



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 526 OF 2013

IN THE MATTER OF ASSIGNMENT OF THE PROFESSIONAL FEES OF THE ARCHITECTS: TRIAD ARCHITECTS TO RICHHOOD LIMITED

AND

IN THE MATTER OF TAXATION

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATESADVOCATE/RESPONDENT

VERSUS

UPWARD SCALE INVESTMENT

COMPANY LIMITED1ST CLIENT/APPLICANT

LINMERX HOLDINGS LIMITED2ND CLIENT/APPLICANT

RICHHOOD LIMITED3RD CLIENT/RESPONDENT

TRIAD ARCHITECTS4TH CLIENT/APPLICANT

RULING

1. The Ruling herein relates to Chamber Summons application dated 24th August 2018, brought under the provisions of paragraph 11(2) of the Advocates Remuneration Order (herein the "ARO"). The application is premised on the grounds on the face of it and an affidavit of the even date, sworn by the 1st client/applicant's director, *Joseph Gitayi Mburu*.

2. The Applicants are seeking for orders that;

(a) pending the hearing and determination of the Reference, there be a stay of any further proceedings in this matter;

(b) 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;

(c) that, in the alternative, the advocate/client bill of costs dated 27th November 2013, be remitted back for taxation before any other taxing officer; and

(d) the costs of the Reference be awarded to the 1st and 2nd clients/applicants.

3. The background facts of the matter are that, the Advocate (herein "*the Respondent*"), filed the subject bill of costs (herein "*the bill*") dated 10th December 2013, whereby the Applicants opposed the taxation thereof by filing a notice of preliminary objection dated 5th May 2015 and a replying affidavit 7th April 2015, sworn by Joseph Gitau Mburu. The Applicants also filed a notice dated 23rd November 2015 to cross-examine the Respondent.

4. Consequently, the taxing officer heard the parties orally and delivered the Ruling on 10th August 2018. However, the Applicants are aggrieved by the decision on the grounds *inter alia*, that the taxing officer: -

- (a) completely ignored all the documents filed by them and proceeded to give a ruling without any reference to the same;
- (b) arrived at a deliberately unjust ruling that was made to benefit the advocate and was obviously biased;
- (c) refused to rule on the preliminary objection that raised pertinent issues on misjoinder, lack of instruction and estoppel;
- (d) taxed a bill that was incapable of taxation as it was filed against two companies and sought payment for services jointly and severally as against them and yet they are distinct legal persons and none is liable for the debt of the other;
- (e) upheld the advocates wrongful action of billing for services rendered whereas; there was no proof of whether she was instructed by any of the parties in the first place;
- (f) allowed the instructions fees at Kshs.5,729,167/= without giving any reason founded on law and in failing to make a finding as to whom among the four Applicants was responsible for the payment of the taxed costs;
- (g) allowed instructions fees whereas the advocate did not complete the transaction and the documents she drew were of no value to the clients who had to seek alternative representation;
- (h) allowed a charge of 16% v.a.t, whereas no evidence was adduced that any such monies were remitted to the tax man thereby unjustly enriching the advocate; and
- (i) unlawfully found that a sum of Kshs.61,000 had been paid but did not bother to find out who paid the said amount and whether the amount was actually paid or illegally taken from the stamp duty account.

5. As a result, on 24th August 2018, the Applicants wrote to the taxing officer objecting to the decision on taxation and sought for the reasons for the same and filed a notice of objection on the same date. The master officer responded that, the reasons were contained in the Ruling and then the Applicants filed this Reference.

6. The application was opposed by the Respondent vide a replying affidavit dated 25th September 2018, sworn by *Mercy Nduta Mwangi*, an advocate of the High Court of Kenya, practicing as such under the firm of *Mwangi Keng'ara & Company Advocates*. She averred that, the application as filed is; misconceived, frivolous, vexatious, a gross abuse of the process of the Court and bound for summary dismissal.

7. That, the 1st and 2nd Applicants instructed her law firm to offer legal services in relation to a joint venture to; purchase, develop and sale block of offices on L.R. 209/309/1. As such the Applicants are not being forthright in raising the issue of misjoinder and lack of instructions and in view of several affidavits sworn stating that, they had jointly instructed the Respondent's law firm to act as their joint counsel, therefore the issue of retainer is a non-issue.

8. The Respondent argued that, there is only one agreement which is the subject of the taxation and/or of cause of action, therefore the averments that, the bill and the taxation ought to be fragmented against individual applicant is not founded on the law.

9. That, as soon as the taxation commenced, the Applicants refused to comply with the court's directions to file submissions and instead embarked on a futile exercise of filing several applications before the High court; as here below stated to stop taxation.

