REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPLICATION NO. 87 OF 2017

KULWANT SINNGH SIHRA .....APPLICANT

VERSUS

PETERSON GITHINJI MWANGI T/A

GITHINJI MWANGI & ASSOCIATES.....RESPONDENT

RULING

1. This was a reference from the taxing officer's taxation on the respondent's Bill of Costs. The ruling was delivered on 27th March 2018 on the Bill of Costs dated 21st June 2017.

2. This Cause was begun in 2009 in respect of proceedings in **Succession Cause No. 844 of 2012 Estate of Mehar Singh Sihra (deceased)**. The applicant was one of the beneficiaries of the estate. He had been blocked by other members of his family from receiving his share of the estate of his father. He therefore retained the respondent as counsel to take up the matter from his previous counsel in pursuit of his share of the estate. In the course of perusing the court file, the respondent discovered that some of the properties forming the estate had been fraudulently transferred to the applicant's mother (now deceased). The fraud was established through the services and report of a document examiner contracted to examine signatures contained in the Will of the deceased, minutes of meetings pertaining to the deceased's company Sihra Engineering Works Ltd dated 1st August 2000 together with a power of attorney dated 9th October 2012. The matter was reported to the police under OB No. CIC/G/GEN/COMP/6/11/2015/880. There were negotiations thereafter between the respondent and the applicant's family which ended in a compromise. The respondent was able to assist the applicant recover the following assets:

a) Lavington Nairobi property land reference number 209/7760 being 21/2 acres (Kshs.600 million);

b) Spring Valley land reference number 12325/79 being ½ acre (Kshs.100 million);

c) South coast Mombasa land reference number 466/25 being 1 acres (20 million);

d) North Coast Mombasa land reference number 49/1402 being 21/2 acres (Kshs.150 million);

e) 60% of the share in Sihra Engineering Limited (Kshs.540 million);

f) Kilifi farm registered in the applicant's name and acquired from family investments being 21 acres (105 million); and

g) Malindi farm registered in the applicant's name and acquired from family investments being 17 acres (119 million).

The respondent also submitted that he prepared the necessary transfer documents and processed titles for the Malindi and Mombasa properties; filed an application in ELC 154 of 2016 seeking reinstatement of the suit regarding the Eastleigh property, prepared a power of attorney regarding the Eastleigh property and attended court severally in the Eastleigh matter. For these services, the respondent claimed he had justified his fees to the tune of Kshs.351, 628, 683/= as indicated in the Bill of Costs. The applicant opposed the Bill and denied having instructed the respondent in matters related to the estate of the deceased. It was the applicant's case that he only sought advice from the respondent to help him recover his share of the estate. The applicant proposed a sum of Kshs.60,000/= as instruction fees and requested the taxing master to tax off all other items for allegedly lack of evidence.

3. On 27th March 2018 the taxing officer found that the respondent had expended immense labour, thought, craft and time to protect the applicant's interests and to help him recover prime properties. The properties recovered by the applicant as a result of the respondent's services were valued at Kshs.1,634,000,000/=. The court relied on the case of **Joreth LTS Vs Kigano & Associates Civil Appeal No. 66 of 1999** to find that the value of the subject matter in the entire matter where the respondent acted for the applicant was Kshs.1,634,000,000/=. The Bill of Costs dated 21st June 2017 was taxed on 27th March 2018 at Kshs.38,401,626/=.

4. The applicant filed the present reference against the taxation, but mainly in respect of items 1, 4, 39, the quantum of total fees and value added tax chargeable in the Bill of Costs. The prayers were that:-

a) the court be pleased to vacate and set aside in its entirety the ruling and reasoning of the learned taxing officer dated and delivered on 27th March 2018 taxing the advocate/respondent's Bill of Costs dated 21st June 2017 at Kshs.38,401,626.00/=;

b) the court be pleased to re-assess items number 1,4,39, the quantum of the total fees and value added tax chargeable in the advocate/respondent's Bill of Costs;

c) in the alternative to prayer (b) above the court be pleased to remit the Bill of Costs dated 21st June 2017 for re-assessment of items 1,4, 39, the quantum of total fees and value added tax chargeable before the taxing master or a different taxing master with appropriate directions thereof; and

d) the costs of this application be provided for.

