



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 243 OF 2017**

**WANJIKU & WANJIKU ASSOCIATES ....APPLICANT**

**- VERSUS -**

**MANU HOLDINGS LIMITED.....RESPONDENT**

**RULING**

1. On 14/12/2017, the applicant, M/s Wanjiku & Wanjiku Associates (**the applicant**), brought a bill of costs against their client, M/s Manu Holdings Limited (**the respondent**). The bill was drawn at a sum of Kshs 1,531,510. The taxing officer of this court (**Hon D Orago**) heard the parties and on 13/9/2018, she taxed the bill at a sum of Kshs 66,235. Dissatisfied with the taxing officer's decision, the applicant brought a reference through a chamber summons dated 8/10/2018 in which she challenging the taxing officer's decision. The said reference is the subject of this ruling.

2. The case of the applicant was that the taxing officer misdirected herself in relation to item 1 (one) because she failed to appreciate the amount of work done by the applicant. She contended that the figure allowed on item 1 was manifestly low and disproportionate to the work done. Secondly, the applicant contended that the taxing officer misdirected herself in taxing off item 3 of the bill of costs yet the meeting relating to that item had been admitted. Thirdly, it was contended that the taxing officer misdirected herself on the applicable principles in taxing the bill. Lastly, it was contended that the taxing officer erred in fact and law by failing to take into account the value of the subject matter.

3. The respondent opposed the application through a replying affidavit sworn on 18/2/2019 by Francis S Njuguna. Their case was that they retained the applicant to act for them in a joint venture transaction with a developer for development of **Land Reference Number 209/8546**. The contemplated joint venture entailed construction of residential apartments for sale but the said transaction collapsed before the documents were prepared and executed. Their position was that the applicant was only entitled to perusal fees. They further contended that the nature of work done by the applicant in relation to the transaction was to prepare the joint venture agreement and to ensure the transaction was successful but this did not happen because parties disagreed midstream. The respondent's case was that the instruction fees assessed by the taxing officer was proper, taking into account the circumstances of the matter. With regard to item 3, the respondent contended that the decision to award or not award the item was discretionary. The respondent added that the applicant had failed to demonstrate that the taxing officer proceeded on a wrong principle or that she wrongfully exercised her discretion. The respondent urged the court not to interfere with the decision of the taxing officer.

4. The application was canvassed by way of written submissions. The applicant filed written submissions dated 15/10/2019. They framed the following as the two issues to be determined by this court: (1) whether the taxing officer erred in law in her taxation of item 1 of the Advocate/Client Bill of Costs dated 13/12/2017; and (2) whether the taxing officer misdirected herself on the applicable principles in taxing the entire bill of costs.

5. Counsel for the applicant submitted that, in awarding instruction fees of Kshs 50,000/-, the taxing officer failed to consider the amount of work done by the applicant and the fact that the applicant had engaged two different developers and the two developers had separate advocates. It was contended that the taxing officer failed to take into account the fact that advocates of the first developer prepared a joint venture agreement which the applicant went through and amended while engagement with the second developer entailed preparation of a joint venture agreement by the applicant.

6. Counsel added that the value of the subject matter was ascertainable from the documents filed. It was contended that the value of the subject matter in the first joint venture agreement was Kshs 255,000,000 while the value of the subject matter in the second joint venture agreement was Kshs 200,000,000. Counsel contended that the taxing officer failed to take into account the two values. Relying on the decisions in **Anthony Thuo Kanai t/a Thuo Kanai Advocates v John Ngigi Nganga [2014] eKLR** and **Nyangito & Co Advocates v Doinyo Lessos Creameries Limited [2014]eKLR**, counsel for the applicant urged the court to allow the reference.

7. I have considered the reference, the response thereto and the submissions before court. I have also considered the entire record which was

before the taxing officer. Similarly, I have considered the relevant legal framework and jurisprudence. The single question falling for determination in this reference is whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to interfere with the discretion of the taxing officer in the exercise of her jurisdiction under the Advocates (Remuneration) Order.

8. The bill of costs giving rise to the impugned decision was drawn under Part II of Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014. There was no contestation about the applicability of the Schedule to the business giving rise to the bill. Item 1 (one) which is the core focus of this reference relates to instructions fees. Rule 1 of part II of Schedule 5 provides the following legal framework on the parameters to be considered when assessing instruction fees under Schedule 5.

#### **1. Instructions**

**Such fees 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 as 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.**

9. The circumstances under which a judge of the superior court interferes with the taxing officer's exercise of discretion are well settled. The superior court will not interfere with the taxing officer's exercise of discretion unless one of the following is shown: (i) either the decision was based on an error of principle or the fee awarded was manifestly excessive or manifestly low as to justify an inference that it was based on an error of principle; or (ii) the taxing officer took into account irrelevant factors or omitted to consider a relevant factor. Emphasizing the above criteria, **Ojwang J** ( as he then was) stated as follows in **Republic v Minister for Agriculture & 2 Others exparte Samuel Muchiri W'Njuguna & 6 Others [2006]eKLR**:

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Muthoni for the Applicant

June Nafula - Court Clerk