



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC NO. 50 OF 2019

ABIB & ASSOCIATES ADVOCATES....ADVOCATE/APPLICANT

- VERSUS -

ESTHER GLORIA MWIHAKI BELL.....CLIENT/RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Chamber Summons dated 23rd July 2021. The application seeks the following substantive orders:

i. Spent...

ii. Spent...

iii. **The Ruling by Hon. Diana Orago, Deputy Registrar of this Honourable Court, delivered on the 24th June 2021 on the Taxation of the Bill of Costs dated 27th March 2019 be set aside and remitted back for fresh taxation.**

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

2. The application is based on the grounds on its face and supported by the affidavit sworn by **Edward Kolla Wangila Advocate** sworn on the 23rd July 2021.

3. When the matter came up for mention on 7th October 2021, the Court directed the Application to proceed for hearing on 18th November 2021 wherein the parties would make their oral submissions.

4. On 18th November 2021, **Mr. Edward Wangila Advocate** made oral submissions for the Applicant while **Mr. Moses Mutanda Advocate h/b for Mr. Stephen Gitonga Advocate** submitted for the Respondent. The Applicant's principal argument is that the Taxing officer misdirected herself in applying the wrong schedule while arriving at her decision. The Taxing officer applied **Rule 18(f) of the Advocates Remuneration Order**. It was the Applicant's argument that the instructions were based on a conveyance whose terms of remuneration are under **Schedule 1 of the Advocates Remuneration Order** because the schedule provides professional services rendered by an Advocate in a conveyance transaction.

5. In response, the Respondent opposed the reference and submitted that the Taxing Officer exercised her discretion correctly and taxed the bill based on the applicable provisions of the Advocates Remuneration Order and considered all there was to be considered before she delivered her award; the taxing officer did not err in principle as alleged by the advocate and that the material conveyance was not completed.

6. I have considered the substance of the reference and the parties' oral submissions. I have also considered the principles upon which this court exercises jurisdiction to interfere with the Taxing officer's exercise of discretion in the taxation of bills.

7. 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 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; (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*.

8. The single issue which in my opinion arises for determination by this Court is whether the taxing officer applied the wrong schedule and wrong principles in assessing the bill of costs.

9. The reference emanates from instructions given to an advocate to act for the client who was a vendor in a sale agreement involving **LR No 209/7153/29**. The Advocate prepared an agreement for sale between the Respondent and for the agreed purchase price of **Ksh 201,000,000/-** but the transaction was not completed. Vide a ruling delivered on 24th June 2021, the Taxing officer considered the Bill and noted that this was a non-contentious matter and since the conveyance transaction was not completed, **Rule 18(f) of the Advocates Remuneration Order** was applicable and proceeded to tax the same at **Ksh 2,360,000/-**

10. 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 which were the subject to the bill of costs were in respect to non-contentious matters.

11. Having considered the reference and examined the relevant provisions of the Advocates Remuneration Order, it is my view that, the fact that services rendered by the advocate to the client in respect to the conveyance was not completed, was not a valid ground by the Taxing officer to tax the bill under **Rule 18(f) which refers to Schedule V of the Remuneration Order**. In my humble view Schedule V is only applied in respect to services rendered in non-contentious matters which no remuneration is provided for in schedule 1. Schedule 1 provides the specific costing of land sale and purchase services. While applying Schedule 1, the Taxing officer would be required to consider the extent of the advocate's services and what remained to be done to complete the conveyance. I have to concur with the oral submissions of **Mr. Wangila Advocate**, that the taxing officer erred in taxing item 1 of the applicant's bill of costs while referring to Rule 18(f) whereas the remuneration in respect thereof was provided for under Schedule 1.

12. However, I am bound by the decision of the Court of Appeal in the case of *Ratemo Oira & Co. Advocates v Magereza Sacco Society Limited (2019) eKLR* which in similar circumstances upheld the decision of Taxing Master and the Environment and Land Court in applying **Rule 18(f) and Schedule V of the Advocates Remuneration Order** which position was applied by the Taxing Master herein.

13. In the end, I must state that I would have set aside the decision of the Taxing Master and remitted back the Bill for taxation of the instruction fees as per Schedule 1 of the Advocates Remuneration Order, but in keeping with the doctrine of **stare decisis**, I am bound by the decision of my Lordships in **Ratemo Oira case (supra)**.

14. Consequently, the reference is declined and dismissed. Each party to meet their respective costs.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF

DECEMBER, 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Edward Wangila for the Advocate

Mr. Moses Mutanda for the Client

E. K. WABWOTO

JUDGE