



REPUBLIC OF KENYA



**CB Gor & Gor v Oceanview Plaza Limited (Civil Miscellaneous
Application 75 of 2020) [2024] KEHC 9173 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL MISCELLANEOUS APPLICATION 75 OF 2020**

DKN MAGARE, J

JULY 11, 2024

BETWEEN

CB GOR & GOR APPLICANT

AND

OCEANVIEW PLAZA LIMITED RESPONDENT

RULING

1. This is a reference by way of Chamber Summons dated 28th November, 2023. It challenged the taxing master's taxation of the Respondent's bill (Advocate) of costs at Kshs. 1,028,426. The advocates opposed the same through an affidavit of Shishir Suryakant Gor dated 6th March, 2024. The summons are supported by the affidavit of Naresh Manilal Kotak.
2. The Respondent submitted that the reference was filed out of time. They stated that the reference should have been filed within 14 days of 19th October, 2023. They questioned lack of leave.
3. They set forth Rule 11(1) and (2) of the *Advocates Remuneration Order*. Reliance is placed on the case of *Paul Wanjohi Mathenge -vs- Duncan Mathenge* (2013) eKLR.
4. On the issue of stay of execution, they stated that the court has to confer the same in light of Order 42 Rule 6. In that connection they state that the court should not interfere with the taxing master's discretion unless essential factors were not considered. In this regard they relied on the case of *KTK Advocates v Baringo County Government* (2017) eKLR, where the court held as follows: -

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also



interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

5. They also relied on the case of *First American First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, where the court stated: -

“This court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. (See *Steel & Petroleum (e.a) Ltd Vs. Uganda Sugar Factory* (Supra). Of course. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the cause or 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment.”

6. This ruling will dismiss the reference. There was no indication on the merit of the reference at all. The submissions were filed on 3/7/2024 at 1611 hours.
7. The Applicant filed submissions on 8th May, 2024. They stated that the bill was in respect to work done in LR. MN/1/9892 and MN/1/9933. The bill had been opposed. The Taxing Master relied on 19th October, 2023 indicating costs of Kshs. 1,028,456/=. They stated that the taxing master failed to consider that no work was done and no completion documents were completed.
8. They stated that the sale was cancelled. They stated that transfers were never effected following cancellation and the deal did not materialize. The taxing master is said to have ignored Rule 18(8) of the *Advocates Remuneration Order* 2014 as read with Schedule 5 part 11 of the *Advocates Remuneration Order*. This is because the advocate is only entitled to form remuneration once formalities are completed. The fees ought to have been charged for work done as per the *Advocates Remuneration Order*. They relied on the case of *Ratemo Oira & Co Advocates v Magereza Sacco Society Ltd* [2019] eKLR which held as follows:-

“This Court is of the view that it is only in contentious suits where an advocate becomes entitled to an instruction fee the moment he is instructed but not in instances like the present case which is expressly provided for under the Advocates Remuneration Order... The Court is not persuaded that the Taxing Master failed to consider any relevant factor in taxing the bill of Costs or that she misdirected herself and caused an injustice to warrant this court to interfere with the exercise of her discretion. The taxing master applied the correct principles.”

It is clear beyond doubt that the only work done by the appellant was preparation of sale and transfer documents, which was not executed by the respondent. It is also clear that the respondent instructed the appellant to undertake sale/purchase transaction, which aborted.



No deposit was paid to the appellant, making it manifest that transaction aborted in its preliminary stage. That means that the appellant's scope and nature of work was minimal and in the early stages of the transaction while we underscore the importance of the services rendered by the appellant, we do not think, it suffered substantial or any loss in the amount determined by the taxing master and upheld by the High Court”

9. They also relied on Maina Murage & Company Advocates v Mae Properties Limited [2018] eKLR, where it was held as doth; -

Rule 20 of the Advocates Remuneration Order (ARO) provides that scale charges shall include all work ordinarily incidental to a transaction, and in the case of a conveyance, transfer or mortgage; it shall include taking of instructions to prepare the necessary deed or document, investigation of title, report on the title to the client, preparation or approval or adjustment of the deed or document, settlement of the transaction if in the town of the advocates practice, obtaining by correspondence any necessary consent or clearance certificate but excluding land control consent, registration of the deed and correspondence between an advocate and his client.

Rule 18(f) of the ARO provides for uncompleted transactions and other business. The rule states that in the case of uncompleted transactions relating to business of a non-contentious nature, the remuneration is to be that prescribed under schedule V.

10. The second aspect was enlargement of time. They stated that this was caused by the delay in getting a copy of the ruling.

Analysis

11. The Taxing Master's decision was made in the presence of parties. The matter was contentious even on the date of delivery. A handwritten ruling was delivered. There was no letter requesting for reasons and no explanation for the absence. The payment for the ruling was made on 1/11/2023. Though the delay is not inordinate, the same has not been explained. There is absolutely no reason, even a fictitious one, as to why the reference was filed out of time.
12. The reference was thus an afterthought. The duty of the court is set out in Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. [2014] eKLR, the court stated that:

“The circumstances under which a judge of the High Court interferences with the taxing officer's exercise of discretion are now well known. These principles are:

1. that the court cannot interfere with the taxing officer's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;
2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or 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;
3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for



reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

13. In this case, the jurisdiction was properly invoked. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively, in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

14. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. There being no valid reference, I dismiss the same with costs of Kshs. 25,000/= payable in 30 days. In default execution to issue.

Determination

15. The upshot of the foregoing is that I make the following orders: -
 - a. The Application dated 28th November, 2023 is dismissed with costs of Kshs. 25,000/= payable within 30 days. In default execution to issue.
 - b. Leave to appeal granted.
 - c. Certified copies of proceedings and Ruling be supplied upon payment.
 - d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JULY, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mrs. Omondi for Wamiti for the Applicant

No appearance for the Respondent

Court Assistant – Jedidah

