



**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**MISC. CIVIL APPLICATION NO. E050 OF 2018**

**BETWEEN**

**ROBINSON KIGEN T/A WESONGA,**

**MUTEMBEI & KIGEN ADVOCATES.....ADVOCATES/APPLICANT**

**VERSUS**

**SAUTH MOHAMED.....1<sup>ST</sup> RESPONDENT/CLIENT**

**SAWZAN LIBAN MOHAMED.....2<sup>ND</sup> RESPONDENT/CLIENT**

**RULING**

1. The subject of this ruling is a reference dated 20<sup>th</sup> May 2019 made under **Rule 11(1)** of the **Advocates Remuneration Order** seeking to set aside the taxation of advocate/client fees by the Deputy Registrar. By the ruling dated 29<sup>th</sup> April 2019, the Deputy Registrar awarded the Advocates Kshs. 112,000/- as instruction fees.

2. In their Advocate/Client Bill of Costs dated 12<sup>th</sup> July 2018, the Advocates claimed Kshs. 125,000/- as fees for representing the Clients as purchasers for the purchase of a property; MAVOKO TOWN/BLOCK 2/4034 where the purchase price was agreed at Kshs. 6,000,000/-. According to the particulars in the Bill of Costs and documents annexed to the Replying Affidavit of Robinson Kigen sworn on 8<sup>th</sup> October 2018, the Advocates conducted the search, drew the sale agreement, exchanged correspondence with the advocates for the vendor; *Murimi and Company Advocates*. The Advocates' correspondence indicated that the sale agreement was executed by the vendor but not by the purchaser who stated that he was busy and was unable to raise the purchase price.

3. The Clients filed written submissions in opposition to the Bill of Costs. They contended that from the particulars of the Bill and the documents presented by the Advocates, the 1<sup>st</sup> respondent was not a person chargeable with the bill as he was not party to the transaction. They further argued that from the evidence, the transaction was not completed hence the proper provision for taxation was **section 18(f)** of the **Advocates Remuneration Order** (wrongly referred to as "**section 5(f)**") by the respondents) which provides for the manner of assessing fees for uncompleted transactions and other business. They contended that the purchase of the property was never completed as the Advocates did not prepare transfer forms or conduct due diligence on the title. They also stated that the sale agreement was not signed by the parties hence the only conclusion the court could draw was that the Advocates rendered services limited to conducting due diligence on the title.

4. The Advocates submitted that since the 1<sup>st</sup> respondent brought the documents in support of the transaction, the 1<sup>st</sup> and 2<sup>nd</sup> respondents issued instructions and were accordingly chargeable with the bill. They further submitted that the apart from conducting due diligence, they drafted the sale agreement, forwarded it for comments to the vendor's advocates and settled it until it was ready for execution but the 2<sup>nd</sup> respondent refused to execute his part. The Advocates pointed out that since the vendor forwarded the signed sale agreement; they had substantially complied with the instructions and were thus entitled to instruction fees hence the matter was not an uncompleted transaction.

5. The Advocates relied on **Hayanga and Company Advocates v Riyal Garden Developers Limited HC ML Misc. No. 305 of 2004 [2006] eKLR** to support the proposition that they were entitled to full instruction fees once they were instructed to prepare the sale agreement. They argued that the Bill of Costs ought to be taxed under the provisions of **Schedule 5** of the **Advocates Remuneration Order** taking into account the work done, care and labour required, number and length of papers perused, nature and importance of the matters and the interest of the parties.

6. After considering the Bill of Costs, documents on record and submissions, the Deputy Registrar held that the evidence was uncontested. Since the Clients did not dispute the fact that the seller executed the sale agreement, the Deputy Registrar held that the court could presume

that the agreement was signed hence the instruction fee would be taxed in accordance with **Schedule 1** of the **Advocates Remuneration Order**. This is the decision that has precipitated the reference.

7. The thrust of the reference and the supporting affidavit of Sawzan Liban Mohamed sworn on 20<sup>th</sup> May 2019 is that Deputy Registrar erred in law applying the principles and law of taxation to the nature of the transaction giving rise to the taxation. They complained that the Deputy Registrar failed to apply the provisions of **section 18(f)** of the **Advocates Remuneration Order** in assessing instruction fees in respect of uncompleted transactions. They further complained that the Deputy Registrar had erroneously presumed that the agreement prepared by the Advocates was duly executed whereas it was not thus coming to the incorrect conclusion regarding the applicable schedule.