- (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 the High Court Miscellaneous Application No. 530 of 2013;
- (c) Notice of Motion dated 2nd February 2015; filed in the High Court Misc. 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 HCCC No. 14 of 2013 (originating summons); and
- (f) Notice of motion dated 19th November 2015; filed in High Court Miscellaneous Application No. 530 of 2013.

10. The Applicants further filed a Civil Appeal No. 83 of 2015 Consolidated with Civil Appeal Application No. 88 of 2015 Nairobi, wherein they sought for orders for stay of proceedings pending appeal. They also filed Civil Appeal No. 83 of 2015 Nairobi, seeking to have the bills dismissed. The applications were heard and dismissed vide Rulings dated 2nd October 2015 and 26th May 2017 respectively.

11. That in further attempt to stop the taxation, on 2nd December 2015, the Applicants filed an application in the Originating Summons, HCCC No. 14 of 2013 HCCC *Linmerx Holdings Limited and Upward Scale Investment Limited v. Mwangi Keng'ara & Co. Advocates and 6 Interested Parties*, which was heard and dismissed vide a Ruling on 11th March 2016.

12. That on 5th November 2015, the parties recorded a consent before the Honourable Deputy Registrar E. Tanui, and agreed to highlight their submissions on 26th November 2015. However, on the eve therefore the Applicants filed a fresh application, dated on 19th November 2015, seeking amongst other prayers to strike out and dismiss the bill. They also filed a notice to cross examine the advocate. The Application, together with the notice to cross-examine dated 23rd November 2015, were struck out vide a Ruling delivered on 1st February 2016, and there has been no appeal filed against that Ruling.

13. Similarly, the Applicants notice of preliminary objection dated 5th February 2015, was argued before the Honourable Deputy Registrar, Mr. Opande, who dismissed the same on 25th January 2018. The Ruling applies to all the other fifteen (15) preliminary objections filed by the applicants. Therefore, as at the date of highlighting of submissions, there was no preliminary objection that was pending for determination by the taxing officer.

14. The Respondent argued that, the taxing officer taxed the bill on sound principles of the law which allow use of percentages and provides for use of discretion in increasing and reducing the costs. The allegations that the taxing officer completely ignored all the documents filed and gave a Ruling without any reference thereto was refuted and argued that, at page 2 of the Ruling the Honourable Deputy Registrar stated, *"I have considered all the documents filed by the parties and the submissions highlighted before me as well as the supporting cases by both parties."*

15. The Respondent argued that, what was not granted in the Ruling is deemed to have been denied, even without a specific pronouncement to that effect. Further it is a sound and well laid down principle of the law that, an issue of quantum per se does not warrant interference of the taxing officer's decision by the High Court and that neither has the taxing officer been accused of misconduct and bias.

16. That the application is so far as it seeks to re-litigate previously determined matters, offends the overriding objectives of the court, the law as embedded in the Civil Procedure Rules and the principle of double jeopardy.

17. I have considered the application and the arguments advanced and I find that the following issues have arisen for consideration whether: -

(a) *the bill that was taxed was incompetent as a result of misjoinder of parties;*

(b) *there was a pending preliminary objection that ought to have been considered but was not;*

(c) *the bill was taxed on merit. In particular, whether the taxing officer dealt with the issues raised relating to; retainer; incomplete works or services; VAT. Whether she awarded high sum of money as total instruction fees and/or failed to consider the applicants' documents and arguments advanced;*

(d) *the taxing officer advanced the reasons for the decision on taxation;*

(e) *the Court should grant the orders sought; and*

(f) *who should bear the costs of the Reference?*

18. However, before I deal with the issue above it will be important to put the matter in perspective, and in that regard it suffices to note as a factual background that, the litigation between the parties commenced vide, an originating summons and application dated 22nd January 2013, filed by the 1st and 2nd Plaintiffs Applicants herein. The Applicants were seeking for the release of; "the title documents and any other documents relating to the suit property" in possession of the Respondent. The Respondent had demanded a deposit of Kshs.2,045,603.90, as a condition for the release of the same.

19. That application was supported by an affidavit sworn on 22nd January 2013; by *Joseph Gitau Mburu*, who described himself as a joint director of the 1st and 2nd Applicants' companies. He deposed that, the companies appointed the Respondent to act on their behalf, as per the tasks he detailed in the affidavit, to carry out tasks stated in the affidavit, over and above the purchase and transfer of the suit property as between the 1st and the 2nd applicants. That the parties mutually agreed the legal fees payable in respect of all legal works carried out by the Respondent would be Kshs.12,000,000/= plus VAT and disbursements.

