



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO.516 OF 2013**

**MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**UPWARD SCALE INVESTMENT COMPANY LIMITED.....1<sup>ST</sup> CLIENT/APPLICANT**

**LINMERX HOLDINGS LIMITED.....2<sup>ND</sup> CLIENT/APPLICANT**

**RULING**

1. The **UPWARD SCALE INVESTMENTS COMPANY LIMITED AND LINMERX HOLDINGS LIMITED** through a chamber summons brought pursuant to paragraph 11(2) of the Advocates Remuneration order seeks the following orders:-

- a. THAT pending the hearing and determination of this Reference there be a stay of the Ruling delivered by the Taxing Master on 12<sup>th</sup> May 2018.
- b. THAT the Ruling of the Taxing Master dated 12<sup>th</sup> May 2018 be set aside and the Bill of costs dated 10<sup>th</sup> December 2013, be struck out and/or dismissed with costs.
- c. THAT the costs of this Reference be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Client/Respondents.

2. The application is premised on the grounds on the face of the application under nos. 1 to 5 and is supported by an affidavit of Joseph Gitau Mburu sworn on 9<sup>th</sup> July 2018 to which the Bill of Costs is attached and marked "JGM-1".

3. In the instant application the grounds relied upon in support of the application are inter-alia set out as follows:-

1. THAT the Learned Honourable Taxing Master erred in principle and in law in taxing the Bill of costs whereas the Bill was for "provision of secretarial services" which is not legal work.
2. THAT the Taxing Master erred in principle and in law in taxing the Bill whereas one cannot charge for Company Secretarial work under the Advocates Remuneration Order.
3. THAT the Learned Taxing Master erred in principle and in law in taxing the Bill whereas the Advocate herein was not the Company Secretarial charged with providing the aforementioned services. The Advocate is not a registered Company Secretary.
4. THAT according to the Certified Public Secretaries Act (Cap 534) in the Laws of Kenya one cannot purport to practice as a Company Secretary without a licence.
5. THAT the Certified Public Secretaries Act CAP 53 Laws of Kenya has its own remuneration procedures separate from the Advocates Remuneration Order.

4. That as per the affidavit deponed upon by Joseph Gitau Mburu it is contended that the Bill lodged by the Advocate was incapable of Taxation as it was filed under schedule V of the Advocates Remuneration order for "provision of secretarial services" and not for legal work done as the same is not provided for in the Advocates Remuneration Order. The attached Bill of costs marked "JGM-1" is headed as follows:-

"In the matter of the Advocates Act chapter 16, Laws of Kenya

**And**

**In the matter of provision of secretarial service in the meeting of the consortium of prospective investors in upward scale investment company limited in the formation of the joint venture for the acquisition, design, development and sale of a block offices on land reference number 209/309/1**

**And**

**IN THE MATTER OF TAXATION**

**Between**

Mwangi Keng'ara & Co, Advocates.....Advocate/Applicant

**Versus**

Upward Sale Invest. Company Ltd....1<sup>st</sup> Client/Respondent

Linmerx Holdings Limited.....2<sup>nd</sup> Client/Respondent."

5. After hearing the parties the Taxing Master in her ruling dated 12<sup>th</sup> May 2018 taxed the Respondents bill of costs at Kshs.22, 478/-taxing off Kshs.60, 805. The certificate of taxation dated 10<sup>th</sup> July 2018 in the court file confirm the Bill as having been taxed at Kshs.22, 478/-.

6. Before the hearing of the application dated 9<sup>th</sup> July 2018, M/s Gichuki King'ara & Co. Advocates for the Applicant filed their submissions dated 3<sup>rd</sup> October 2018 in support of their client's application dated 9<sup>th</sup> July 2018 whereas M/s Mwangi Keng'ara & Co. Advocates filed their submissions dated 18<sup>th</sup> December 2018 opposing the Applicant's application. The court subsequently heard both Advocates in highlighting on their rival submissions.