8. In their respective written submissions before this court, the parties rehashed the arguments they had made before the Deputy Registrar. It is readily apparent therefore that the issue for resolution concerns determination of the instruction fee due to the Advocates. The jurisdiction of this court is not disputed and so also the controlling principle guiding this court in exercise of that jurisdiction. The principle is that this court will not interfere with the discretion of the taxing officer unless it is shown that either the decision was based on an error of principle or the fee was too high or too low to justify interference on the ground that it is an injustice to one party (see **Premchand Raichand Limited and Another v Quarry Services of East Africa Limited and Another** [1972] EA 162, **First American Bank of Kenya v Shah and Others** [2002] EA 64 and **Joreth Limited v Kigano and Associates** [2002]1 EA 92).

9. The issue for my determination is whether the instruction fee ought to be assessed under **Part II, section 18(f)** or **Schedule 1** of the **Advocates Remuneration Order**.

10. **Section 18** of **Part II** of the **Advocates Remuneration Order** which deals with Non-Contentious matters provides for remuneration of advocates, in part, as follows:

*Subject to paragraph 22, the remuneration of an advocate in respect of conveyance and general business (not being in any action, or transacted in any court or in chambers of any judge or registrar) shall be regulated as follows—*

**Uncompleted transactions and other business**

*(f) In respect of any business referred to in this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and any other business of a non-contentious nature, the remuneration which has otherwise not been provided for, the remuneration is to be that prescribed in Schedule 5*

11. **Schedule 5** of the **Advocates Remuneration Order** provides for the alternative mode of assessment. **Part II** thereof sets out the basis for assessment of instruction fees as follows:

*Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.*

12. As a starting point, the Deputy Registrar must identify the proper and applicable charging to the transaction subject of the dispute between the Advocate and Client. Failure by the Deputy Registrar to identify and apply the proper charging provision in the **Advocates Remuneration Order** constitutes an error of principle which would entitle this court to intervene.

13. The Clients' contention is that since the transaction is incomplete, **section 18(f)** of the **Advocates Remuneration Order** applies. A reading of that provision, which I have set out above, shows that it applies under two conditions. First, the transaction must be incomplete and second, the transactions must be one which is not provided for under the **Advocates Remuneration Order**. Once those conditions are satisfied then the provisions of **Schedule 5** would apply.

14. In this case, the transaction concerned the sale of a property, a matter squarely within **Schedule 1 First Scale** of the **Advocates Remuneration Order** dealing with "**Scale Fees on Sale and Purchase of Land registered in any Registry.**" Hence it is not necessary to determine whether in fact the transaction was complete or not as there was a specific charging provision governing the transaction. In this respect, I agree with the dictum in **Hayanga and Company Advocates v Riyal Garden Developers Limited (Supra)** that, "*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 was ready.*" The Advocates were therefore entitled to the full instruction fee once the sale agreement was settled and it is on this basis that I affirm the decision of the Deputy Registrar.

15. The other issue raised by the Client is whether Sauth Mohamed was a person chargeable with the Bill of Costs as the sale agreement was between the vendors and Sawzan Liban Mohamed. The Deputy Registrar did not consider this contention.

16. The issue is raised by the respondent is whether there was a retainer between the Advocates and the 1st respondent. A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. It is not necessary that retainer be in writing. In **Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited** [2008] 1 EA 380, the court held that;

*[I]t is not the law that an advocate must obtain a written authority from client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless, it can be implied from the conduct of the Client/Advocate "relationship".*

*The court further held that;*

*It is the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission... the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact, it is in the normal parameters of balance of probability.*

17. Where a retainer is denied, the burden falls on the Advocate to prove the retainer on the balance of probabilities. It is noteworthy that the issue of the 1<sup>st</sup> respondent was raised in written submissions prompting the Advocates to file an affidavit where they asserted that it is the 1<sup>st</sup> respondent who issued the instructions, brought the documents to them and informed them that she was going to look for financing. This deposition was not denied either before the Deputy Registrar or before this court. In the circumstances, I can only conclude that the 1<sup>st</sup> respondent was a client and therefore liable to pay fees.

18. For the reasons I have set out, above, I dismiss the reference. I award the Advocates costs of the reference which I assess at Kshs. 8,000/- all inclusive.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of October 2019.**

**D.S. MAJANJA**

**JUDGE**

**Mr Kigen instructed by Wesonga, Mutembei and Kigen Advocates for the Advocates.**

**Mr Dayib instructed by Edwin Nyanyuki, Advocate for the Respondents/Clients.**