REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO.517 OF 2013

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

-VERSUS-

UPWARD SCALE INVESTMENTCOMPANY LIMITED...1ST CLIENT/ RESPONDENT

LINMERX HOLDINGS LIMITED.....2ND CLIENT/ RESPONDENT

RICHWOOD LIMITED.....3RD CLIENT/ RESPONDENT

MASTERBILL INTERGRATED PROJECTS.....4TH CLIENT/ RESPONDENT

RULING

1. This ruling is in respect to the application dated 24th August 2018 in which the applicants/clients seek orders to set aside the decision of the Taxing Master made on 10th August 2018 and further, that the Bill of Costs dated 10th December 2013 be struck out and/or be remitted to another Taxing Master for taxation.

2. The application is supported by the affidavit of the 1st applicant's director **Joseph Gitau Mburu**, and is premised on the grounds that:

a) That the Learned Honourable Taxing Master erred in principle and in law in taxing the Bill of Costs whereas Masterbill Integrated project, Richhood Limited and Upward Scale Investment are distinct legal persons and as such separate Bill of Costs ought to have been filed against each company separately and taxed separately.

b) That as seen from the Bills filed by the Advocate herein, the advocates charged all the respondents whereas the work was purportedly done on behalf of the 3rd and 4th respondents.

c) That the Learned Taxing Master erred in principle and in law in upholding the advocate's wrongful action of billing for services rendered with no proof of whether she was instructed by any of the parties in the first place.

d) That the Learned Honourable Taxing Master erred in principle and in proceeding with taxation of the Bill in view of the misjoinder of persons and the joint demand for fees. The same ought to have been struck out.

e) That the Learned Honourable Taxing Master erred in principle in taxing the instructions fees without giving any reason founded on the law and in failing to find who among the four respondents was liable on the Bill and in finding that "The amount to be charged per client is the minimum of kshs 160,000/-, since the advocate acted for both parties the amount is reduced by 1/6 to be kshs 133,333 per client".

f) That the ruling does not identify who the two clients are out of the four sued thus the taxing master was overly biased in favour of the advocate.

g) That the Learned Taxing Master erred in law and in fact in allowing instruction fees whereas the advocate did not complete the transaction and the documents she drew were of no value to the client who had to seek alternative representation.

h) That the Learned Taxing Master erred in taxing an exorbitant and exaggerated fee for the instruction fees.

i) That the Learned Taxing Master erred in law and in fact in finding, that the advocate had been paid a sum of kshs 61,000 and in allocating the said amount to general account without bothering to find out who paid the said amount and/or whether the said amount was actually paid and/or illegally taken from sums paid to the advocate on account of a stamp duty.

j) That the certificate of taxation is incapable of execution for want of specification.

3. At the hearing of the application, Mr. Kingara learned counsel for the applicants submitted that the advocate never completed the transaction for the client and that the documents that were drawn were not executed by the parties in which case, no one benefited from the work. It was further submitted that the instructions fees awarded by the Taxing Master is also exorbitant as the Taxing Master did not give reasons for the amount that she awarded to the advocate.

4. Counsel submitted that the taxing master did not specify, who among the four respondents was responsible for paying the taxed costs. It was argued that the certificate of taxation was therefore incapable of execution for want of specification considering that the 4 applicants are distinct legal persons who cannot be held liable for the debt of the others.

5. Counsel cited Schedule 1 of the Advocates Remuneration Order (ARO) which provides for different charges for either the vendor or the purchaser and Rule 29 of Advocates Remuneration Order which provides that:

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, the purchaser advocates charges- such charges in each case reduced by a sixth.

6. Counsel also faulted the Taxing Master for disregarding the documents filed by the applicants in opposition to the taxation of the Bill of costs.

Respondent's case

7. The respondent/advocate opposed the application through the replying affidavit of **Mercy Nduta Mwangi** advocate, sworn on 1st October 2018 wherein she explains, in detail, the sequence of events and previous court proceedings that led to the filing of the Bill of Costs and the legal work that was undertaken by the advocate on behalf of the clients/applicants herein.

