



ONGOTO & CO. ADVOCATES APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.RESPONDENT

RULING

This is a reference made to High Court under the provisions of Advocates' Remuneration Order, Rule 11. The issue for decision is setting aside the taxing officer's entire decision made on the applicant's bill of costs dated 19/7/2007 and taxed on 14/3/2008, on the ground that the taxing officer erred in holding that the applicant was entitled to claim from the respondent legal fees in the sum of Kshs.773,810/64.

The taxing officer should have found that the purchasers of the respondent's properties which gave rise to the bill of costs were responsible for all the applicants costs, including the legal costs in respect of work done for and on behalf of the respondent.

The taxing officer should have found that instructions from the respondents provided that the entire sum of the applicant's costs, including the costs incurred on account of acting for the respondent as vendor were to be borne by the purchasers. The taxing officer failed to give effect to the sale agreement between the respondent as vendor of the said property and the various purchasers which stipulated that the applicant's costs should be borne by the purchasers, and other grounds.

I have perused the ruling of the taxing officer Mrs. R. Kimingi, SPM and I noticed that she acted under Schedule 1 and also under Rule 29 Advocates Remuneration Order and noted that in some parcels (plots) the applicant acted as advocate for both vendor and the purchaser. There was not evidence before her that the applicant was paid vendor's fees which he was entitled to.

Consequently, she allowed the payment of legal fees and disbursements and VAT charges and taxed the bill at Kshs.773,810/64 which is the certified fees.

The respondent in opposition to this application says that it was for the applicant to collect all fees from the purchasers and that was the agreement between him and the respondent. If he did not collect the fees then it is to be presumed that he waived his right to the fees and he cannot now come to claim from the respondent.

The taxing officer should not have allowed any costs in the certificate of taxation against the applicant. I have perused the authority of **HCC No. 55 of 2005 – Church Road Development Co. Ltd. vs. Barclays Bank of Kenya Ltd & 2 others** where there was in a charge a contract and the chargor

agreed to pay costs on the basis of client/advocate.

The court said such a contract was null and void and contrary to law. In this case the applicant firm of advocates was retained on certain conditions that the costs for retainer would be recovered by the firm from the purchasers of property being sold by the defendant. It is true that the Advocates Remuneration Order does not prevent advocate from acting both purchaser and vendor but it is on the basis of consent.

Furthermore, the basis of the application being purported agreement between the client and advocate which provided that the client would pay no legal fees to the advocate is contrary to the provisions of **Advocates Act**. An advocate is not to perform services without payment. Such agreement would be contrary to law and it would be declared null and void.

It is the obligation for client to pay his advocate legal fees as provided under **Section 2 of Advocates' Act**. The proposition by applicant that the respondent waived his right to the costs is not in accordance with the law. As stated by Hon. Justice Warsame agreements cannot supercede the written law. He said in the Church Road case:-

“My position is that a contract cannot be used to override the provisions of law. And where there is a conflict the law is supreme.

In the ruling of the Taxing Officer she did find that the advocate did receive payment for some work done under the retainer.

That the respondent advocate had established, which is not denied by the applicant (client).”

Client/applicant submits that the advocate waived his right to claim the unpaid fees from the purchasers. It is correct that the meaning of “waiver” is as written by the applicant in their submissions. But a close reading of the Blacks Law Dictionary, it is waiver of a legal right or advantage. The legal right in this case was for the payment of fees by the client. There was no legal right to be paid by the purchasers.

I have perused the authorities relied upon by the advocate. The application **No.37 of 2002 – Mereka & Co. Vs. National Bank of Kenya** where the court said:-

“A decision on taxation can only be interfered with by the High Court under the provisions of sub paragraph (2) paragraph 11 of the Advocates’ Remuneration Order or if either an error in principle is disclosed or the award is manifestly excessive.”

That the Taxing Officer refused to uphold the alleged agreement between the parties was not an error in principle. The Taxing Officer was only upholding the legal principle that an advocate must be paid costs for services rendered. It is not established that the respondent/advocate has not prepared the work he was retained for.

I have already referred to **Church Road Development Co. Ltd. vs. Barclays Bank & others – Civil Suit No. 55 of 2005.** the ruling of Hon. Justice Lesiit in **Muriu Mungai & Co. Advocates vs. New Kenya Co-operative Creameries Ltd. – HCC No.373 of 2007.** In that matter the client was complaining of taxation of the bill. The court followed the decision of Court of Appeal in **Kipkorir, Titoo & Kihara Advocates vs. Deposit Protection Fund [2005] 1 KLR 528** where the Court of Appeal found that there was substantial compliance with **Rule 11 (2)** of the **Order**.

Again, the Hon. Judge found that the Taxing Officer was not wrong in principle in applying **Schedule 1** of the **Order** according to instructions given by the client. This authority is not relevant here where the applicant seeks to set aside taxation on ground that the Taxing Officer ignored an agreement whose effect was to allow client not to pay fees.

Upon considering the above said, it is clear it is established that the Taxing Officer did not act on any

wrong principle in taxing this bill. The retainer and amount is not disputed. I find no merit in this application and I dismiss the same with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2009.

JOYCE N. KHAMINWA

JUDGE