



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Case 290 of 2007

MURIU, MUNGAI & CO. ADVOCATE
ADVOCATE/APPLICANT

VERSUS

NEW KENYA CO-OPERATIVE

CREMERIES LIMITED RESPONDENT/CLIENT

RULING

1. By a ruling of the Deputy Registrar delivered on 30th July 2008 the taxing master taxed a bill of costs in favour of M/s Muriu, Mungai & Co. Advocates (herein after referred to as “the Advocate”), and awarded the Advocates a sum of Ksh. 602,454.00/-. This bill of costs was in respect of the fees due to the Advocates for transferring a property known as **LR NO. NANDI/KIMINDA/972** in favour of New Kenya Co-operative Kenya Limited the client (herein referred to as “the client”.)
2. Being aggrieved by that ruling the client has filed the chamber summons application which is expressed to be brought under rule 11 (2) of the Advocates Remuneration Order. The client seeks for orders that the decision of the taxing officer as it relates to items 1 and 2 of the bill of costs be set aside and the matter be referred for re-taxation. In the alternative the entire bill of costs be struck out and the court may re tax items 1 and 2 of the bill of costs.
3. This application is based on the grounds that the entire bill of costs is

Legally untenable because there existed an agreement for fees between the client and the Advocates hence disentitling the advocates from filing a bill of costs because the legal fees payable had been agreed upon. Secondly, the nature of instructions given to the advocate, the extent and involvement of carrying out those instructions and all the relevant factors were not taken into account when the taxing officer awarded Ksh.518,150.00/- as instruction fees and Ksh.82,904.00/- as VAT. Thus the taxing officer's assessment of these two items represents an error of principle by failing to appreciate the nature of instructions given to the advocates by the Client. There was a notice of objection filed by counsel for the Client in which counsel requested to be furnished with reasons for the decision in regard to taxation of items 1 and 2 as provided for under paragraph 11(2) of the Advocates Remuneration Order. Parties filed a consent before the taxing officer that the reasons given in the ruling be deemed as the reasons for the taxation.

4. This application was opposed by the advocates, they relied on the grounds of opposition filed on 11th May 2009. It is contended that the application is incompetent and fatally defective for failure to comply with mandatory provisions of the law. The affidavit filed in support of the application is also faulted for being defective and bad in law. Finally the application is challenged for being an after thought and intended to delay the end of this litigation.
5. Counsel for the Client made extensive submissions on why the orders sought in the application should be granted. Briefly stated, the Government of Kenya set out to acquire KCC from private hands and an agreement was entered into between the Government of Kenya and KCC dated 16th November 2004 for a consideration of Ksh.547,000,000/-. The Government incorporated New KCC to take over the assets from the old KCC those properties included motor

vehicles, land, machinery and buildings which were to be vested upon the New KCC. That is how the advocates were instructed to carry out the work of taking over the assets of KCC and vest them upon the Government of Kenya which owns the New KCC. Counsel referred to a letter by the Advocates dated 17th February 2005 in which they confirmed the instructions to act for the client. The Advocate stated in that letter that their fees will be ksh.11,000,000 but the client would bear the costs of disbursements and taxes. This letter was accompanied a fee note dated 16th February 2004 indicating that the fees together with VAT would be Ksh.12,760,000.00/

6. According to Mr. Nganga this constituted an agreement because the advocate has been paid about 90% of the fees demanded. It was a block fee note therefore it was not necessary to file a bill of costs regarding every item of conveyance because the instructions did not constitute a separate agreement. In the course of time, there was a disagreement between the client and the advocate over a legal fees charged for litigation work. That is when the advocate hit back at the client for demanding an over payment in respect of 3 litigation matters and threatened to file bills of costs for taxation in respect of each property.
7. That in essence is against the agreement which was represented to the client that the advocate would charge Ksh.11,000,000/-. That representation was acted upon by the client who gave instructions based on the agreement. Now the client is being black mailed and charged exorbitant fees based on valuations of the properties by Tysons Limited which had nothing to do with these instructions. Counsel submitted that allowing this bill of costs will run contrary to public policy and is tantamount to undue enrichment to allow individual bill of costs for each property when the instructions was issued together for the work to be done as one.
8. The above arguments were countered by Mr. Munge for the advocate. He

relied on previous rulings, in **HCCC MISC CASE NO. 284 OF 2007 Murui, Mungai and Company Advocates vs New KCC** in which my sister **Khaminwa J** found that there was no agreement between the advocates and the client as provided for under section 45 (1) of the Advocates Act. He also referred to another ruling in **MISC CIVIL APPLICATION NO. 373 OF 2007 Murui, Mungai & Co. Advocates vs New KCC** where my sister **Lesiit, J** found that there was no error in principle considering the ruling of the taxing master who had assessed the instruction fees at Ksh.83,000,000/- in favour of the Advocates.