8. She avers that there is overwhelming evidence, through the previous court proceedings, that the applicants had retained the services of the advocate and maintains that the advocate is therefore entitled to recover the legal fees for work concluded in 2011. The respondent's deponent further avers that the instant application is yet again another desperate attempt by the applicants to delay the conclusion of the taxation after many other unsuccessful applications that have had the effect of unnecessarily protracting the taxation process. In this regard the deponent highlighted and listed at least nine (9) previous unsuccessful applications filed by the applicants herein over the same subject matter and attached the rulings thereof to the replying affidavit as annexures **"MNM8"**, **"MNM9"**, **"MNM10"** and **"MNM11"**.

9. At the hearing of the application, Miss Mwangi, learned counsel for the advocate/respondent submitted that the issue of whether or not the applicants instructed the advocate to act for them is an issue that had been deliberated upon by this court through several rulings especially the ruling of Justice C. Kariuki delivered in 11th March 2016 which ruling the applicants had not appealed against.

10. On the claim that the advocate was not entitled to the fees because the deed of assignment was not executed by the parties, counsel cited the decision in **Hayanga & Company Advocates –vs- Rayal Garden Developers Limited [2006]eKLR** wherein the court considered the issue of the point at which an advocate is entitled to fees upon preparation of an agreement and held that:

"In the circumstances, as the sale transaction was not completed, the client believes that the advocate should not have been awarded the full instructions fee…….The proper consideration, whether or not the position prevailing in England applies here, is the ascertainment of the work actually done vis-à-vis the nature and extent of the instructions. In effect, if an advocate was instructed to prepare an agreement for sale, he would have earned his full instructions fee, as soon as the said agreement for sale was ready."

11. On whether there was an error in principle in assessing the costs, it was submitted that the taxing masters assessment was below the minimum scales and cannot be said to be exorbitant or exaggerated. For this argument counsel relied on the decision in the case of **George Arunga Sino T/A Jone Brooks Consultants Limited –vs- Patrick J. O & Geoffrey D. O. Yogo T/A Atieno Yogo & Company Advocates[2012]e KLR** wherein it was held that :

"In our view, the Remuneration Order enacted by Parliament, in which the public is represented, and which presents the minimum allowed costs cannot be said to allow such high costs as would affect the public in their quest for justice."

12. Counsel also highlighted the principles/conditions under which the High Court may interfere with the decision of the Taxing Master.

Analysis and determination

13. I have considered the application dated 24th August 2018, the respondent's response and the rival submissions presented by counsel for the parties herein. The main issue that falls for determination is whether the applicants are entitled to the orders sought in the application. The applicants seek the setting aside of the Taxing Master's decision rendered on 10th August 2018 on five principle grounds namely;

a) That the advocate/respondent did not carry out or complete the work/brief for which it was retained by the applicants to conclusion.

b) That the respondent had already been paid the full fees and was therefore precluded from making any further claim for fees.

c) That the documents that the applicants relied upon during taxation were not considered by the Taxing Master.

d) The Taxing Master did not specify the amount payable by each of the applicants.

e) That the amount awarded to the advocate was exorbitant.

14. In considering each of the above grounds for the application it is worthy to note that this is not the first time that the applicants are challenging the taxation of the advocate's Bill of Costs. This court notes that as pointed out by the respondent in both the replying affidavit and submissions, there have been several other applications over the same subject of the taxation and that the said applications have all been determined in favour of the respondent/advocate herein. In determining this application, this court will therefore, make reference to the previous decisions in this matter where applicable.

15. On the applicant's claim that the advocate was not entitled to claim any fees as she did not complete the transaction and that the documents drawn by the advocate were of no value to the client, I have perused the previous rulings that have, so far, been delivered in this case over the issue of taxation and especially the ruling of Havelock J. delivered on 19th November 2013 in **Linmerx Holdings Ltd & Another –Vs- Mercy Nduta Keng'ara T/A Mwangi Keng'ara & Company Advocates[2013]eKLR** wherein the court had the following to say on the issue of professional work done by the advocate in a case wherein the applicants were the plaintiffs:

"There would seem to be equanimity as between the parties hereto to regards the professional work that the defendant was to carry out on behalf of the plaintiffs and the other investors in the project. It is somewhat unfortunate that the impression given by the court from the contents of the affidavit in support of the application was that a composite fee had been agreed with the third defendant in February 2012. This was not the case for, from the correspondence and evidence put before the court, the professional work done and carried out by the defendant was in fact performed in the year 2011. I go along with the replying affidavit of the defendant and accept that she had been approached by the said Mr. Mburu in November 2010 requesting her to offer her legal advice for the joint venture project. 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 present certainly at meetings held on 8th February 2011, 21st February 2011, 28th February 2011, 7th March 2011, and 14th March 2011. Further, it exhibits "MNM-4" and "MNM-5" being copies of letters addressed to the 1st and 2nd plaintiffs dated 30th November 2010 and 7th March 2011 seeking for the defendant's firm to be appointed as the joint-venture project's advocates and setting out the scope of the legal work required to be done. That leads onto when the defendant actually performed in the legal services required of her by the plaintiffs. From the documents annexed to the further affidavit of the defendant dated 27th February 2013, it is quite apparent that they are all dated on various dates in 2011. This would explain why the defendant rendered the series of fee notes that she did in respect of work done and which are annexed to her replying affidavit dated 1st February 2013. The list scheduled at paragraph 22 of that said affidavit details a total of 16 fee notes having been rendered to the plaintiffs. The total of those fee notes comes to Shs. 24,534,435/-. To this court, it is obvious that the plaintiffs having been faced with that total bill resolved to enter negotiations with the defendant aimed at substantially reducing the same.

Those negotiations from the affidavits of both parties took place in and around February 2012,. They seen to have resulted in the Email from Mr. Gotoho to the defendant (amongst others) dated 10th February 2012 at page 2 of the annexure to the affidavit in support of the plaintiffs' said application before court. Such was followed up with the letter at page 2 of the annexure being the letter from the 2nd plaintiff to the defendant dated 29th February 2012. Such prompted the response of the defendant dated 6th March 2012 at pages 3 and 4 of the said annexure. I have thoroughly perused that letter and nowhere does it state that the defendant had accepted the proposed composite fee of shs.12 million for the legal work which she had undertaken on behalf of the plaintiffs. This is the borne out by the letter dated 12th March 2012 from the 2nd plaintiff to the defendant when in paragraph 1 it detailed."

16. From the above extract of the ruling of Havelock J. over the issue of professional work done by the respondent, I find that it is not in doubt that the advocate was instructed by the applicants to act for them and having found that there was lack of consensus between the parties over the professional fees due to the advocate, Havelock J. directed the advocate to file the 16 bills of costs for taxation. Having regard to the said finding that the advocate had performed legal services on behalf of the client for which she was entitled to legal fees, I find that the applicant's current argument that the advocate was not entitled to fees as she did not complete the work does not hold any water as it is an issue that is already spent. In the same vein, the applicants' claim that they do not owe the advocate any fees is not the correct position going by the finding by Havelock J. that there was a dispute in the fees due to the advocate that required that the bill of costs be filed for taxation.

17. On the claim that the taxing master did not consider the documents filed by the applicant, I have perused the impugned ruling by the Taxing Master that is the subject of this application and I note that in the said ruling, the Taxing Master specifically stated as follows:

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

18. I find that the above statement by the Taxing Master is a clear indication that she considered all the documents presented before her by the parties and that the applicants' position that the Taxing Master did not consider their documents is therefore incorrect.

19. On the claim that the Taxing Master did not specify the amount of fees payable by each client/applicant and that separate bills ought to have been filed for each client, I find that this is not a ground for setting aside the decision of the taxing master or striking out the Bill of

Costs as it is an issue which the applicants could have addressed through an application for review before the same Taxing Master for purposes of seeking a clarification on the amount payable by each client.

20. I have also considered the applicants' argument that there was misjoinder of parties and that the advocate ought to have filed separate bills for each client. I have perused the respondent's annexure **"MNM9"** to the replying affidavit which is a ruling delivered by Ogolla J. in a related matter, being **Mwangi Keng'ara & Co. Advocates vs Upward Scale Investment Co. Ltd & Another Misc. Application No. 516 of 2013** and I note that in the said application, the applicants were of the view that all the 15 related bills needed to be consolidated for purposes of tidiness and to avoid over enriching the advocate as they related to the same transaction involving the same parties herein. This court therefore finds the applicants' current argument that the advocate ought to have filed separate bills for each client to be quite baffling as it is an apparent complete about turn from the position that they had adopted in the said earlier related case.