7. From the submissions by the parties I have come up with the issues arising thereto for consideration as follows:-

**a. Whether the Bill of Costs was properly before court?**

**b. Whether instruction fees (if any) was properly calculated?**

**c. Whether the Respondent offered the secretarial services and if so whether the Respondent is entitled to fees as professional Advocates?**

**d. Whether the Bill of Costs is incapable of being taxed and whether there is misjoinder of the parties?**

**e. Whether there was an error of principle and law in tabulation of instruction fees?**

**A. Whether the Bill of Costs was properly before court?**

8. The Applicants contended that the Bill of Costs before the taxing master was not proper as it was for "*provision of secretarial services*" which is not legal work. It is further contended that the Bill of Costs related to company secretarial work, whereas the Respondent was not a registered company secretary. That the company secretaries charge fees under certified public secretaries Act (Cap 534). The Applicants in support of their argument relied on section 15 of the certified public secretaries Act (Cap 534) which relates to submissions of official Statutory Returns of companies and Trading Organization; certification of statutory returns of records related to statements; or engaging in any service which may be presented.

9. The Bill of costs before the Taxing Master was "*Advocate/Client Bill of costs under schedule V part II*". Schedule 3 of the Advocates Remuneration (Amendment) Order headed "*Formation, Incorporation and Registration of Companies*" clearly demonstrates that Advocates can handle matters listed thereto and charge fees. Paragraph 3 of the said schedule provides as follows:-

**"All work relating to company other than that for which fees are prescribed in this Schedule shall be charged under the relevant Schedule."**

**10. Section 44(2) of the Advocates Act** is more specific on remuneration of Advocates for non-contentious matters for professional work and specifically provides that:-

**"The mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business or by a gross sum...."**

Furthermore schedule 5 provides for remuneration for which is not otherwise prescribed whereas part II of the said schedule deals with alternative method of assessment of fees.

11. The Bill of Costs before the court was for various services rendered including journey from home, time engaged; attendance, drawing and perusal of document, correspondence, which is provided for under schedule 5. What was being done cannot be claimed to be secretarial services as alluded to by the Applicants. The Bill of cost in my view was properly brought to court under schedule 5 part II, which provides for charges on the basis under the said schedule by the Advocate and as per item of work done. The Advocates Remuneration Order provides for professional non-contentious or contentious work. The Bill of costs does not deal with "*conveyance documents*" as alluded to by the Applicants. In the whole Bill of Costs there is no item for instruction fees and none was granted. The Taxing master in her ruling, applied schedule 3 of the Advocates Remuneration order and Rule 18(f) of the Advocates Remuneration Order which were relevant as well as schedule V of the Advocates Remuneration order. In summing up I find that the Bill of costs in this matter was properly before the court and court acted properly in admitting the Bill of Costs for taxation. I find no good reason to find otherwise.

#### **B. Whether instruction fees (if any) was properly calculated?**

12. The Applicant contend that instruction fees was not properly calculated as the Respondent never completed the transaction for the client, hence the documents drawn were of no value to the client, forcing the client to seek alternative representation, which further inconvenienced the client and proved to be more costly. It is Applicants submission, therefore that the Respondent is not entitled to levy the full instructions fees since the Respondent did not deliver to the clients as agreed. That the draft conveyance documents cannot be executed and fees for such services are only payable upon completion. It is further urged the instruction fees awarded by the taxing master is also highly exorbitant as the taxing master did not give reasons for the specific amount awarded to Advocate as instruction fees and further there was an error in failing to state who exactly was the Respondent, that is responsible for payment of the taxed costs. It is further urged under schedule V of the Advocates Remuneration order there is no provisional for instruction fees.

