



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC NO. 19 OF 2020**

**ANTHONY BURUGU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**ELECTRO WATTS LIMITED.....RESPONDENT**

**RULING**

This ruling is in respect of the application dated 5<sup>th</sup> October 2020 which seeks to have this court vary or set aside the Taxing Officer's ruling dated 21/9/2020 in relation to items 1, 2 and 3 of the bill of costs dated 26/2/2020 by increasing the amount payable to the Advocate in line with the sums proposed in the bill of costs. Further, that this court exercises its inherent jurisdiction and allows such fees on those items as it shall deem fit and that it makes such other orders as regards the bill of costs.

The application was made on the grounds that the Taxing Officer did not exercise her discretion in the required manner when she relied on Schedule 5 of the Advocates Remuneration Order (ARO) and taxed items 1 and 2 of the bill at Kshs. 290,000/= despite the fact that the Applicant prepared the sale agreement and the addendum to the sale agreement and that he conducted all the due diligence appertaining to the sale of the land whose sale price was Kshs. 75,000,000/=. The Applicant objected to the Ruling on item 3 because in the Applicant's view, it was evident from the correspondence and documents attached to the bill of costs that expenses were incurred in preparing the sale agreement, the addendum to the sale agreement, correspondence and delivery of various documents to the purchaser's advocates for execution. The proposed sum of Kshs 10,000/= in the bill was in their view reasonable and the Taxing Officer misdirected herself when she ruled that there was no proof. The Applicant urged that it was in the interest of justice that the reference be allowed and the taxation be varied in accordance with the provisions of the ARO of 2009.

The application was supported by the affidavit of Anthony Burugu, an Advocate of the High Court sworn on 5/10/2020. The Respondent opposed the application through the affidavit sworn by Stephen E. Elkington, the Managing Director of the Respondent herein on 26/4/2021.

The application was canvassed through written submissions. The Applicant's principal argument is that the Taxing Officer misdirected herself in applying the wrong schedule and in arriving at her decision. That the Taxing Officer applied Schedule 5 part 2 of the ARO 2014. It was the Applicant's argument that the instructions were based on a conveyance whose terms of remuneration are under Schedule 1 of the ARO, 2014 because the schedule provides for professional services rendered by an Advocate in a conveyance transaction.

On items 1 and 2 of the Bill of costs, the Applicant submitted that the Taxing Officer had correctly stated that the conveyance transaction which was the subject of the bill of costs was not completed. However, the Applicant faulted the Taxing Officer for taxing the bill at Kshs. 250,000/= as instruction fees without giving any reasons save by reiterating the words of Schedule 5 part 2.

The Applicant relied on various authorities including the decision in **Kimani Richu & Associates Advocates v Centurion Holdings Limited [2018] eKLR**, where **Eboso J.** stated as follows: -

*“19. In the present reference, the Taxing Officer applied Schedule V in assessing fees in respect of services relating to sale and purchase of land. Her view was that an incomplete sale/purchase of land is not provided for under Schedule 1. That in my view was an error. The Taxing Officer should have taxed the bill based on Schedule 1 which provides the costing of land sale and purchase services. While applying Schedule 1 she would be required to take into account the extent of the advocate's services and what remained to be done to complete the conveyance. That way she would have arrived at a rational figure.”*

On item 3 of the bill of costs, the Applicant submitted that the Taxing Officer erred in principle in disallowing the entire amount of Kshs. 10,000/= which had not been proved. The Applicant further submitted that he incurred expenses on account of printing, photocopying, emails and telephone calls for which the Taxing Officer should have used her discretion and allowed.

The Respondent submitted that the Taxing Officer exercised her discretion correctly and that she taxed the bill based on the applicable

provisions of the ARO. Further, that she considered all there was to be considered before she delivered her award. That the Taxing Officer did not err in principle as contended by the advocate and that the material conveyance was not completed. The Respondent submitted that the correct schedule was schedule V which the Taxing Officer relied on and added that there was no error in applying that schedule.

