



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISCELLANEOUS. CAUSE NO. E213 OF 2019

WETANGULA, ADAN &

COMPANY ADVOCATESAPPLICANT/ADVOCATE

VERSUS

BHARAT RAMJI and

GAMI PROPERTIES LIMITED.....RESPONDENT/CLIENT

RULING

A. INTRODUCTION

1. The Advocate herein filed its bill of costs dated 27th December, 2019 against the Client where the same was taxed and assessed by the Deputy Registrar of this Court vide a ruling delivered on 2nd December, 2020.

2. The Client being dissatisfied by the Deputy Registrar's ruling filed the instant reference vide the Chamber summons application dated 5th March 2021 with a supporting affidavit of even date sworn by **Leo Masore Nyang'au** the Client's Counsel seeking the following orders:

i) *THAT this Honourable Court be pleased to set aside the decision on taxation of the Senior Deputy Registrar given on the Applicant's bill of costs dated 27th December 2019.*

ii) *THAT the Honourable Court be pleased to remit the bill of costs dated 27th December 2019 for taxation before a different Taxing Officer.*

iii) *THAT in the alternative to prayer 2 hereof, the Honourable Court be pleased to remit the bill of costs dated 27th December 2019 to the same Taxing Officer with appropriate directions over her decision on items 1,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22 and 25 of the bill of costs dated 27th December 2019.*

iv) *THAT the costs of this Application be provided for.*

3. The application was supported by the following grounds: -

a) *THAT the Learned Senior Deputy Registrar erred in law and in fact in failing to apply the correct principles in assessing instruction fees at item 1.*

b) *THAT the Learned Senior Deputy Registrar failed to reduce the scale fee payable to the Applicant by one-third.*

c) *THAT the award of Ksh 15,890/= on item 4 is unjustified as there was no extra work done.*

d) *THAT the award of Ksh 7,630/= on item 5 is unjustified.*

e) *THAT the award of Ksh 7,280/= on item 6 is unjustified.*

f) *THAT the award of Ksh 30,000/= on item 7 is unjustified.*

- g) *THAT the award of Ksh 15,960/= on item 8 is not justified.*
- h) *THAT the sums awarded on item numbers 9,10,11,12,13,14,15,16,17,18,19,20,21 and 22 are not justified.*
- i) *THAT the Hon. Taxing Officer did not make any decision on item 18 of the bill of costs.*
- j) *THAT fees at attending taxation at Ksh 4,000.00/= is unjustified when the attendance was virtual and taxation done by written submissions.*
- k) *THAT the applicable rate of VAT at taxation was 14% and not 16% at the time of taxation.*
- l) *THAT the Learned Senior Deputy Registrar failed to exercise her discretion fairly and judiciously by taxing all court attendances on the lower scale.*
- m) *THAT the Learned Senior Deputy Registrar failed to consider the Applicant's submission in regard to the impugned items.*

4. The application was opposed vide a notice of preliminary objection filed on 9th July 2021 and an affidavit sworn by **Naima Sheikh** on the even date. In the notice of preliminary objection, the Advocate stated that the reference herein had been filed out of time and that no application for enlargement of time had been sought and hence the court lacked jurisdiction to entertain it.

5. The application was canvassed through written submissions. The Client's submissions were filed on 1st October 2021 while the Advocate's submissions were filed on 4th October 2021.

