



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Misc Appli No 305 of 2004**

**HAYANGA & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**RAYAL GARDEN DEVELOPERS LTD. ....DEFENDANT**

**RULING**

On 6<sup>th</sup> September 2004, the learned taxing officer taxed an Advocate/Client Bill of Costs in the sum of Kshs.1,544,933.60.

Being dissatisfied with the results of the said taxation, the client gave notice of its objection thereto, on 16<sup>th</sup> December 2004. It was specified in the said notice that the client objected to the taxation on the item numbered (6), as well as to the miscalculations in the overall figures.

Having been requested for the reasons for his decision, the learned taxing officer responded on 20<sup>th</sup> September 2004, as follows:

**"REASONS FOR TAXATION.**

**Item 6 – shs.1,153,500/= is awarded as the letter of instructions instructs counsel to complete the transaction within 2 – 3 weeks.**

**I have made mistake in calculation**

**Bill is Kshs.      1,169,750/=**

**Plus VAT            157,168/=**

**Total    Kshs.      1,356,918/=**

**Plus disbursements   725/=**

**Total              1,357,643/=**

**Bill is Kshs.1,357,643/=**"

After receiving the foregoing, reasons, the client prosecuted the reference, on 3<sup>rd</sup> February 2006.

It was pointed out that the purchase price for the property was Kshs.75 million. However, as the sale aborted, it was contended that the advocate was not entitled to charge the full instruction fee.

In explaining to the court the extent of the instructions which had been issued to the advocate, it was pointed out that the said instructions were contained in the letter dated 25<sup>th</sup> November 2002. And, according to the client, the said letter did not instruct the advocate to prepare an Agreement for Sale.

At this point in time, I feel that it is necessary to put various facts within perspective. First, the item numbered (6) on the Bill of Costs reads as follows;

**"Instructions to draw a sale Agreement between yourselves (Rayal Garden Development Limited) and Nidcon Investments Limited for Kshs.79 million."**

After the client was served with the Bill of Costs, it wrote to the advocate seeking particulars of the various items listed thereon. Upon receipt of the said request for particulars, the advocate filed an answer, dated 25<sup>th</sup> June 2004. In the said answer, the advocate told his client that the instructions which he had been given, to draw up the Sale Agreement was embodied in a letter dated 25<sup>th</sup> November 2002.

Having perused the record of proceedings herein, I noted that the letter at page "A12", which is from the client is dated 25<sup>th</sup> November 2002. It was addressed to the advocate, and read as follows;

**"RE: 24 NO. EXECUTIVE APARTMENTS AT SOUTH "C" NAIROBI**

**We refer to the above property and enclose (sic) please find a copy of a letter of offer from M/s Nidcon Investment Ltd. who confirm to purchase the property.**

**Kindly, write to Shelter Afrique Mr. A. M. Shillimi the legal officer with copies of the letters – i.e. both the offer and our acceptance and we anticipate the transaction to be completed in two/three weeks. At the same time we will remit the full monies owed to them.**

**Kindly do the needful."**

When prosecuting this reference, the client pointed out that that letter did not give to the advocate instructions to prepare a Sale Agreement.

I therefore sought to know if the client was challenging the advocate's right to claim any fees, on the ground that she had not been instructed. The answer was in the negative.

Therefore, although, on the face of it, that letter did not appear to be instructing the advocate to prepare a Sale Agreement, I will nonetheless presume that such instructions were indeed given to the advocate.

The only complaint which the client now raises is that the learned taxing officer awarded the full instruction fee, whereas the advocate did not earn it.

The client submitted that an advocate could only earn the full instruction fee if he substantially concluded the task which he had been instructed to undertake. He relied on the follow extracts from "**Solicitor's Remuneration Act, General Order, 1882**", to back that proposition;

**"To earn the scale fees in Schedule 1, the solicitor must do substantially all the work mentioned in the scheduled.**

**The question in every case is whether there has been completion in substance, and the court is entitled to look at the substance of the transaction.**

**If the solicitor is not, for any reason, entitled to charge the scale fees under Schedule 1, he may charge in detail for all work properly done, according to the old system as altered by Schedule II"**

The client contended that a similar position prevailed in Kenya, and that those words were therefore of persuasive authority.

In the circumstances, as the sale transaction was not completed, the client believes that the advocate should not have been awarded the full instruction fee.

On his part, the learned taxing officer did not award the full instruction fees because the work had been substantially completed. The reason given by him, for awarding the fees is that the advocate had been instructed to complete the transaction within 2 – 3 weeks. In my considered view, the fact that the transaction was supposed to be completed within 2 – 3 weeks, was not reason enough to warrant the award of full instruction fees. The proper consideration, whether or not the position prevailing in England applies here, is the ascertainment of the work actually done vis-à-vis the nature and extent of the instructions. In effect, if an advocate was instructed to prepare an Agreement for Sale, he would have earned his full instruction fee, as soon as the said Agreement for Sale was ready.

In this case, the letter dated 25<sup>th</sup> November 2002 talks about the client's anticipation that **"the transaction to be completed in two/three weeks."**

It appears to me that those instructions may not have been limited to the mere preparation of the Sale Agreement. However, the parties may need to address the taxing officer on that aspect of the matter.

In the meantime, suffice it to say that the reason cited by the learned taxing officer for awarding the fee on item 6 is without foundation. The instruction fee should not be pegged only to the duration of time during which the client may wish the transaction to be completed. Having done so, the learned taxing officer erred in principle. Accordingly, the reference herein allowed. The Bill of Costs is hereby referred back for re-taxation before any other taxing officer, other than Mr. El Kindy. The said re-taxation will however be limited to item 6, and the resultant re-calculations.

The costs of the reference are awarded to the client.

Dated and Delivered at Nairobi this 2<sup>nd</sup> day of March 2006.

**FRED A. OCHIENG**

**JUDGE**