5. The application was based on the grounds that the taxing master acted contrary to well settled principles of law and also misdirected himself on the principles of law applicable; that the taxing master failed to find that the respondent was not entitled to instruction fees despite having found at paragraph 24 of the ruling that the respondent admitted to have taken over the matter from the firm of Wangira Onkoba Advocates who while acting for the applicant had already filed the necessary pleadings raising all issues and prepared the matter for trial; that the taxing master wrongly exercised his discretion in awarding instruction fees to the respondent in that he failed to find that the respondent was not entitled to full instruction fees but to proportionate fees on work done as well as court attendances in **Succession Cause No. 844/2012**; that the award of Kshs.5,460,000 by the taxing master to the respondent was legally and factually erroneous and wrong exercise of discretion as the taxing master clearly admitted that preparation of the case for trial and or filing of pleadings was not done by the respondent and that the case never proceed to trial or hearing at all; that the taxing master wrongly exercised his discretion to find that the agreement/settlement or consent arising from Criminal Complaint lodged by the applicant at the Directorate of Criminal Investigations vide CIC/G/GEN/COMP/6/11/2015/880 formed a settlement or compromise in **Succession Cause No.844/2012** yet no consent or compromise was filed in the said succession cause; that the taxing master erred in law and in fact in applying **Schedule 10 Part 1 and 2** of the **Advocates Remuneration Order (2014)** to assess and award instruction fees payable to the respondents work or legal services undertaken to pursue a criminal complaint lodged by the applicant at Directorate of Criminal Investigations vide CIC/G/GEN/ COMP/6/11/2015/880; that the taxing officer exercised his discretion on the grounds that are both unclear, unreasonable and legally untenable in awarding the requisite instruction fee as Kshs.16,380,000.00/= when the value of the subject properties was not ascertainable from the pleadings filed; that the award of the instruction fees was arbitrary, capricious, excessive, unreasonable, unjustified and gratuitously and violated the principle that costs should not be awarded as a punitive measure against a losing litigant; that there was no evidence that the consent letter dated 28th April 2016 by the Firm of Shabana Osman & Associates relied on by the taxing officer had been duly filed in court in light of the settlement and or adopted as an order of the court for purposes of ascertaining the value of the properties; that the taxing master misdirected himself on the evidence and matters before him to find that the respondents had recovered the properties listed at paragraph 8 of the impugned ruling whereas the respondent admitted to only have recovered and registered two properties in the name of the applicant consequently basing the payable fees on alleged Kshs.1,633,000.00 which was an exaggerated value of the 2 properties recovered; and that the learned taxing master erred in principle and in law when he failed to consider and determine the merits of each and every item in the advocate's Bill of Costs and instead allowed item number 39 at Kshs.19,200/= without giving reasons thereto noting that there were no minutes produced by the advocate or time sheets to justify the 8 hours allegedly spent. The reference was supported by the affidavits of Oscar Litoro dated 25th April 2018 and 6th July 2018.

6. The reference was opposed by the respondent through the replying affidavit of Peterson Githinji Mwangi dated 21st June 2018. The summary of his case was that the application was an abuse of the court process as it was outside the scope of the provisions of **Rule 11(2)** of the **Advocates Remuneration Order**; that the amount of Kshs.38,401,626/= taxed by the taxing officer was fair and justifiable and the taxing officer properly exercised his discretion in his finding as envisaged by the **Advocates Remuneration Order**; that the ruling gave all the reasons for arriving at the sum of Kshs.38,401,626/= and further gave reasons for allowing items number 1,4, 39 and the quantum of the total fees and value added tax chargeable in the Advocate/Respondent's Bill of Costs; that the brief was enormously important, the issues raised impacted heavily on the parties, searches in the law were involved as the matter was complex hence he spent hours working on getting back properties on behalf of the respondent which properties were enormously valuable and as such the sum of Kshs.38,401,626/= was justifiable; that the applicant had not demonstrated that the taxing officer misapplied the principles under **Rule 13A** of the **Advocates Remuneration Order**; and that the instant application was meant to delay the execution process commenced by the applicant