B. PARTIES RESPECTIVE CASE/SUBMISSIONS

Client's case/submissions

- 6. The Client in his submissions urged the Court to issue the above prayers in the chamber summons Application.
- 7. It was the Client's contention that the reference was filed within time and it was proper before this Court.
- 8. The Client submitted that through his supporting affidavit he had narrated the events and timelines that led to the filing of the reference and demonstrated how the same was filed within time.
- 9. Specifically, the Client stated that the 14 days period for filing a reference starts to run not from the date of the taxation but from the date the objector receives the reasons for the taxation. He further submitted that in the instant case, the ruling was delivered on 2nd December 2020 and he objected on 9th December 2020 within the prescribed 14 days period. He later received the reasons on 2nd March 2021 and subsequently filed the reference on 5th March 2021 within the prescribed 14 days period. He urged the court to dismiss the preliminary objection with costs.
- 10. It was the Client's contention that the Taxing Master did not give specific reasons for the taxation when she was requested to do so save to merely state that her reasons for taxation were to be found in her ruling. On this front, the Client submitted that the Taxing Master never gave reasons for instance as to why item 18 was not taxed and also subjecting the bill to 16% VAT when the prevailing rate was 14%.
- 11. In addition, the Client also submitted that the Taxing Master misdirected herself in not reducing item 1 by one third. The Applicant further urged the Court to set aside the Taxing Master's decision and remit it back for taxation as prayed in the application.

Respondent's case/Submissions

- 12. The Advocate filed a notice of preliminary objection and a replying affidavit in opposing the reference. They submitted that the Taxing Master's decision was correct and impeachable and that no error could be discerned from the said decision.
- 13. The notice of preliminary objection filed by the Advocate objected to the reference for the reasons that the same had been filed out of time and that no leave was sort to remedy the situation. It was the Advocate's submissions that the 14 days period started running from the date the ruling was rendered being 3rd December 2020 and ending on 17th December 2020.
- 14. The Advocate further submitted that the reference having been filed on 5th March 2021, came 93 days late. The cases of **Evans Thiga Gaturu, Advocate v KCB [2012] eKLR** and **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited (2) [2006] 1 EA 5** were relied on to support the preliminary objection.
- 15. The Advocate also submitted that the reference focussed on quantum which in their view could not be a reason to upset the Taxing Master's decision. They relied on the following case to advance their position, **Green Hills Investments Ltd v China National Complete Plant Export Corporation t/a Covec [2004] eKLR**.
- 16. In respect to item 1, the Advocate submitted that the Taxing Master applied Schedule 1 of the Advocates Remuneration Order as the correct schedule and applied the graduated scales within the first scale of Schedule 1 Paragraph 1 when computing scale fees and allowed the

scale fees as drawn at Ksh 10,500,000/.

17. On the aspect of the one third reduction, they stated that the proviso applies only to the vendor and specifically where the vendor's advocate does not prepare a letter of agreement, heads of agreement or agreement for sale. They further stated that in the instant case, the vendor's Advocate was Kaplan & Stratton Advocates as per the Agreement for sale dated 1st February 2016.

18. The Advocate also submitted that on the rest of the items, the decision of the Taxing Master was correct since the same were properly taxed off or disallowed as applicable.

19. On the issue of VAT, the Advocate submitted that the Taxing Master's decision to uphold the 16% VAT on legal fees was correct, and no error was identified. The same was anchored on Section 19 (1) of the Value Added Tax Act which provides that tax shall be due and payable at the time of service as per the scale. Reference was made to the case of **Ericsson Kenya Limited v Attorney General & 3 Others [2014] eKLR**. They stated that in the instant case the services were rendered between January to March 2016 when VAT was 16%.

ISSUES AND ANALYSIS

20. I have considered the reference, the response and submissions by parties. I have also considered the decisions relied on by parties. The issues which in my opinion arise for determination are as follows:

- i) ***Whether the reference is time barred and filed without leave of the court.***
- ii) ***Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and thereby reached a wrong assessment.***

Issue No. I

Whether the reference is time barred and filed without leave of the court.

21. The Advocate submitted that the reference was time barred having been lodged outside the 14 days limitation period prescribed in Rule 11(2) of the Advocates Remuneration Order. The reference was lodged 93 days after the delivery of the reasoned Taxation Ruling. The Advocate also submitted that no leave was sought to enlarge time.

22. The Client countered the Advocate's assertions and contended that the reference was filed within time since time started running from the date when the reasons for the ruling were received by the objector and in this case the reasons having been received on 2nd March 2021 and the reference having been filed on 5th March 2021 the same was within time.

23. The procedure by an aggrieved party to challenge a taxation ruling is set out in the Advocates Remuneration Order Paragraph 11 and is very specific on what an aggrieved party should do. ***A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.***

24. Paragraph 11 of the Advocates Remuneration Order stipulates-

11(1) should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all parties concerned, setting out the grounds of his objection.