13. In the case of **Opa Pharmacy Ltd vs Howse & Mcgeroge Ltd Kampala HCMA No.13 of 1970 (HCU) [1972] EA 233**, it was held:

**"Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fees. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The future to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."**

14. In High Court Miscellaneous Application No. 100 of 2013, **Ufundi Co-operative and Credit Society vs Njeri Onyango & Co. Advocates** (unreported) on page 10, it was held:-

**"It is trite law however, that the Appellate tribunal, which the Judge in chambers in respect of taxation ruling is, will not generally interfere with an exercise of discretion of the taxing officer unless the latter's decision:-**

**i. Was in error of principle**

**ii. The sum allowed is so high or excessive that or so low that it is clearly unreasonable and will have been contrary to the existing principle."**

15. In the instant matter, upon perusal of the Bill of costs and the court's Ruling dated 12<sup>th</sup> May 2018 I find that there was no prayer raised for instructions fees and none was awarded. The Bill of costs similarly do not relate to "*conveyancing documents*". I therefore find no merit in the applicants urging court that instruction fees was not properly calculated when no amount was awarded under the sub-heading of instruction fees.

#### **C. Whether the Bill of Costs is incapable of being taxed and whether there is misjoinder of the parties?**

16. The Applicant contend that the Respondent offered secretarial work and the taxing master erred in principle and in law in taxing the bill of cost for "*provision of secretarial services*" which is not provided for in the Advocates Remuneration order. That the Advocate is neither a registered company secretary nor was she charged with providing the aforesaid services. That the certified public secretaries Act, (Cap 534) provide that one cannot purport to practice as a company secretary without a licence. That the certified public secretary Act, (Cap 534), has its own remuneration procedures separate from the Advocates Remuneration Order.

17. In the instant matter, it is conceded by the Respondent that it rendered secretarial services to the Applicants by attending meetings which were convened by the Applicants/Clients and did take and prepared the minutes. This court was referred to page 31 of Respondent's **Exhibit MNM-3** at paragraph No. 15, where the court found as follows with regard to attending the meetings.

**"There would seem to be little doubt that the Defendant attended a number of meetings in connection with the joint venture project. Indeed copies of minutes annexed to the replying affidavit as Exhibit "MNM-3" detail that the Defendant was certainly present in at the meetings held on 8<sup>th</sup> February 2011, 21<sup>st</sup> February 2011, 28<sup>th</sup> February 2011, 7<sup>th</sup> March 2011 and 14<sup>th</sup> March 2011."**

18. In the instant matter, the Respondent attended the meetings and performed the tasks for which she was instructed on various dates. The

Bill of Cost is brought under the provisions of the Advocates Remuneration order under schedule V and not under the Certified Public Secretaries Act, (Cap 534). The Respondent in claiming the fees is not claiming the same as a certified public secretaries but as an Advocate. The items in the Bill of Costs are provided for under the schedule which the bill of costs is based on. I therefore find the Respondent is entitled to fees sought in the Bill of Costs as Advocate and not otherwise.

#### **D. Whether the Bill of Costs is incapable of being taxed and whether there is misjoinder of the parties?**

19. The Applicants position is that the Bill of Costs lodged by the Advocate was incapable of being taxed as it was filed against two companies seeking payment for services rendered jointly and severally apparently for both of them. That the certificate of taxation in the taxation proceedings is therefore incapable of execution for want of specification, as there is no specification which client between the two, being sued, is specifically being charged. It is further submitted that the two Applicants are distinct legal persons capable of being sued in their own individual capacities and as such none of the Applicant is liable for the debt of the other and as such separate bills of costs ought to have been filed against each company separately. That on charging the two Applicants for services rendered to any one of them brings out the issue of misjoinder of persons, this accusing a miscarriage of justice on the part of the innocent parties.

20. It is further urged that under schedule I of the Advocates Remuneration Order has a different charge for either the vendor or purchaser separately. That the taxing master having allowed bundled charges against both parties, the 1<sup>st</sup> Applicant has been literally been forced to pay charges for the 2nd Respondent, which is an apparent error in principle and in law, that ought to be reversed by this honourable court. It is urged the Bill of Costs violate Rule 29 of the Advocates Remuneration Order which provides:-

**"Where an Advocate acts for both vendor and purchaser he shall be entitled to charge as against the vendor, the vendor's Advocates charges and as against the Purchaser Advocates charges-such charges in each case reduced by a sixth."**

It is urged the above Rule illegitimizes a joint joint Bill of Costs as against both parties and as such the Bill of costs is bad in law and ought to be struck out as each party is only obliged by law to be liable for its own part of the Bill of Costs.

