



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

MISCELLANEOUS CIVIL APPLICATION 8 OF 2008
Section 3A, Civil Procedure Act, (Cap 21 Law of Kenya)

Application challenging the decision of the Taxing Master

KYALO MBOBU
T/A KYALO & ASSOCIATES ADVOCATES.....PLAINTIFF

VERSUS

ST. PAUL THOMAS ACADEMY LIMITED.....1ST DEFENDANT
PIONEER UNIVERSITY COLLEGE LIMITED...2ND DEFENDANT

R U L I N G

The reference has been filed by the Advocate/Applicant with the Bill and challenges the decision of the Taxing Master as having erred in principle in the manner she taxed the Bill of Costs.

The courts jurisdiction in a reference was set out in the Court of Appeal decision of KIPKORIR, TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTION FUND [2005]1 KLR 528 at page 533 where the Court held:

“On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.

‘where there has been an error in principle the Court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.’

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles, or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit. We have no doubt that if the taxing officer fails to apply the formula for assessing instruction fees or costs specified in Schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso 10 of Schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer. The judge has however a discretion to deal with the matter himself if the justice of the case so requires.’

The Applicant has to show that the Taxing Master erred in principle.

The first complaint is that the Taxing Master erred in principle when she ruled that since the Advocate made no election to have the Bill taxed under schedule V, paragraph 22 thereof, that the Bill could not be taxed under the said schedule. The Advocate contends that the election to have the Bill taxed under Schedule V was made in the Advocate's letter to the Client dated 12th May, 2004 in which the initial demand for fees was made. The letter is reproduced herein below:

CL344/2003K/6

12th May 2004

**Mr. Peter Kahara Munga
P. O. Box 65082**

NAIROBI

Dear Sir,

RE: SALE AGREEMENT

LR. NO. 4953/55/IV I.R NO. 4410 THIKA

Further to previous correspondences herein, we write to record our concern that no deposit of fees has ever been paid herein. Hence, we are totally out of pocket in this account.

In light of the fact that the transaction is all but finalised, we enclose herewith our fee note for immediate settlement.

Please oblige and settle to energise our services in this and other matters.

**Yours faithfully,
For: KYALO & ASSOCIATES**

KYALO MBOBU

Enc."

That letter annexed a fee note which is at page 23 of affidavit in support of the Bill and which has a breakdown of fees claimed and a Note as follows:

| "PARTICULARS | SALE AGREEMENT | AMOUNT (KSHS) |
|---------------------|--|----------------------|
| | <u>L.R No. 4953/IV I.R NO. 4410 THIKA</u> | |
| | DR | CR |

To fees for professional services in connection with: -

| | | |
|----|--|---------------------------------|
| 1. | Instructions fees for getting up and conducting of arbitration proceedings to claim kshs.13.6 m. Add 16% VAT | 315,000.00 50,400.00 |
| 2. | Attendances, drafting correspondences receiving And perusals, photocopy, telephone and faxes, Stationary and sundry | 53,130.00 |
| | TOTAL | <u>418,530.00</u> |

Please oblige to settle

KYALO & ASSOCIATES

NOTE: Unless otherwise stated, we have elected under R.22 of the Advocates Remuneration Order to charge fees under Schedule V thereof."

The letter and fee note were sent to the Client by the Advocate. The election to have the fees charged under Schedule V as provided under Rule 22 thereof was spelt out clearly in the fee note. The Client cannot be heard to deny that such election was made. The learned Taxing Master on the other hand erred in principle when she found as a fact that no such election was made by the Advocate to the Client. That is an error in principle.

Regarding taxing off of item 1 of the Bill. This item relates to instructions fees for drawing of the Agreement for Sale. The learned Taxing Master had this to say about this item.

"I turn to item 1 which relates to instruction fees. The applicant has admitted in his further submission that he drew two agreements over the same parcel of land for reasons that one was used to defeat the payment of full stamp duty required and also to delude the bank of the actual purchase price for the land so as to benefit the vendor who had an account with KCB. All the facts in this regard are contained in the applicant's submissions and affidavit in support of this bill. The Applicant gave this explanation after the court queried why there were two sale agreements on record and which one the court should rely on.

After getting this explanation, I note that the applicant was clearly facilitating a transaction that would deny the government payment of the required stamp duty. This obviously cannot be taken to be a bonafide act. It is a principle of law that a contract made to defeat the ends of justice being met cannot be enforced. The applicant cannot therefore seek to be paid instructions fees on either of these agreements because the one for 10 million is false and the one 20 million is not the official agreement that parties presented for registration or stamping. It is an unofficial document.

On that basis item 1 shall fail. Item 2 to 47 will be taxed off because they are not provided for under schedule 1 and they are not justified under schedule V"

I agree with the Taxing Master that an illegal contract cannot be enforced in a court of Law but more importantly no court can allow a party to benefit from such a contract. The Advocate admitted that he drew two Agreements with the sole purpose of denying the Government of the Stamp Duty payable on the actual purchase price of the suit property and also to delude the Bank to whom the Client was indebted on the actual amounts paid on the suit property. The work done by the Advocate under this item was in furtherance of an illegal purpose. It is against public policy to enforce such a contract or to make any order that would benefit an accomplice to benefit under it. For that reason, the Advocate cannot, after admitting his involvement in an illegal transaction, obtain an order from a court of law in order to benefit from this illegal act.

Miss Kamende submitted that the Government was not denied revenue and referred to

pages 168 and 169 of its exhibits. The receipts annexed at pages 168 to 169 of the affidavit in support of the Bill of Costs are not for Stamp Duty. Even if the ones in support of payment of Stamp Duty were annexed, having confessed he prepared two Agreements in order to facilitate payment for less Stamp Duty than the Government was entitled to claim, that would not cure the illegal facilitation confessed to. I find that on the basis of Public Policy the sum claimed as the instruction fees under item 1 was not payable. The Taxing Master did not err in principle when she taxed off this item. Same goes for item 3 of the Bill which also related to the drawing of the Agreement of Sale. Item 3 is for drawing of Agreement. That appears to me to be duplication of item 1 even though a lesser sum is claimed In any event, having drawn two Agreements in furtherance of an illegal act, both items ought not to be allowed.

Regarding items 2, 4 to 48, 51 to 95 the learned Taxing Master erred in principle for finding that Schedule V did not apply. The taxation on the rest of the items are correct and are therefore upheld.

In conclusion, I uphold the Taxing Officer's decision on the taxing of the Bill regarding items 1, 3, items 49 and 50, 96 to 102. The proper order to make in the circumstances is to set aside the learned Taxing Master's ruling on items 2, 4 to 48 and 51 to 95. I order that the Bill of Costs be placed before the same Taxing Master with directions that she taxes items 2, 4 to 48 and 51 to 95 of the Bill of Costs dated 10th January, 2008 based on Schedule V of the Advocates (Remuneration) Order. The cost of this application be in the cause.

Those are the orders of the Court.

Dated at Nairobi this 12th day of June, 2009.

**LESIT, J.
JUDGE**

Read, signed and delivered, in the presence of

- Ms. Kamende for Applicant**
- N/A for the Respondent**

**LESIT, J.
JUDGE**

Principles applicable