3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4) The High Court shall have power in its discretion by order enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.

5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days' notice in writing or as the court may direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.

25. It is therefore apparent from the law that the above provision provides for the filing of a reference within 14 days from the date of receiving the reasons for the decision. This continues to apply despite the fact the Taxing Master would often indicate that the reasons are contained in the decision.

26. In my view, the authorities cited by the Advocate, the case of **Evans Thiga Gaturu, Advocate v KCB [2012] eKLR and Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited (2) [2006] 1 EA 5** do not expressly indicate that one may be deemed to

have filed a reference out of time if the same is filed after 14 days from the date of getting reasons for the decision.

27. I agree with the submissions from the Client's Counsel that in the instant case, the reference was filed within time and hence no leave was necessary. On this aspect, I find that the reference is properly filed before this court and I hereby dismiss the notice of preliminary objection dated 9th July 2021 with costs.

Issue No. ii

Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and thereby reached a wrong assessment.

28. The Principles of taxation were aptly stated in **Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162)** where the court noted as follows on the principles on taxation:

“(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

29. The circumstances under which a Judge interferes 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 decision 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 inference 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 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 practise 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; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**.

30. The Client's principal argument is that the Taxing Master misdirected herself in taxing the bill at Ksh 12,286,390.20 /= while the Advocate on the other hand maintained that the Taxing Master correctly taxed the bill as per scale and exercised her discretion properly.

31. In determining instruction fee, the Taxing Master went ahead to give her reasons indicating that the same was drawn as per scale since it related to an agreement dated 1st February 2016 that provided the Client and or his nominee as the purchaser of LR. Number 27253/42. The purchase price was Ksh 960,000,000/=. The Taxing Master also found that the transfer instrument was prepared by the Advocate (acting for the purchaser) herein and hence was not subject to one third reduction. For these reasons, she taxed the instruction fees as per scale for Ksh 10,500,000/=

32. On item no. 18 which the Client submitted that the same was taxed without any reasons being given, I hold a contrary view since from the perusal of the Ruling delivered by the Taxing Master it is clear that the same was disallowed for the reasons that the services therein formed part of the scale fees.

33. On the issue of the VAT being applied at 16% and not 14% as submitted by the Client, I also find that the Client's submission on the same is misplaced. The services were rendered between January to March 2016 when VAT was 16%. I agree with the submissions for the Advocate that the same was anchored on Section 19 (1) of the Value Added Tax Act which provides that tax shall be due and payable at the time of service as was stated in the case of **Ericsson Kenya Limited v Attorney General & 3 Others [2014] eKLR**. Similarly, the Taxing Master gave her clear reasons as to why the VAT was applied at 16%.

34. I have also perused the Ruling in respect to the other item numbers 9,10,11,12,13,14,15,16,17,19,20,21 and 22 and I am convinced that the Taxing Master disallowed or allowed them where applicable as provided for by the scale.

35. I have carefully considered the reference and the amount the taxing officer allowed and the reasons given to support her decision. I have also considered the Client's grievances and supporting arguments. I have further considered the principles upon which this court exercises jurisdiction to interfere with the Taxing officer's exercise of discretion in the taxation of bills as outlined earlier and I do not find merit in the reference.

36. . The taxing officer in my view did not misapprehend the applicable principles and law in arriving at her decision. It is therefore not open for this court to interfere with the same.

37. As was stated by the **[Supreme Court of Uganda (Mulenga, JSC) in Bank of Uganda v Banco Arabe Espaniol, Civil Application No. 29 of 2019]**;

...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. (Emphasis added).

38. Flowing from what I have stated above, I am unable to uphold the Client's argument that the taxing officer committed an error of principle or law in her decision. Consequently, the reference is declined and dismissed.

39. Each party shall meet their respective costs of the reference.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF OCTOBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Evans Ochieng for the Advocate.

Mr. Masore Nyang'au for the Client.

Court Assistant; Caroline.