REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO.518 OF 2013

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

-VERSUS-

UPWARD SCALE INVESTMENT COMPANY LIMITED....1ST CLIENT/ RESPONDENT

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

RULING

1. Before this court for consideration is the application dated 9th July 2018 in which the applicants/clients seek orders that the ruling of the Taxing Master dated 12th May 2018 be set aside and that the Bill of Costs dated 10th December 2013 be struck out and/or dismissed with costs or in the alternative, the said bill be remitted back for taxation before any other taxing officer.

2. The application is supported by the affidavit of the 1st applicants director sworn on July 2018 and is premised in the grounds that:

a) That the Learned Honourable Taxing Master erred in principle and in law in taxing the Bill of Costs Linmerx Holdings 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 advocate charged both the vendor and the purchaser in consolidated bill and purported to pay herself from monies advanced to her by "Upward Scale" for stamp duty in essence making Upward Scale pay for Linmerx yet the stamp duty money was paid by Upward Scale.

c) That the Learned Taxing Master erred in principle and in law in upholding the advocate's wrongful action of taking money belonging to one individual to pay the debt another individual.

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 and in her duty to ascertain the fee due on a certain transaction and as such erred in holding that Linmerx Holding had paid Kshs 2,500,000 fees yet the said amount was unlawfully taken from funds forwarded by Upward Scale for stamp duty.

f) That the Learned Taxing Master erred in law and in fact in allowing instructions 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.

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

3. The advocate respondent opposed the application through the replying affidavit of **Mercy Nduta Mwangi** sworn on 15th September 2018 wherein she avers that the instant application is, yet again, another desperate attempt by the applicant to delay the conclusion of the taxation herein after other several failed attempts through other applications that have had the effect of unnecessarily protracting the taxation. She listed the said unsuccessful applications as follows;

a) Notice of motion dated 4th March, 2014 filed in High Court Miscellaneous Application No. 516 of 2013.

b) Notice of motion dated 19th August, 2014 filed in High Court Miscellaneous Application No. 530 of 2013.

c) Notice of motion dated 2nd February 2015 filed in High Court Miscellaneous Application No. 530 of 2013.

d) Notice of motion dated 15th May 2015 filed in High Court Miscellaneous Application No. 530 of 2013.

e) Notice of motion dated 2nd December 2015, filed in H. C. C. No. 14 of 2013 (Originating Summons).

f) Notice of motion dated 19th November 2015 in High Court Miscellaneous Application No. 530 of 2013.

4. Copies of the rulings in the above listed 6 applications were attached to the replying affidavit as exhibit "MNM3". She further states that applicants also filed an application in Nairobi Civil Appeal (Application) No. 83 of 2015 wherein they sought orders for stay pending appeal and a further application to have the bills of costs dismissed which applications were also dismissed as shown in the rulings attached as exhibits marked "MNM4" and "MNM5" respectively.

5. She further states that on or about 22nd January 2013, the clients filed a suit against the advocate in Milimani HCCC No. 14 of 2013(Originating Summons) wherein the advocate was ordered to file her advocate/client Bill of Costs for taxation and adds that the grounds highlighted in the instant chamber summons are therefore *res judicata* and did not fall within the scope of the Taxing Master as all that she was required to do was to assess the quantum of fees due to the advocate. She further avers that the clients having sworn an affidavit to the effect that they had instructed the advocate to handle the sale of the property among other tasks and that the issue of retainer and client's liability to pay the advocates fees in a non –issue in the taxation.

6. The respondent's deponent further avers that it is as a result of the orders made on 19th November 2013 that she filed the Bill of Costs in respect to the professional services rendered for the preparation of an agreement for the sale and purchase of LR No. 209/309/1 (Grant I. R. 92457/1) wherein the advocate represented both the vendor and the purchaser.

7. Parties filed written submissions to the application which they highlighted during the hearing.

The applicant's submissions.

8. At the hearing of the application, Mr. Kingara, learned counsel for the applicants highlighted the issues for determination to be as follows:

a) Proof of instructions.

b) Calculation of instructions fees.

c) Misjoinder of parties.

d) Disregard of all the documents filed by applicants.

e) Amount already paid to the advocate.

9. On proof of instructions, counsel submitted that the Taxing Master erred in principle in proceeding with taxation in view of the misjoinder of parties and the demand for fees instead of striking out the bill.

