



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 529 OF 2013

MWANGI KENG'ARA & CO. ADVOCATES.....ADVOCATE

-VERSUS-

UPWARD SCALE INVESTMENT CO. LTD.....1ST CLIENT

LINMERX HOLDINGS LIMITED..... 2ND CLIENT

GEOMAX CONSULTING ENGINEERS.....3RD CLIENT

(Being a Reference from the decision of the Taxing Master C. Wanyama on the taxation on 10th August 2018)

RULING

1. **Mwangi Keng'ara & Company Advocates** (the Advocate) filed an Advocate/Client Bill of Costs, in this matter on 10th December 2013. That Bill of Costs was filed against three Clients namely: **Upward Scale Investment Company Limited** (the 1st Respondent); **Linmerx Holdings Limited** (the 2nd Respondent); and **Geomax Consulting Engineers** (the 3rd Respondent).

2. That Bill of Costs was taxed by the Taxing Master C. Wanyama on 10th August 2018. That taxation is the subject of the reference by all the three Respondents by a Chamber Summons dated 24th August 2018. By that Chamber Summons the Respondents seek the following prayers:

a) That the Ruling of the Taxing Master dated 10th August 2018 be set aside and the Bill of Costs dated 10th December 2013 be struck out and/or dismissed with costs.

b) That in the alternative, the Advocate/Client Bill of Costs dated 29/11/2013 be remitted back for taxation before other Taxing Officer.

c) That the costs of the reference be awarded to the 1st, 2nd and 3rd Client/Respondents.

3. The one thing that I wish to highlight, before going further, is that the Bill of Costs in this matter was filed by the Advocate on 10th December 2013 and is dated 27th November 2013. It follows that the Respondents' reference to the two dates, above in prayer (a) and (b), that is 10th August 2013 and 29th November 2013, as the date of the bill, is at variance with the actual date of the Bill Of Costs, the subject of this matter. That as it may be I shall proceed on the basis that the Bill of Costs the Respondents object to, in this reference, is the one filed in Court on 10th December 2013 and dated 27th November 2013.

4. The reference was opposed by the Advocate who sought for the dismissal of the Chamber Summons of the Respondents.

ANALYSIS AND DETERMINATION

5. I have considered the Chamber Summons, the affidavit evidence and written submission. Having done so I find there is a basis for the prayer by the Respondents to have the Advocate's Bill of Cost re-considered. Having reached that conclusion, I will then avoid finer discussion of the issues raised by the parties in order to give the Taxing Master free hand in her decision as she re-considers the Bill of Costs.

6. The Taxing Master by her taxation of 10th August 2018 stated:-

“I have considered all the documents filed by the parties and their submissions highlighted before me as well as the supporting case law by both parties.”

7. Other than stating that the Taxing Master had considered those documents filed by the parties in this matter, the Taxing Master did not discuss those documents at all in her ruling of 10th August 2018. This is despite documents such as: Notice of Preliminary Objection, affidavits, legal authorities and submissions being filed by the parties.

8. In my view, the Taxing Master was required to set out in her ruling how she had exercised her discretion in consideration of those documents filed by the parties. It was not enough to say she has considered and then leave it there. How else does a judge, hearing the reference decide whether or not the Taxing Master’s exercise of discretion was correct or not?

9. Further, as rightly argued by the Respondents, the Respondents in this matter are three. It is not denied that the three Respondents agreed to enter into a joint venture. They thereafter engaged the Advocate to carry out the necessary legal work for the joint venture.

10. The Taxing Master in her ruling had this to say:

“The agreement dated 11th August 2011 is between Upward Scale Investment Company Limited and Geomax Consulting Limited where the consideration was Kshs. 8,000,000. Linmerx holding [Limited] is not a party to the agreement and is wrongly joined in this bill.”

11. The Taxing Master did not, thereafter in her ruling indicate which of the Respondents were to pay the Advocates costs and nor did she state what is the liability of the paying Respondent. In other words was the liability jointly and severally or was each Respondent due to pay a specific amount.