7. Parties filed written submissions to support their cases. I have considered them.

8. I note that prior to filing the reference, the applicant filed a notice of objection dated and filed in court on 11th April 2018. I further note that the ruling dated 27th March 2018 contained the reasons thereof. The reference was therefore made in compliance with the provisions of **Paragraph 11** of the **Advocates' Remuneration Order.**

9. I bear in mind that during taxation the taxing officer exercises a wide discretion. His decision should not be disturbed by the judge determining a reference unless it is demonstrated that a wrong approach was taken in the taxation. In **Steel and Petroleum (EA). V. Uganda Sugar Factory LTD [1970] E.A. 141** it was observed that the Court should not interfere with the decision of the taxing officer 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 an

inference that it was based on an error of principle. Further, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and, or not to consider **Remuneration Order** itself. Some of the relevant factors to take into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial judge.

10. In the Court of Appeal decision in **Premchand Raichand V Quarry Services (NO 3) [1992]EA 162,** it was held that the Court will only interfere with the award of the taxing officer if it is so high or so low as to amount to an injustice to one party; if the bill taxed is not comparable with previous taxations, except that consideration be had of inflation. In reaching the figure, the Court should consider the following principles:

(a) that costs should not be allowed to rise to such level as to confine access to the courts to the wealthy;

(b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur*;*

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made.

11. The value of the subject matter for the purpose of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement, but if the same is not ascertainable the taxing officer is entitled to use his discretion to ascertain such instruction fees as he considers just.

12. Back to the facts of this case. It is not disputed that although the applicant had contracted the firm of Wangira Onkoba Advocates to act for him, it was not until he retained the respondent that there was substantial progress in the matter which led to the recovery of the properties listed in paragraph 2 of this ruling. The proposal from the firm of Shabana Osman & Associates dated 28th April 2016 indicated that the applicant's family had considered his proposal regarding the properties listed, that the family had resolved to amicably settle all issued and differences in the matter on various conditions. Condition (c) required the applicant undertakes to forego all legal claims of whatsoever nature whether the claims arose in Kenya, the United Kingdom or India as against Mrs. Gurdial Kaur Sihra, her family members and or Jagjeet Singh Sihra and his immediate family members. Condition (i) required the applicant to forego his legal rights, claims and interest on any assets and income of Mehar Singh Sihra (the deceased) and Gurdial Kaur Sihra and their respective family members, and to relinquish any such rights that he had to his siblings and the remainder of the children of the deceased and Gurdial Kaur Sihra. Condition (j) required the applicant, before signing the memorandum of understanding, to settle, withdraw and or terminate all suits, proceedings and or actions filed against each other and or against the estate of Mehar Singh Sihra (the deceased) wherever they may have been commenced whether within the republic of Kenya, United Kingdom and or any part of the world. Condition (q) went on the list the properties given to the applicant as settlement together with their values. They were as follows:

h) Lavington Nairobi property land reference number 209/7760 being 21/2 acres (Kshs.600 million);

i) Spring Valley land reference number 12325/79 being ½ acre (Kshs.100 million);

j) South coast Mombasa land reference number 466/25 being 1 acres (20 million);

k) North Coast Mombasa land reference number 49/1402 being 21/2 acres (Kshs.150 million);

l) 60% of the share in Sihra Engineering Limited (Kshs.540 million);

m) Kilifi farm registered in the applicant's name and acquired from family investments being 21 acres (105 million);

n) Malindi farm registered in the applicant's name and acquired from family investments being 17 acres (119 million).