10. On the issue of calculation of instructions fees, it was submitted that the advocate never completed the transaction for the client and that, the documents that she drew were of no value o the client and further, that she was therefore not entitled to the full instructions fees since she did not delivered the deed of assignment to the client as agreed. In effect, counsel argued that the advocate failed to perform her contractual obligations to the client.

11. It was further submitted that the fees awarded by the taxing master is highly exorbitant as the taxing maser did not give reasons for the amount that was awarded to the advocate as instructions fees. For this argument counsel referred to the decision in the case of **Opa Pharmacy Ltd vs Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233** wherein 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 fee. 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 failure 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."

12. Counsel further relied on the decision in the case of **Thomas James Arthur –vs- Nyeri Electricity Undertaking [1961] E. A. 492** wherein it was held;

"***The principles which are applied by judges upon review of the taxing officer's certificates are known…..where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene in exceptional cases"***

13. It was submitted that page of the Advocates Remuneration Order (ARO) is explicit that the fees set out therein is for "completion of the contract" and "Completing the Conveyance or Assignment" in which case, the advocate did not complete the conveyance.

14. On misjoinder of parties, counsel submitted that the Bill of Costs was incapable of being taxed as it was filed against two companies for payment of services rendered or services rendered to them jointly and severally. Counsel argued that the certificate of taxation was therefore incapable of execution or want of specification on whom among the two clients was specifically charged. Counsel maintained that the Bill of Costs violates the provisions of Rule 29 of the Advocates Remuneration Order.

15. Counsel also faulted the taxing master for failing to consider the documents filed by the applicants and for making a ruling that was biased. It was further submitted that the taxing master erred in allowing VAT of 16% when the advocate did not produce receipts proving that she had paid VAT.

Respondent/advocate submissions.

16. Miss Mwangi learned counsel for the advocate highlighted the issues for determination to be as follows;

1) Did the Taxing Officer err in law or in principle by awarding the full instruction fees for the services rendered by the respondent in relation to the sale and purchase of L. R. No. 209/309/1 and are the assessed costs "exorbitant and excessive?"

2) Are the applicants documents which are marked Exhibit J.G.-2 namely the transfer dated 18/9/2012, the Kenya Revenue Authority Stamp Duty Declaration Assessment and Pay in Slip dated 18/9/2012, which were not part of the court record during taxation, lawfully and properly produced for the first time at the reference level after conclusion of taxation?

3) Did the taxing officer err in law and in principle by taxing the bill of costs as filed, against the 1st and 2nd applicants, or should the respondent have filed two separate bills of costs against each applicant?

4) Did the Taxing Master have the jurisdiction to determine the issue of which of the clients had paid the respondent's fees after the numerous admissions on oath and pleadings by the applicants in previous related court proceedings and the myriad rulings and judgments of the Superior Courts affecting the same subject matter?

5) Was there an error of law and principle by the Taxing Master in giving credit for amounts paid to the respondent prior to taxation?

6) Did the Taxing Master err in law and in principle in awarding 16% VAT and is there a requirement in law that the same be paid prior to taxation?

17. On the first issue counsel submitted that this court will only interfere with the decision of the Taxing Officers where it is established that here is an error in principle. For this argument, counsel relied on the decision in the case of **First American Bank of Kenya vs Shah and Others [2002] I EA 64** where in it was held;

"***The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle…"***

18. Reference was also made to the decision in the case of **Arthur vs Nyeri Electricity Undertaking [1961] EA 497** where it was held;

"Where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will interfere only with exceptional cases."

19. It was submitted that the advocate was entitled to the full instructions fees as she fully discharged her obligations to both the vendor and the purchaser by not only preparing the agreement but also the transfer that was duly executed by the parties before being presented to the lands office for valuation but that the applicants herein stopped the registration of the transfer through a court case wherein they obtained an order for the release of the title documents thereby giving rise to the taxation that is now the subject of this application.

20. Counsel argued that the advocate was therefore entitled to the full fees and cited the decision in the case of **Hayanga & Company Advocates vs Royal Garden Developers Limited [2006] eKLR** wherein it was held that an advocate would have earned his full instructions fees as soon as the agreement for sale is ready and his instructions were to prepare an agreement for sale.