20. The 1st and 2nd Applicants thus sought for an Order that, the Court do direct the Respondent to file her bills for taxation pursuant to Section 47(1) of the Advocates Act, as the Respondent *"bill was exorbitant."* As a result, thereof the Court ordered the Respondent to file sixteen (16) bills of costs for taxation purposes.

21. The Applicants have disputed that they retained the Respondent to act for them, the question that arises is, why would the 1st and 2nd Applicants seek for an Order for taxation of the bills as aforesaid, if they had not instructed the Respondent to act on their behalf and if they strongly believe that they were not liable to pay the legal fees? But even more so, on what basis did they negotiate to pay the Respondent all-inclusive legal fees of Kshs.12,000,000/= plus VAT and disbursements. Can they raise the issue of retainer at this stage?

22. Be that as it were, the Respondent filed several Miscellaneous applications numbers 515 to 529 of 2013 and number 26 of 2014. However, the 1st and 2nd Applicants filed a notice of motion application dated 4th March 2014, seeking for orders inter alia that; all those applications be consolidated. That the Honourable Court make an Order that *"there is multiplicity of bills of costs yet the cause of action in all is one agreement."* Further, the bill be represented for taxation before the same taxing officer at the same time. It is clear therefore evident that the 1st and 2nd Applicants wanted the matter determined one cause of action based on one agreement and giving rise to one bill of costs.

23. It is therefore ironical for the 1st and 2nd Applicants to aver as stated herein in the affidavit of Joseph Gitau Mburu in support of this application at paragraph ten (10) and eleven (11) as follows; -

“(10) That I verily believe that, the bill lodged by the Advocate was incapable of taxation as it was filed against two companies and sought for services jointly and severally as against Linmerx Holdings Limited and Upward Scale Investments.

(11) That Linmerx Holdings Limited and Upward Scale Investment are distinct legal persons and as such, I am advised by my Advocates on record that none is liable for the debt of the other and I verily believe that separate bill of costs ought to have been filed against each company separately.”

56. However the Court pronounced itself on the issue as follows; -

“It is clear that the filing of separate bills of costs for taxation arises from an Order of this court. That order, until it is revised or appealed against remains in force, and the Respondent/Advocate in coming up with separate bills of costs is simply complying with this court’s order. It is clear from that Ruling that the issue of duplicating or multiplicity was determined when the Court found out that 16 pieces of work had been done by the Advocate/Respondent for which 16 bills of costs could be filed. It is therefore beyond the scope of this Court now to find that there is duplicity or multiplicity of suit and that consolidation should ensue. I therefore cannot open up that issue for submissions and further determination without following the procedure of review.”

24. Following that finding the Respondent filed the sixteen (16) bills of costs. In fact, the 1st and 2nd Applicants did not raise the issues of misjoinder of persons, joint demand for fees and/or proof of instructions or who was liable to pay the legal fees, when they for the Order for consolidated bill of costs, in the application dated 4th March 2014.

25. Similarly, in a subsequent notice of motion application dated 19th August 2014, filed by seven (7) Applicants inclusive of the four (4) Applicants herein; the applicant sought for orders *inter alia*; that the “Court stay proceedings of taxation of the bills of costs” filed and “be pleased to strike out or dismiss the bills of costs”. Upon hearing that application, the Court had this to say;

“To be specific, before the Clients/Applicants application dated 4th march 2013 giving rise to my Ruling of 27th June 2014 was filed, and determined the Clients/Applicants herein already knew the content of the 16 bills which the above application sought to consolidate and have taxed before one master. Why did the Clients/Applicants then not apply to have them struck out at that stage?”

26. Thus as rightfully observed by the Court the seven (7) Applicants had an opportunity to raise the issue of stay of proceedings and/or striking out or dismissal of the bills, but did not. Even then, the Applicants appealed vide; Civil Appeal No. 83 consolidated with 88 of 2015, against the Orders of the Court granted on 27th June 2014, upon hearing the Notice of Motion applications dated 4th March 2014, 18th November 2014, and 19th August 2014.

27. But the Court in the Ruling delivered on 2nd October 2015, dismissed the two consolidated appeals with costs, for lack of merit and observed that the Order leading to filing of the bill of costs, was made on the request of Applicants and that the bills had not even been taxed and neither was there an Order of taxation that could cause the Applicants any grievances. The Court of Appeal then held that, the bills should proceed to taxation. This Court of Appeal Ruling upheld the High Court decision declining to consolidate, or strike out and/or dismiss the bills. Indeed, there is no appeal against that decision of the Court of Appeal.

