



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC MISC. APPLICATION NO. 225 OF 2016

KIMANI RICHU & ASSOCIATES ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

CENTURION HOLDINGS LIMITED.....CLIENT/APPLICANT

RULING

The client filed the application dated 22/11/2018 seeking to set aside the award of the taxing master delivered on 12/9/2019 in so far it relates to the reasoning and determination on the taxation of the bill of costs dated 2/9/2016. The client sought to have the matter referred back for taxation of the bill of costs or in the alternative that this court re-taxes the bill of costs by decreasing the amount payable to the advocate under the Advocates Remuneration Order (ARO) of 2014. The application was made on the grounds that the taxing master erred in principle in assessing item 1 of the bill of costs dated 2/9/2016, that the amount awarded to the advocate was excessive and the client stood to suffer gross injustice if the taxation was allowed to stand.

The application was supported by the affidavit of Daniel Kiragu, the advocate who represented the client. He deponed that the bill of costs was initially taxed by the Hon. I. N. Barasa on 7/2/2017 where she awarded Kshs. 159,304/=. Being dissatisfied with that decision, the advocate filed a reference dated 13/3/2017 seeking to have that decision set aside. The matter was canvassed through written submissions and in his ruling delivered on 25/5/2018, Eboso J. remitted the bill of costs back to the taxing master for taxation afresh under Schedule 1 of the ARO of 2014.

Mr. Kiragu deponed that the client filed an application dated 8/11/2018 for leave to appeal against the decision of Eboso J. However, parties entered into a consent on 28/2/2019 vide which they agreed to set aside the ruling of Eboso J. and allow the taxing master to tax the bill of costs afresh. The bill was taxed by Hon. Barasa on 12/9/2019 at Kshs. 912,956/=. The client contended that in giving her award, the taxing master did not lay a firm basis for assessing the instruction fees at Kshs. 750,000/= which according to the client was too high when one considers the work done by the advocate and urged that it therefore represented an error of principle.

Mr. Kiragu annexed a copy of the ruling of Hon. Barasa dated 12/9/2019. In her ruling, the taxing master noted that the Appellant carried out a conveyancing transaction in respect of the sale of land reference numbers (L.R. No.) 12565/37 and 12565/38. Parties executed an agreement for sale but the transaction could not be completed because the seller, Kathumo Holdings Limited was unable to complete the sale. The taxing master observed that since the transaction was not completed the bill of costs should be taxed under Schedule V as provided by Paragraph 18 (f) of the ARO. Further, the taxing master noted that the conveyance transaction terminated at the time of completion and that the advocates engaged at length on the issue of completion. She awarded Kshs. 750,000/= on account of instruction fees and taxed off the sum of Kshs. 550,000/= from the figure sought by the Advocate in the bill.

Parties filed submissions with regard to the instant reference which the court considered. The client submitted that the work undertaken by the advocate was limited to conducting an official search at the lands registry as well as receiving and perusing the sale agreement from the seller's advocates. According to the client, the advocate made minor changes or amendments to the agreement which was about the only work undertaken because the transaction was never completed. The client submitted that paragraph 18 of the ARO was to be applied sub-paragraph (b) of which stated that in respect of any business which was not completed, the remuneration was that prescribed in schedule 5.

The client submitted that under schedule 5 paragraph 2, there is a caveat to the effect that an advocate may elect to charge his remuneration according to schedule 5 and if there is no election it would be according to the scale applicable under the other schedules. The client contended that the provision was to the effect that the advocate may agree with the client to charge under schedule 5. While there was no election in the present case, the client submitted that under paragraph 18 (f), the schedule applicable was V.

The client relied on various decisions including **Antony Thuo Kanai T/A A. Thuo Kanai Advocates v John Ngigi Ng'ang'a [2014] eKLR and Maina Murage and Company Advocates v Mae Properties Limited [2018] eKLR.**

The client contended that as a result of the aborted transaction, the client instructed the advocate to file a suit being ELC No. 946 of 2014 and that the advocate had also filed a bill of costs in ELC No. 224 of 2016 arising from that suit in which it seeks costs of Kshs. 2,742,425. The client contended that the advocates seeks to recover costs twice arising from the same transaction which according to the client went against the principles outlined in **Premchand Raichand Limited v Quarry Services of East Africa Limited (No. 3) [1972] EA 162.** The client

contended that the advocate was seeking more than what he ought to be fairly reimbursed.

On the issue of whether the taxing master exercised her discretion correctly in assessing the instruction fees charged in the bill of costs dated 2/9/2019, the client conceded that the value of the property in the conveyance transaction was Kshs. 85,000,000. However, it argued that the transaction was not completed and referred to schedule 5 Part II which states that the fees for instruction had to take into consideration the labour and care required, the number and length of papers to be perused, the nature or importance of the matter, the value of the subject matter involved, the interest of the parties, the complexity of the matter and all other circumstances in the case. It further states that due allowance should be given in the instruction fees for other charges raised under that schedule.

The client maintained that the advocate did minimal work that cannot warrant the instructions fees of Kshs. 750,000 while adding that since the sale did not materialize the advocate could not claim the full instruction fees. The client urged that the instruction fees should be Kshs. 100,000 in line with the initial ruling taxing master of 7/2/2017.

Regarding the other items, the client contended that the advocate charged Kshs. 2000 and Kshs. 1500 for service of correspondence and they have also charged Kshs. 1500 for drawing the letters. The client relied on Rule 20 of the Advocates Remuneration Order on the point that correspondence between an advocate and his client should be excluded. The client submitted that all other items in the bill of costs ought to be taxed off.