21. Still, on the applicants' claim that there was misjoinder of parties in the taxation I note that Order 1 Rule 9 and 10 of the Civil Procedure Rules stipulate as follows: -

> *Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*
>
> *Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*
>
> *(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*
>
> *(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.*
>
> *(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.*

22. The above rules were considered by Gikonyo J. in ***Zephir Holdings Ltd Vs Mimosa Plantations Ltd, Jeremiah Maztagaro And Ezekiel Misango Mutisya [2014 eKLR,*** where he held that:

> ***"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."***

23. The Court of Appeal in ***William Kiprono Towett & 1597 Others Vs Farmland Aviation Ltd & 2 Others [2016] eKLR*** held that:

> ***"…Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."***

24. The above position is further supported by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice. The said article stipulates that:

> ***In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.***

25. In the **case of *Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR* where Ochieng J. held that:**

> ***".. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."***

26. Applying the jurisprudence expressed in the above cited cases and provisions of the law to the instant case, I reiterate my finding that the inclusion of all the applicants to the taxation of the same bill of costs did not amount to a misjoinder of the parties as all the applicants instructed the advocate to act for them in the transaction that was the subject of the taxation. Moreover, the Taxing Master found that the advocate acted for both the vendor and the purchaser and was clear on the amount of fees that each of the clients needed to pay to the

advocate. I therefore find that the issue of misjoinder of parties does not arise in this case.

27. Lastly, on the claim that the amount of fees awarded was exorbitant or exaggerated, I find that the law is now settled on the conditions under which the High court may interfere with the Taxing Master's decision on taxation. The general principles governing interference with the taxing master's exercise of discretion were stated in the South African case of ***Visser vs Gubb*** **1981 (3) SA 753 (C) 754H – 755C wherein it was held that:**

> ***"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his 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 master 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."***

28. It is also a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (See ***Preller vs S Jordaan and Another*** **1957 (3) SA 201**.

29. In ***Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others*** ***[2016] eKLR*** Ojwang J. (as he then was) expressed himself on the subject as follows:-

> ***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…. 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 interference that it was based on an error of principle. 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 case 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 reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment… A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved… Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for…. The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs……."***

30. In civil proceedings, costs are ordinarily awarded to a successful party in order to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled either to initiate or to defend litigation. *Advocates are also entitled to charge fees for other work done for their clients that do not necessarily entail court litigation. It is for this reason that the ARO makes specific provisions for the amount of fees that may be charged for the various categories of legal work that an advocate may undertake on behalf of his client.* In considering a Bill of Costs, the taxing master is to be guided by the ARO and is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the transaction.

31. The principles governing taxation of costs laid out in the above cited cases were also reiterated in the leading case of ***Premchand Raichand Ltd Another vs Quarry services of East Africa Ltd and Another*** **[1972] EA 162** as follows: -

> ***i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.***
>
> ***ii. The taxing master was expected to tax each bill on its merits;***
>
> ***iii. The value of the subject matter had to be taken into account;***
>
> ***iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;***
>
> ***v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.***

vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

32. Applying the above considerations, the question that falls is whether the amount taxed is too high or too low. In the instant case, the dispute between the advocate and the clients over the fees due to the advocate was referred to the taxation when the parties disagreed on the amount payable. The Taxing master stated as follows on the issue of the instructions fees payable:

"The instructions fees is to be calculated on the consideration of Kshs. 16,000,000/= however the said deed was made pursuant to the agreement dated 17th May 2011 is between upward Scale Investments Company Limited and Masterbill Integrated Project. The deed was made between Masterbill Integrated Project and Richhood Limited……. The amount to be charged per client is the minimum of Kshs. 160,000/= since the advocate acted for both the parties the amount is to be reduced to be Kshs. 133, 333/= per client. The other items in the bill are taxed as drawn."

33. From the above decision by the Taxing Master it is clear that he took into account the fact that the advocate acted for both parties and adopted the minimum scale bearing in mind the value of the subject matter which was stated to be Kshs. 16,000,000/=. I find that having adopted the minimum scale applicable and having given the reasons for the amount awarded following the taxation, there is no reason to interfere with the decision of the Taxing Master.

34. Having regard to the findings and observations that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with costs to the advocate/respondent.

Dated, signed and delivered in open court at Nairobi this 18th day of July 2019.

W. A. OKWANY

JUDGE

<u>In the presence of</u>:

Miss Mwangi for the respondent

Mr Mirie for Kingara for the applicant

Court Assistant - Fred