The Respondent relied on various cases including **Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR**, **Chokaa & Company Advocates v Deposit Protection Fund [2007] eKLR** and **Njeri Kariuki Advocate v Mary Wamaita Kaittany [2019] eKLR**.

Having considered the reference, the affidavits and the rival submissions together with the authorities cited. The circumstances under which a judge interferes with the Taxing Officer's exercise of discretion are where either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. Some of the relevant factors to be taken into account under the ARO include the nature and the 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. The principles for consideration were outlined in **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**.

Two issues emerge for determination in this reference, which are whether the Taxing Officer applied the wrong schedule and wrong principles in assessing the bill of costs; and whether the instruction fee of Kshs. 250,000/= assessed by the Taxing Officer for an unfinalised conveyance of land valued at Kshs 75,000,000/= was manifestly or grossly low in the circumstances of the case so as to warrant an injustice.

The reference emanates from instructions given to the advocate to act for the client who was a purchaser in a contract involving land reference number 209/12817. The Advocate prepared an agreement for sale and an addendum to the agreement for sale between the Respondent and the African Centre for Women and Information and Communications Technology (ACWICT) at the agreed purchase price of Kshs. 75,000,000/=. Vide the ruling delivered on 21/9/2020, the Taxing Officer considered the bill and noted that since the conveyance transaction was not completed the correct schedule was Schedule 5 part 2 of the ARO and proceeded to tax the item at Kshs. 250,000/=. It is not disputed that the conveyance transaction was not completed. It was also not disputed that the services rendered by the Advocate to the client related to non-contentious matters. The fees for non-contentious matters are provided for under Schedule 1 of the ARO.

In this court's view that, the fact that the services rendered by the advocate to the client in respect to non-contentious matters were not completed was not a valid ground for the Taxing Officer to tax the bill under Schedule V of the Remuneration Order. Schedule V only applies to services rendered in non-contentious matters which no remuneration is provided for in schedule 1. Schedule 1 provides the costing of land sale and purchase services. While applying Schedule 1 the Taxing Officer would be required to take into account the extent of the advocate's services and what remained to be done to complete the conveyance as Eboso J. stated in **Kimani Richu & Associates Advocates v Centurion Holdings Limited**. The Taxing Officer erred in taxing item 1 of the Applicant's bill of costs under schedule V of the ARO instead of Schedule I.

Regarding item number 2 of the Bill of costs, the court notes that the Applicant sought Kshs. 40,000/= which was billed as the instructions to draw up an addendum to the agreement of sale of LR No. 209/12817 at an agreed consideration of Kshs. 2,000,000/= between Electro Watts Limited and ACWICT. On this item, the court agrees with the Respondent's submission that instruction fees are charged once and should not be charged twice for the same transaction.

The final issue for determination is whether the Taxing Officer misdirected herself in disallowing the disbursements of Kshs. 10,000/=. Counsel for the Applicant submitted that the Taxing Officer ignored the documents attached to the bill of costs and that she failed to appreciate that expenses were incurred. The Taxing Officer declined to allow that item because no proof was provided for the actual expenses incurred as disbursements. The Applicant was expected to avail those documents to prove that those expenses were incurred. The Taxing Officer exercised her discretion properly in disallowing that item.

The court finds that the decision of the Taxing Officer in awarding instruction fees of Kshs 250,000/= was made in error, as the wrong schedule of the ARO was applied. The reference partly succeeds in relation to the Taxing Officer's decision on item number 1. The decision of the Taxing Officer on items 2 and 3 will not be interfered with.

The Taxing Officer's decision in the ruling dated 21/9/2020 in which she taxed item number 1 on instruction fees at Kshs 250,000/= is set aside. The bill of costs dated 26/2/2020 will be remitted to another Taxing Officer of this court for taxation of item number 1.

Each party shall meet their respective costs of the reference.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF AUGUST 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. V. Owuor- Court Assistant

No appearance for the Applicant and the Respondent