21. Reference was made to 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] eKLR** where the Court of Appeal followed the principle laid down in the case of **First American Bank of Kenya vs Shah and Others** where it was held;

"***The present Court of Appeal has on the other hand expressed the view the instruction fee is an independent and static item,***

chargeable only once and is not affected by the stage the suit has reached……In my opinion, the full instruction fees to defend a suit is earned the moment a defence is filed and the subsequent progress of the matter is irrelevant to that item of fees"

The Court of Appeal in Kisumu went on to hold;

"***Lastly we are also of the view that the advocate did not continue with the case after he was given instruction and he prepared the documents that were filed in court, could not in law have affected his entitlement to the instruction fees."***

A similar position was taken in Joreth Ltd –vs- Kinjo and Associate, EALR [2002] 1 EA (cak) on page 99.

The aforesaid cited decisions indicate that the position stated in Mayer's & another versus Hamilton & Others, Opa Pharmacy Ltd –vs- Howse & Mcgeorge Ltd Kampala HCMA No. 13 of 1970, which the applicants have cited are no longer followed by our courts. The said decisions are also distinguishable from the matter at hand as they relate to suits/proceedings in court, whereas the taxation herein relates to a non-contentious matter which is regulated by Section 44 of the Advocate Act.

From the cited case law it follows that the advocate is considered to have earned instruction fees the moment the contract documents are ready. Other ancillary tasks that need to be taken to finalise the brief do not disentitle the advocate of instruction fees.

22. Counsel argued that the fees awarded by the Taxing Master was not excessive as alleged in view of the fact that the minimum scale was applied.

23. On the issue of misjoinder of the applicants in the taxation, and the bill of costs, counsel cited the provisions of Order 3 Rule 5(1) of the Civil Procedure Rules (CPR) that provides for joinder of causes of action and Order 3 Rule 8 which provides that a suit will not fail for misjoinder.

24. Counsel further cited paragraph 18(a) of the Advocates Remuneration Order that allows and recognizes that an advocate may act for both the vendor and purchaser in the same transaction. It was submitted that the Bill of Costs dated 5th December 2013 was specific on the fees charged on each client and that the issue of want of specification on the amount payable by each applicant does not rise.

25. On the issue of whether the Taxing Master was in order to include VAT at 16% on the fees awarded to the advocate, counsel submitted that there was no error in awarding VAT relied on the decision in the case of **Muthoga Gaturu & Company Advocates vs Naciti Engineers Limited Nairobi HC Miscellaneous No. 51 of 2011** wherein it was held:

"***This court is satisfied that legal services are taxable under VAT Act (Cap 476) Third Schedule Item 4."***

Determinations

26. I have carefully considered the application dated 9th July 2018, the respondent's response and the submissions made by the parties' respective counsel together with the authorities that they cited. The main issue that falls for the determination by this court is whether the applicant has made out a case for the granting of the orders sought in the application.

27. The applicants are aggrieved by the decision of Taxing Master in taxing the respondents Bill of Costs for the reasons that they stated in the chamber summons and highlighted in their submissions. The applicants mainly faulted the Taxing Master for firstly; taxing a single /joint Bill of Costs when the applicants were two separate legal entities, Secondly; allowing instructions fees whereas the advocate did not complete the transaction and lastly; for allowing exorbitant and exaggerated fees for instructions.

Misjoinder of parties.

28. It was the applicant's case that there was misjoinder of parties in the respondents consolidated Bill of Costs as the applicants are two distinct legal entities for which separate Bills of Costs needed to have been filed and for taxation to be conducted separately. The advocate's position on the other hand, was that both the applicants instructed her to act for them as one unit as the vendor and purchaser in the same transaction and that there was therefore no error whatsoever in the filing of a joint Bill of Costs

29. Order 3 Rule 5(1) and 8 of the Civil Procedure Rules stipulate as follows:

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(8) Where it appears to the court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the court may either on the application of any party or of its own motion order separate trials or may make such order as may be expedient.

30. In the instant case, it is worthy to note that the taxation of the advocates Bill of Costs did not arise out of the blue but was as a result of a decision made by the High Court in Civil Suit No. 14 of 2013 in which the applicants herein sued the advocate seeking the release of title documents that were in the advocates' custody following their instructions to the advocate to act for them in the agreement for sale. In

determining the said case, the court found that since there was no agreement in respect to the fees payable to the advocates the said advocates needed to file 16 Bills of Costs for taxation by the taxing officer. It is also noteworthy that in the said High Court case, the applicants herein stated that they had jointly instructed the advocates to act for them in the subject transaction in which they were the vendor and purchaser respectively.