28. It also suffices to note that, the 1st to 4th Applicants herein, were parties to the Civil Appeal No. 83 and 88 of 2014 and High Court Civil Case Number 14 of 2014, appearing as 1st and 2nd Plaintiffs and 1st and 5th Interested parties respectively and similarly sought for the bill of costs herein dated 10th December 2013, to be struck out or dismissed with costs.

29. Therefore, prayer (2) of the chamber summons herein cannot be granted for reasons that, first and foremost, the bill has already been taxed and therefore is not available for striking out and/or dismissal with costs. Secondly, the Order sought for having been dealt with in the decisions referred to herein, that prayer is *res judicata* and is disallowed.

30. The remaining limb of prayer (2) seeks for the orders made by the taxing master dated 10th August 2018, be set aside. As already stated reasons and/or grounds relied on in support of this prayer; namely of misjoinder of persons, joint demand for fees, proof of instructions and filing of the bill against two distinct legal persons have been dealt with as stated herein.

31. Be that as it may, I shall consider these other grounds on merit of the decision. The first ground is that, the applicants’ submitted that the documents they produced were ignored by the taxing officer. I have gone through the Ruling delivered by the taxing officer dated 10th August 2018, and at paragraph 2 of page 2, it is stated as follows: -

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

32. Therefore, the Applicants subject ground has no merit. The third issue relates to the instructions fees, Applicants aver that, the Respondent was awarded total instruction fees of Kshs.5,729,167/=. However, I do not understand where this figure came from, in that in the bill of costs, filed by the Respondent applicant against the 1st to 4th Applicants in Miscellaneous Civil Application No. 526 of 2013 indicates that, the Respondent was seeking for a total sum of Kshs.1,232,819.88/=. Of this sum, Kshs.556,800/= was claimed as instructions fees.

33. In the final decision delivered by the taxing officer she stated as follows;

“The instruction fees is to be calculated on the consideration of Kshs.32,000,000/=. The said deed was made pursuant to the agreement dated 17th May 2011, is between Upward Scale Investments Company Limited and Triad Architects;

The amount to be charged per client is the minimum of Kshs.320,000/= since the Advocate acted for both the parties the amount is reduced by 1/6 to be Kshs.266,667/= per client.”

34. The taxing officer taxed the other bills as drawn, the initial figure under items (i) to (v) in the bill of costs was reduced from Kshs.1,114,668/= to Kshs.534,402/=. The taxing officer awarded VAT at 16% on a figure of Kshs.534,402, giving rise to a sum of Kshs.85,504/= and disbursements at Kshs.325.00/=. The bill was thus taxed as follows;

Professional fees	Kshs.534,402
VAT at 16%	Kshs.85,504
Disbursements	<u>Kshs.325.00</u>
Sub-total	Kshs.620,231
Less amount paid	<u>Kshs.61,000</u>
Total	<u>Kshs.559,231</u>

Thus the amount awarded in this matter is Kshs.559,231/=, with Kshs.673,588/= taxed off. Thus the figure referred to herein of Kshs.5,729,167 is not understandable.

35. The Applicants further faults the taxing officer for having made reference to professional fees, but there is no ambiguity, as the sum was clear and understood as it is clear from the sub totals; in the bill of costs that, the substantive claims were in respect of fees, VAT, and disbursements.

36. It is also argued that there was no evidence that the amount awarded as VAT was remitted to the tax authority (Kenya Revenue Authority). However, the claim for VAT was made in the bill but during the oral address before the taxing officer, the same was not raised by the applicants.

37. In conclusion, I find as that; -

(a) the prayer seeking for stay of any further proceedings can't be granted as the law is clear that, once a bill has been taxed and any party is aggrieved by the decision of taxing officer, the cause of action is to, file a Reference and that is what the Applicants herein have done;

(b) the other prayer was sought for pending the hearing and determination of the Reference which has now been heard; thus it has been overtaken by events;

(c) the second prayer is seeking for setting aside of the bill and among the reasons given under paragraph 4 has been dealt with herein as aforesaid and declined.

38. Finally, the Applicants seek that, in the alternative the subject bill of costs be remitted back to the taxing officer for taxation. Having found no merit in the entire application and considering the circumstances of the case and the amount awarded, I find no justification for that order.

39. The upshot of all this is that, the application is dismissed with costs Respondent.

40. Those then are the Orders of the Court.

Dated, delivered and signed in an open Court this 16th day of October 2019

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Simiyu for Ms. Mwangi for the Respondents

Mr. King'ara Antony for the Clients/Applicants