12. Further, I must state, I found it very difficult to follow how the Taxing Master arrived at the figure of Kshs. 130,000 for each Respondent. Here, again, the Taxing Master needed to state which of the three Respondents should pay Kshs. 130,000.

13. I was unable to also determine where the figure Kshs. 294,413 came from.

14. I believe the challenge that I face in determining the Taxing Master’s determination of the taxed amount is because she failed, throughout her ruling, to identify the item numbers in the Bill of Costs she was referring to and failed to marry them to the figures in her ruling.

15. I also need to state that I was not clear what the professional fees were. Was it the instruction fee? That was not clear.

16. On the whole, I agree with submissions of the Respondents, that because of the lack of clarity highlighted above, it is necessary for the Bill of Costs to be re-considered but I party company with the Respondents that the Bill of Costs be re-taxed by another Taxing Master. This is because by his ruling of 27th June 2014, Justice E. K. O. Ogola stated that the series of Bill of Costs between the Advocate and the three Respondents should be considered by one Taxing Master.

17. I will therefore interfere with the Taxing Master’s exercise of her discretion because she failed to set out the reason why she taxed the bill costs as she did. I believe such interference of exercise of discretion, by this Court, is in keeping by analogy with what was stated in the case **STANLEY KAUNGA NKARICHIA V MERU TEACHERS COLLEGE L& ANOTHER [2016] eKLR** where the Appellant Court found the trial Court’s failure to state the reason it decided that costs should not follow the event, as provided in law, permitted the Appellant Court to interfere with the trial Court’s discretion. This is what the Appellant stated:

“In totality, the appellant was the successful party to whom costs ought to be awarded. Other than just stating that: “as pointed out by Counsel for the defendant, plaintiff did not adduce evidence to show where there was service of demand and notice of intention to sue...” , there is absolutely no reason given by the Trial Magistrate which would deny the successful party costs of the suit. In the circumstances, the trial magistrate did not exercise discretion judicially; she did not take into account the relevant factors; she did not apply the correct principles of law; she did not give any reasons to depart from the general principal of law that costs follow the event, and eventually her decision was wrong. This court is, therefore, entitled to interfere with her discretion on costs.”

18. Similarly in this case, for the reasons stated above, this Court shall interfere with the Taxing Master’s exercise of her discretion because of lack of clarity on what led her to exercise her discretion as she did.

19. For the avoidance of doubt, I will not permit the parties to re-submit before the Taxing Master on the Bill of Cost. What the Taxing Master is required by this Court to do is re-consider the taxation by clarifying the issues raised above and any other issues raised by the Respondent. In so doing, she will issue a ruling of her taxation without receiving any further submissions from the parties.

20. To that end, the Taxing Master will give reasons for not upholding the Preliminary Objection dated 5th May 2015, which objection I was unable to trace in the Court file. She shall also give reasons for declining to allow the cross-examination of the Advocate, as sought by the Respondents, amongst others.

21. In the end, I grant the following orders:-

a) The taxation of Bill of Costs taxed on 10th August 2015 is hereby set aside.

b) The Bill of Costs dated 27th November 2013 shall be reconsidered and a Ruling shall be delivered by the Taxing Master C. Wanyama on a date to be fixed by the said Taxing Master.

c) For the avoidance of doubt, such re-consideration of the Bill of Costs will not require any party to resubmit or to file any documents or affidavits other than those on record when the Bill of Costs was taxed on 10th August 2018.

d) There shall be no order as to costs to the Chamber Summons dated 24th August 2018 because the reconsideration of the Bill of Costs is not due to any default on the parties.

e) At the reading of this ruling, a date will be given for parties to appear before the Taxing Master C. Wanyama for purpose of the Taxing Master to give a date for her Ruling.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE ADVOCATE

.....FOR THE 1ST CLIENT

.....FOR THE 2ND CLIENT

.....FOR THE 3RD CLIENT