9. According to counsel for the advocates the application challenges the taxation of item No. 1 and 2 therefore the client is now estopped from challenging the whole bill of costs. He urged the court to disregard prayer No.3 . He submitted that there were instructions to transfer various properties therefore the issue of retainer is not challenged. The Advocates obtained a vesting order in respect of all the properties. They also obtained the consents and completed the instructions by transferring the suit property in favour of the client. The taxing master relied on the Advocates Remuneration Order and also the valuation report by Tysons Limited who had valued the property for Ksh.33,000,000/-. That being the market value, the instruction fees was correctly assessed based on the market value of the property.

10. Counsel made reference to the case of **First American Bank of Kenya vs Shah and Others EALR (2002) 1EA Page 64** the judgment of Ringera J where it was held:-

“The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer’s decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify and inference that it was based on an error of principles (Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factor (1970) EA 141

followed. Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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."

11. Counsel for the Advocate further argued that there was no agreement because the letter dated 17th February 2005 was a mere offer and there was no response by the client signifying the acceptance of the offer. Thus the Advocate is entitled to file individual bills because the block fee note does not bar an advocate from filing separate bills. In any event the provisions of section 45 (1) of the Advocates Act is clear that the agreement on fees should be in writing and signed by both parties. It is the client who is motivated by bad faith for demanding the fees from the Advocates. The client cannot now turn round and ask the advocates not to file their bill of costs.
12. In analyzing the issues raised in this application I wish to acknowledge the facts that I have read the two rulings by my two sister Judges **Lesiit, J** and **Khaminwa J**. According to the way each of them appreciated the facts I respectively find their rulings not wholly persuasive. I have taken a different angle in appreciating the matters and the evidence and the circumstances of this matter which leads me to a different opinion from my sister Judges. The issues as I understand them, is firstly whether there was an agreement between the Advocate and the client as envisaged under Section 45(1) of the Advocates Remuneration Order. Secondly, whether the taxing master was in error when assessing the fees payable to the Advocates in item 1 and 2 and in the entire bill of costs.
13. As regards the issue of whether there was an agreement, the advocate relied on the provisions of section 45 (1) of the Advocates Act especially the proviso which provides that:-

“Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

- a) . . .
- 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”

14. In this particular case, I agree with counsel for the advocates, that there was no agreement entered into in respect of the fees to be charged. This is because there is no written agreement signed by the client which is clear and unequivocal. I am persuaded that the Advocate could file a bill of costs but in respect of all the work which was a block instruction and whose value was to be found in the primary document of agreement between KCC and Government of Kenya which is Ksh.547,000,000/- for the entire work. This now leads me to consider the next issue on whether the assessment by the taxing officer of the instruction fees represented an error in principle.
15. The principles to apply in order to establish whether there is an error in principle are well settled. Firstly, this court cannot interfere with the discretion of the taxing master unless the fees awarded is manifestly excessive or too low. All the relevant factors to be considered such as the nature and importance of the matter, the amount of the value of the subject matter involved, the interest of the parties and the general conduct of the proceedings were not taken into account when the taxing officer considered the amount to be assessed in this bill or in items No. 1 and 2.
16. I find in this matter the Government of Kenya set out to acquire the assets of the client from private hands at a consideration which is indicated in the agreement as ksh.547,000,000/-. This take over entailed the transfer of the assets into the name of the client and the whole exercise is captured in the letter by the advocates dated 17th February 2005 which was accompanied by

a fee note titled: “**Finalization of Take Over of New Kenya Co-operative Creameries Limited 2000 by the Government of Kenya.**” This was a block fee note for all the work the advocates were supposed to do which included a deed of assignment assigning all the assets to the client in line with the agreement of sale between The Government of Kenya and KCC 2000. It also included the drawing of the transfers in respect of 38 titles and other items of work noted in the fee note.

17. It is my humble opinion that the taxing officer did not consider all the relevant factors which were presented in the submissions by counsel for the Advocates. Had he done so, and appreciated all the factors he would have come to the conclusion that the advocate was not entitled to file separate and individual bill of costs but itemized bills comprising all the items which were transferred to the client for a consideration of Ksh. 547,000,000/-.
18. The basic and dominant document which guides the value of the work that was done and the instructions given to the client by the advocates is the agreement dated 16th November 2004. That is the basis upon which all the properties were supposed to be transferred and vested in favour of the client. I also find that the learned taxing officer was in error by relying on valuation report by Tysons Limited which had nothing to do with the instructions given to the advocates by the client. He should have confined himself to the primary documents which constituted the instructions given to the Advocates based on the sale agreement.
19. The last issue which was raised by counsel for the Advocate was that the present application only challenged the taxation in respect of items No. 1 and 2 of the bill of costs. My understanding of prayer No.3 which is in the alternative, the court was asked to strike the entire bill of costs and or re tax items No. 1 and 2. In this regard therefore the court can consider the competency of the entire bill of costs and consider whether to re-tax it. I found the

of costs is not representative of the block instructions given to the Advocates. The advocates have segmented the block instructions which in my view is meant to take undue advantage of the client because a disagreement had arisen between the client and the advocates regarding separate instructions on litigation matters. Thus the Advocate are hitting at the client which is tantamount to unfair enrichment and taking undue advantage of the client. For those reasons I would strike the entire bill of costs with costs to the client.

RULING READ AND SIGNED ON 26TH MARCH 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**