends that, in view of the pendency of what is referred to as the parent suit, the Respondent ought not to have charged full instruction fee and that the award herein is excessive, exaggerated and not commensurate with the services rendered to the applicant/client. He contends further that the taxing officer erred in not considering the written submissions filed for the Applicant and that his discretion was wrongly exercised, leading him to arrive at an erroneous decision in the circumstances.

Written submissions were filed in this application, replicating the submissions filed at the taxation. The Applicant has cited the following authorities to support his case.

1. Kuloba: Judicial Hints on Civil Procedure (2<sup>nd</sup> Edition).
2. Republic -v- Deputy Registrar, High Court, Mombasa  
Ex Parte Tiomin (K) Ltd [2002] 2 KLR 218.
3. Mayers and Another -vs- Hamilton & Others [1975] 1 (CAN).

Although in the Applicant's submissions it is stated that the litigation is still ongoing, the Supporting Affidavit proves that the subject suit was withdrawn and discontinued.

The Respondent's position is that the reference is brought in bad faith, lacks merit and is an abuse of the process of the court. By the Replying Affidavit sworn by Peter Gichuki Kingara, advocate, on 6<sup>th</sup> June 2010, and the written submissions filed on behalf of the Respondent on 30<sup>th</sup> June 2010, the Respondent seeks to demonstrate that the sum awarded as costs herein was well earned, reasonable and justified in that the application for injunction in H.C.C.C NO. 684 of 2006 was highly contested and took three years. Also that the proceedings were complicated by the existence of several defendants and a protracted succession cause, NO. H.C.C.C. NO. 527 of 1981.

The Respondent contends that the instruction fee as raised was deductible from the value of subject matter of the suit (the purchase price Ksh.214,800,000/=) and that the Respondent became entitled to the full instruction fee once a defence was filed in the suit. He submits that even if the bill was filed prior to the withdrawal and discontinuance of the suit, the taxation itself was done much later and that the taxing office considered all the relevant factors, and applied the correct principles of taxation when arriving at his decision. The following authorities were cited to support the Respondent's position herein.

1. **Kuloba: Judicial Hints on Civil Procedure (2<sup>nd</sup> Edition).**
2. **JORETH LTD –vs- KIGANO & ASSOCIATES**  
**NAIROBI CIVIL APPEAL NO. 66 OF 1999 (unreported).**
3. **GREENHILLS INVESTMENTS –vs- CHINA NATIONAL COMPLETE PLANT CORPORATION (COMPLANT) T/A COVEL H.C.C.C NO. 572 OF 2000 (MILIMAN)**  
(unreported)

Contrary to what has been submitted by the Applicant the taxing officer's ruling of 24<sup>th</sup> March 2010 clearly, shows that the Applicant's submissions in objecting to the taxation were considered and the objection found to have had no merit. The taxing officer considered the objection as to whether the Applicant's bill was prematurely brought by the Applicant in circumstances where there had been a change of advocates and the matter not concluded. He held that paragraph 62A of the Advocates (Remuneration) Order did not apply. The section provides that where there is a change of advocates, then it is the last advocate on record who is entitled to file a bill of costs in the entire matter on behalf of all. The taxing officer held that the said provisions only applied to party and party costs and not advocates- clients bills as in the present case. He relied on the case of **JORETH LTD –VS- KIGANO & ASSOCIATES** (supra) to support his finding that the bill was properly before court and that a full instruction fee had been earned, which he taxed at the disputed sum of Ksh.3,950,379/= out of the Ksh.5,660,798/= claimed.

All that the Applicants submitted before the taxing officer was that the taxation was premature and that the sum claimed as instruction fee (under item 1) was exaggerated. They sought to have the taxing officer either strike out the bill or alternatively, substantially reduce the instruction fee.

In **MUGAMBI MUNGANIA & CO. ADOVCATES –VS- JOSEPH MAINGI MUGWIKA Misc. Application No. 847 of 2009 (Milimani Commercial Courts)** (unreported) I held that in my view, paragraph 62A of the Advocates (Remuneration) Order applies to both party and party costs as well as Advocates-Clients costs, given that it falls under Part III of the Advocates (Remuneration) Order and is applicable by virtue of paragraph 49(1) which states that:-

**“This part shall apply to contentious matters and in the taxation of costs as between advocates and clients and between party and party in contentious and other proceedings.”**

As will be seen from my ruling herein referred to, there exists differing opinion on the application of Section 62A. The court has established through its own enquiries and research that an intended appeal in regards to **Milimani Misc. Application No. 632 of 2004 (Macharia Njeru t/a Macharia Njeru & Co. Advocates)** which would have settled the position appears not to have been filed.

Clearly therefore I find that the taxing officer erred in principle when he allowed the bill of costs filed by the Respondents herein before the matter had been concluded; given the clear provisions of paragraph 62A which provides as follows:-

- (1) **“62A (1) Where there has been a change of advocates or more than one change of advocates,**

**the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.**

**(2) On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity of costs which he has not paid.**

**(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.”**

As stated earlier in this Ruling the evidence placed before court shows that the suit has been concluded by the filing and service of the notice for withdrawal and discontinuance. The burden then fell upon the Applicant’s advocates to draw up and present a final bill for taxation, in the event that an agreement on the costs payable could not be arrived at.

This is not a case where this court can substitute the award of costs with its own. Neither can the taxing officer’s decision be upheld in the circumstances. The said decision is therefore, set aside and the Applicant’s bill of costs dated 20<sup>th</sup> November 2009 struck out.

I order and direct that the taxation of the costs in **H.C.C.C NO. 648 of 2006** do proceed in accordance with the provisions of paragraphs 62A and 70(1) of the Advocates (Remuneration) Order.

The Applicants shall have the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY 2011.**

**M.G. MUGO**

**JUDGE**

In the presence of:

Mr. Njenga For the Applicant

Mr. Wechesa Werimo holding brief for Mr. Anzala For the Respondent