21. It is the Respondent's submissions that prayer 2 of the chamber summons cannot issue nor can the Bill of Costs be struck out or dismissed as sought in view of the ruling of this Honourable Court, in Milimani Commercial & Tax Division, High Court of Kenya Miscellaneous Civil Application No. 530 of 2013 Mwangi Keng'ara & Co. Advocates vs Upward Scale Investment Limited, that was delivered on 18/11/2014 pursuant to an application by the Applicants herein seeking the bill of costs herein and 16 others struck out and/or dismissed. The ruling is part of Exhibit MNM-7 pages 77-79. On page 78 paragraph no.6, the Honourable Judge held;

**"Before I proceed any further in this matter I want to state at the outset that there are two Rulings of this court in relation to the matters before the court. The first Ruling is dated 19<sup>th</sup> November 2013 by Hon. Justice (Retired) Havelock, and the second one is dated 17<sup>th</sup> June 2014 by this very court. Those Rulings are on record herein and I will not repeat them. In the light of those Rulings I will also not write a long Ruling in this matter, as I consider most issues raised herein having been dealt with either in those two Rulings, or would have been raised in the last of the two applications to save court time. To be specific before the Client/Applicant application dated 4<sup>th</sup> March 2013 giving rise to my Ruling of 27<sup>th</sup> June 2014 was filed and determined the Client/Applicant herein already knew the contents of the 16 bills which the above application sought to consolidate and have taxed before one Tax Master. Why did the Client/Applicant then not apply to have them struck out at that stage."**

22. Upon consideration of the rulings HCMISC Application No.530 of 2013 and NAI Court of Appeal Application No. 83 & 88 of 2015, HCCC 14 of 2013 and a ruling in this matter involving the parties herein and submissions by counsel that touch on the bill of costs herein, I find there is no option for striking out or dismissing of the Bill of Costs in this matter simply because the court's order herein above specifically directed as the fees has to be assessed for purposes of determining the fees due to the advocate. The court having expressed itself in unambiguous terms the taxation of the Bill of costs was an exercise that required the taxing officer to carry out. In view of the foregoing I have no hesitation in stating that the issue of whether the Bill of Cost was capable of being taxed was settled by the decision of the High court and by a court of equal status to this court. This court cannot sit on appeal or a decision of a court of equal status. I find no basis for this court to find otherwise.

23. On whether there is misjoinder of the parties it is Applicant contention that both Respondents instructed to have to produce secretarial services and they did admit so in Nairobi High Court of Kenya, Civil Suit No.14 of 2013.

24. On the issue of misjoinder of the parties the Respondent demonstrated that both Applicants instructed her and the High Court in Hccc No. 48 of 2013 found that was so.

25. This court has noted that the court ordered that the Bills of Costs shall be taxed by one Taxing Master as per the ruling dated 27/6/2014 in this suit.

26. Under Order 3 Rule 5(1) of the Civil Procedure Act provides for joinder of action. In the instant matter the cause of action was one. That a suit shall not fail for misjoinder as court is empowered to make any order regarding the joinder of parties. I find that as parties agreed by jointly instructing the Advocate and the cause of action is the same none is prejudiced by the joinder of the parties.

#### **E. Whether there was an error of principle and law in tabulation of instruction fees?**

27. It is trite that courts should not interfere with taxing officers decision on taxation unless it is shown that either the decision was based on an error of principle or the fees awarded was so manifestly excessive as to justify an inference that it was based on an error of principle and law.

28. In the instant matter I am guided by the previous Rulings in the High Court and Appeal. I find the same issues raised in this application where litigated upon and decisions made, dismissing the same. The principles of res Judicata therefore applies. I therefore find that the Taxing master did not error in taxing the Bill of costs. There is no error in principle in tabulation of fees due and further no instruction fees was tabulated and as such I find no error in tabulation on fees due.

29. The upshot is that the application dated 9<sup>th</sup> July 2016 is without merit and is dismissed with costs to the Respondent.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of February, 2019.**

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**J .A. MAKAU**

**JUDGE**