31. Having regard to the clear provisions of Order 3 Rule 5(1) and 8 of the Civil Procedure and the Advocates Remuneration Order, I find that there was no error on the part of the Taxing Master in taxing joint Bill of Costs in respect to the applicants. Moreover, the Court of Appeal had the following to say on the issue of misjoinder of parties in the case of ***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."***

32. In the instant case, I note that the Taxing Master indicated that the bill was taxed under Schedule 1 of the Advocates Remuneration Amendment Order 2009 and he stated thus:-

> ***"The transfer dated 15th May 2012 is between Upward Scale Investments Company Limited and Linmerx Holdings where the consideration was Kshs. 220,000,000/-. The value of the property as per the valuation by the Government valuer was Kshs. 256,000,000/- which shall be used as the subject matter. The instructions fees has been taxed at a minimum fees of Kshs. 3,125,000/- as provided under Schedule 1 for the Vendor Linmerx Holdings Limited. Rule 29 of the Advocates Remuneration Order provides the "Where the advocate acts for both the 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's advocates charges, such charges in each case to be reduced by one-sixth. 1/6 of 3,125,000 is 540,833/- the fees chargeable to upward scale Investments company Limited is Kshs. 2,604,167/-. The total instructions fees is taxed at Kshs. 5,729,167/-."***

33. The above excerpt of the Ruling of the Taxing Officer further shows that he took into account the provisions of Schedule 1 of the ARO and the fact that the transaction in question had progressed up to the stage of the execution of the transfer. The Taxing Master further took into account the fact that the advocate acted for both the vendor and the purchaser and was careful to not only adopt the minimum scale allowed by the rules but also reduced the instructions fees for both parties by one sixth as required by the provisions of Rule 29 of ARO.

34. From the above extract of the Taxing Master's ruling on taxation, it is clear that he distinguished the amount that each of the clients was to pay for the work done by the advocate and I therefore find that the applicants claim that there was lack of clarity in the amount payable by each client is incorrect. Even assuming, for arguments sake, that I am wrong in the above finding on the amount due and payable by each client, I find that the mere fact that there could have been lack of clarity on the amount of fees that each client need to pay does not form a ground for setting aside the decision of the Taxing Master as that is an issue that can be addressed through an application for review to the Taxing Master for the purposes of such clarifications.

35. Turning to the applicants' claim that the advocates did not complete the work assigned to them and were therefore not entitled to the fees awarded by the Taxing Maser and that the amount awarded is exorbitant, I find that the issue of the work done by the advocates and their entitlement to tax their bill is an issue that had already been determined in the earlier decision by this court in Civil suit No. 14 of 2013 that I have already alluded to in this ruling. Moreover, it was not disputed by the applicants that the advocate acted on their instructions and prepared a sale agreement and transfer forms that were duly executed by the parties before being presented for registration when the advocate was stopped, by the applicants, from concluding the registration process through a court case that I have also alluded to in this ruling. In the circumstances of this case, one cannot therefore say that the advocate did not perform their obligations to the client.

36. On the claim that the amount awarded was exorbitant, I find that the law is now settled on the condition under which this court can interfere with the decision of the Taxing Master on taxation. The principles governing taxation of costs were laid out 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.***

37. In the case of **Joreth Limited v Kigano & Another** **[2002] E.A. 92** the court set out various factors that are to be considered in determining the instruction fee namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its

dispatch and the impact of the case on the parties. The court also emphasized the principle that the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the ***Advocates (*Remuneration) Order 2009** including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.

38. 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 is 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……"***

39. In the circumstances of this case, I am unable to find that the fees awarded was exorbitant or that the advocate did not complete the work as alleged by the applicants. Needless to say, the transfer document is ordinarily the last document to be executed by the parties in a conveyance transaction before the same can be presented for registration at the relevant lands office. I would in this case be guided by the decision made in in **Hayanga & Company Advocates vs Royal Garden Developers Limited** (supra) that:

> ***"...The proper consideration... is the ascertainment of the work actually done vis-a-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 instruction fee, as soon as the said Agreement for Sale was ready."***

40. In the premises and for the reasons that I have stated in this ruling, I find no merit in the Chamber Summons dated 9th July 2018 and I therefore dismiss it with costs to the respondent/advocate.

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

W. A. OKWANY

JUDGE

In the presence of:

Miss Mwangi for the advocate/respondent

Mr. Mirie for Kingara for the applicants

Court Assistant - Fred