13. From the above conditions, it is evident that the compromise of the suit involved settling both the criminal proceedings in which properties forming the estate had been fraudulently transferred to the applicant's mother (now deceased) as a result of forgery of documentation and the succession cause in the estate of Mehar Singh Sihra (the deceased) **Succession Cause No.844/2012** where the applicant had been left out of the distribution of the estate of his father. The criminal complaint and the succession suit comprised of "any legal issue instituted by either party within the republic of Kenya, United Kingdom and or any part of the world". The applicant cannot therefore be heard to claim that the agreement/settlement or consent was only with regard to the criminal complaint lodged by the applicant at the Directorate of Criminal Investigations vide CIC/G/GEN/COMP/6/11/2015/880. This court finds that the settlement or compromise covered everything including the proceedings in **Succession Cause No. 844 of 2012.** That being the case, the taxing officer properly exercised his discretion to find that the agreement/settlement or consent arising from the criminal complaint lodged by the applicant at the Directorate of Criminal Investigations vide CIC/G/GEN/ COMP/6/11/2015/880 and formed the settlement or compromise in **Succession Cause No. 844 of 2012**. Item 39 of the Bill of Cost on the respondent's attendance of a meeting to discuss the mode of distribution of the estate of Mehar Singh (deceased) at La Maison Royale was correctly taxed.

14. There was an allegation that the respondent took over the matter from the firm of Wangira & Co who while acting for the applicant had filed all the necessary pleadings and prepared the matter for trial, and that the respondent had not earned the full instruction fees as per items 1, 2, and 3 of the Bill of Costs. Then there was item 4 on the getting up fees where the respondent had taken up conduct of the matter from the firm of Wangira Onkoba & Co. Advocates. I note the finding of this court in **Kenya Tea Development Agency Ltd V J. M. Njenga & Co. Advocates [2008] eKLR** where the court held as follows:

> **"A new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer's discretion to increase or (unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one-half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge's certificate for more than one counsel."**

15. I further note that although extensive pleadings had been filed, it was only after the respondent took over the matter that substantial progress was made towards the recovery of the assets listed in paragraph 2 of this ruling. I find that the instruction fees and the getting up fees were correctly assessed by the taxing officer.

16. Regarding the value of the estate, this court notes that the values of each asset were indicated against each asset. At the time of settling the matter, the applicant did not dispute the value of any property. He cannot be heard to dispute the value or to seek to challenge the value that he accepted. The court rightly exercised its discretion in relying on the case of **Joreth LTS Vs Kigano & Associates Civil Appeal No. 66 of 1999** to find that the value of the subject matter in the entire matter where the respondent acted for the applicant was Kshs.1,634,000,000/=.

17. Further, there is nothing in the grounds and affidavit supporting the reference that points to any issue or principle that the taxing officer failed to consider during the taxation. Instead, it is clear from the ruling of taxation that the taxing officer took into consideration;

> ***"the documents filed and the value of the estate of the deceased, the complexity of the matter and the interest exhibited by the parties in the matter."***

He also considered:

> ***"the work done by the applicant."***

He reduced estimated legal fees for the entire brief from Kshs.351,628,683/= as indicated in the Bill of Costs (which he found excessive) to Kshs.38,401,626/=. The quantum of the total fees and the value added tax were commensurate to the value of the estate recovered, the complexity of the matter, and the amount of work done.

18. In conclusion, I have considered the reference against the taxation, and mainly items 1, 2, 3, 4, and 39 of the Bill of Costs. I have looked at the quantum of total fees and the value added tax chargeable in the Bill. All these have been weighed against the principles of taxation and the reasons that the taxing officer gave in reaching the amounts in each case. I find that the taxing officer did the best in the circumstances. The reference has no merits and is dismissed with costs.

DATED and SIGNED at NAIROBI this 10TH day of DECEMBER 2018

A.O. MUCHELULE

JUDGE