The client relied on the decision in **KTK Advocates v Baringo County Government [2017] eKLR** and urged that the taxing master disregarded factors of principles that she should have considered especially on the issue of instruction fees and therefore wrongly interpreted the law. Further, that the taxing master exercised her discretion improperly for which the court ought to allow the reference.

The advocate submitted that it investigated the title and reported to the client. That it attended various meetings and expended time and energy scrutinizing the draft sale agreement. That it ensured the approved agreement for sale was signed by the seller besides being actively involved in sending draft transfers to the vendor's advocate with a view to finalizing the transfer. The advocate contended that it gave skills and expertise beyond the completion date of 10/6/2014 when the transaction was frustrated owing to the vendor's inability to complete it. The advocate referred to the various correspondence exchanged on the transaction which were attached to the submissions dated 16/11/2016.

The advocates relied on the decision in **Ratemo Oira & Company Advocates v Magereza Sacco Society Limited [2019] eKLR** where the Court of Appeal observed that an advocate would be entitled to payment of a reasonable fee which is commensurate to the work done and that the taxation of costs must ensure a balance between the guiding principles such as ensuring that costs are not allowed to rise to a level which deprives parties access to courts; and that the remuneration should be such that it attracts worthy recruits to the profession. The court noted that what would be a reasonable fee could only be adjudicated by a taxing master by application of his discretion.

The advocate relied on the decision of Eboso J. made on 25/5/2018 where he observed that the baseline in conveyancing fees was the instruction fees stipulated for a complete conveyance. That this is what the taxing officer would use in arriving at the proportionate remuneration for an incomplete conveyance brief while taking into account the actual services rendered by the advocate up to the point when the conveyance aborted. The advocate added that Eboso J. stated in his ruling that the taxing officer should have applied schedule 1 in the taxation which should have required her to take into account the extent of the advocate's services and what remained to be done to complete the conveyance.

The advocate computed the fees payable based on the consideration of the value of the subject matter as Kshs. 1,508,000 and pointed out that the taxing master awarded Kshs. 750,000/= which in his view was not excessive. The advocate urged the court to take into account the fact that the conveyance transaction was terminated at the time of completion and that the advocate for the seller and the purchaser engaged at length on the issue of completion of the sale.

On the other items challenged by the client, the advocates submitted that they were subsumed in paragraph 20 of ARO. Further, that items 2, 10, 12, 21, 23, 25, 27, 29, 33 and 35 related to service on the vendors advocates in Upper Hill Nairobi and the others related to service on the client in Kiambu. The advocate submitted that the amounts were reasonable and chargeable under paragraph 1 to 6 of schedule VI Part II of the ARO and urged the court to allow this as drawn. The advocate contended that the client had failed to show that the taxing master disregarded factors that should have been considered in taxing the bill of costs. The advocate contended that if the court were minded to interfere with the decision of the taxing master, it would be to award the sum of Kshs. 1,508,000/= to the advocate as itemized in the bill of costs dated 2/9/2016.

The issues for determination are whether the taxing master exercised her discretion wrongly in assessing the instruction fees and whether there are grounds for interfering with her decision in the taxation of the bill of costs.

The client contended that the work undertaken by the advocate was limited to conducting an official search at the lands registry, receiving and perusing the sale agreement from the seller's advocates, and making minor amendments to the agreement more so because the transaction was never completed.

The court notes from the documents which were annexed to the bill of costs that the advocate wrote to Ochieng, Onyango, Kibet and Ohaga on 28/3/2014 informing them that he had been instructed to act for the client. The advocate forwarded the draft sale agreement with amendments to the seller's advocates. The advocate sought funds to cater for the purchase price, stamp duty and registration fees. The advocate remitted 20% of the deposit to the seller's advocates as can be seen from the letter dated 9/4/2014. The advocate forwarded the draft transfers to the seller's advocates on 17/4/2014.

The advocate wrote to the client on 2/5/2014 informing it that the total fees and disbursements for the two transactions would be Kshs. 1,439,900/= which the advocate sought to have deposited in its bank account whose details were given in that letter. The client does not appear to have challenged that fee note. By that time the sale transaction had not aborted. The client returned an erroneously signed transfer to the advocate through the letter dated 9/5/2014.

The advocate forwarded the transfers to the seller's advocates for execution on 23/5/2014. The advocate informed the client vide the letter of 17/6/2014 that it was prudent to register caveats against the two parcels of land to protect the client's interests and forwarded the caveats and affidavits for execution by the client. The seller's advocates wrote to the advocate on 2/7/2014 indicating that the seller would not be able to complete the transaction. The advocate responded to the seller's advocates on 7/7/2014 and pointed out that there was a binding agreement for sale between the parties.

From the above, it is evident that the advocate undertook more work than what the client contended in this reference. The court is not persuaded that the sum of Kshs. 750,000/= which the taxing master awarded was excessive considering the work the advocate did before the sale transaction aborted. Based on the consideration of the value of the subject matter, the advocate had charged Kshs. 1,508,000/= in the bill but the taxing master taxed off the difference.

The client has failed to demonstrate that the taxing master exercised her discretion improperly for this court to interfere with the taxation.

The court declines to grant the orders sought in the application dated 22/11/2019. The Advocate is awarded the costs of the application.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Aaron Kinyanjui for the Client/Applicant

Ms. T. Thenge holding brief for Ms. E. Ndungu for the Advocate/Respondent

Mr. V. Owuor- Court Assistant