



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CAUSE NO. 731 OF 2012

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

KAGWIMI KANG'ETHE & COMPANY ADVOCATES.....APPLICANT

VERSUS

A.A. KAWIR TRANSPORTERS LIMITED.....RESPONDENT

RULING

[1] The Chamber Application dated **20 May 2016** was filed herein on **23 May 2016** by the Respondent, **A.A. Kawir Transporters Limited**, for orders that the Court be pleased to review the Taxing Master's Award of **17 November 2014** on Item 1 of the Applicant's Bill of Costs dated **4 December 2012**; and that the costs of the application be in the cause. The application was premised on the ground that the Taxing Master erred in fact and in law in assessing Item 1 of the Advocates' Bill of Costs dated **4 December 2012** and therefore awarded an amount that was manifestly excessive, so as to amount to an error in principle. In support of the application, the Respondent relied on the Supporting Affidavit sworn by **Abdi Ahmed Abdi** on **20 May 2016**, in which the background of the Reference was provided thus: the Respondent, in its capacity as the Vendor, instructed the Applicant, **Kagwimi Kang'ethe & Co. Advocates**, to act on its behalf in a sale transaction in respect of property known as **LR No. 209/20052** and **LR No. 209/11803/3**, but that in the course of the sale transaction, injunction orders were issued in **Nairobi High Court (ELC) No. 746 of 2011** and **Nairobi High Court (ELC) No. 747 of 2011**. Furthermore, Conservatory Orders were issued in **Constitutional Petition No. 194 of 2011** restraining the Respondent from dealing with the two parcels of land in any manner whatsoever, thus frustrating the sale.

[2] It was further averred that the Applicant subsequently filed his Bill of Costs dated **4 December 2012** after the sale of the two properties aborted as aforesaid, which Bill of Costs was first taxed before **Hon. Nyambu DR**, who, in a Ruling delivered on **19 June 2013**, awarded the Applicant a sum of **Kshs. 255,652, Kshs. 200,000** thereof being Instructions Fees per Item 1. Being dissatisfied with the award on Item 1, the Applicant filed a Reference seeking the setting aside of the Deputy Registrar's Award of **19 June 2013**. The Reference was successfully argued before **Havelock J**, whereupon the initial taxation was set aside, and a direction given for the Applicant's Bill of Costs to be taxed afresh in respect of Item 1

only before a different Deputy Registrar.

[3] The Respondent further averred that Item 1 of the Applicant's Bill of Costs was thereafter taxed by **Hon. Reuben Nyakundi**, Deputy Registrar (as he then was) and a sum of **Kshs. 850,000** awarded, which the Respondent now disputes by way of the Chamber Summons dated **20 May 2016**, contending that the sum awarded by **Hon. Nyakundi** was so inordinately excessive as to amount to an error in principle. In support of its application, the Respondent exhibited, inter alia, a copy of the Agreements for Sale prepared by the Purchaser's Advocates, copies of correspondence and court order in respect of **High Court (ELC) 746 and 747 of 2011**, a copy of the Applicant's Bill of Costs and the Rulings thereon delivered by the Deputy Registrars.

[4] In response to the application, the Applicant posited, vide the Replying Affidavit sworn by **George Kagwimi Kang'ethe** on **29 June 2016**, that to the extent that the application is based on quantum of Instructions Fees awarded by the Taxing Master, the same lacks merit and constitutes an abuse of the process of the Court. It was the Applicant's contention that the Bill of Costs was filed for taxation because the Respondent instructed another firm of Advocates to take over the conduct of the matter on its behalf but failed to pay the legal fees due to the Applicant.

[5] It was further averred by the Applicant that the Respondent had not given any valid explanation or justification to warrant the review sought, contending that the Taxing Master properly exercised his discretion and considered relevant factors in arriving at his decision as he was required to under **Schedule V Part 2 of the Advocates (Remuneration) Order**. The Applicant urged the Court to accordingly dismiss the Chamber Summons application dated **20 May 2016** with costs.

[6] The Respondent, in a bid to demonstrate that the Taxing Officer erred in principle and to rebut the Applicants averments in the Replying Affidavit, filed a Supplementary Affidavit on **29 July 2016**. It was deponed therein that where quantum is manifestly high, a misdirection of principle may be inferred, and the Court would, in such circumstances, be justified in interfering with the Taxing Master's assessment of costs. The Respondent denied having withdrawn instructions from the Applicant as alleged in Paragraph 5 of the Replying Affidavit, contending that it was only in respect of the litigation matters that the Respondent instructed another firm of Advocates to act for it; and that at no time did it withdraw instructions from the Applicant in respect of the sale transaction. Other than the foregoing disputations, the parties were in agreement as to the rest of the facts.

[7] Having considered the application, the affidavits filed in respect thereof and the submissions made by Learned Counsel for the parties, the key issue for the Court's determination is whether the amount awarded by the Taxing Master, namely, **Kshs. 850,000**, is so manifestly excessive as to amount to an error on principle to warrant a review as sought herein. I say so because it is now trite that a Judge ought not to interfere with the discretion of a Taxing Officer on quantum merely because the amount awarded was high. It has to be demonstrated that the fee awarded was so manifestly excessive as to justify interference. One of the leading authorities on this is the case of **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64**, in which it was held thus:

"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 interference that it was based on an error of principle (Steel Construction Petroleum Engineering (EA) Limited vs. Uganda Sugar Factory [1970] EA 141 followed). Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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."

[8] In the light of the foregoing, it was the contention of the Respondent that the Taxing Officer erred in principle by awarding the sum of **Kshs. 850,000** for Instructions Fees, granted that the Sale Agreement was drafted by the Purchasers Advocates, and therefore should be reduced. **Para 18(a) of the Advocates**

(Remuneration) Order, was relied to support the proposition that where the advocate for the vendor does not prepare an agreement for sale, the scale fees should be reduced by one-third, and that this is a factor that was not taken into consideration by the Taxing Officer. Accordingly, it was the Respondent's contention that the Applicant expended little labour in this matter granted that the transaction was stopped soon after the Sale Agreement was approved.

[9] The second line of attack of the Taxing Officer's Award was on the ground that he relied on speculations, assumptions and omissions and thereby came to the wrong conclusions. It was posited that the Taxing Master assumed that the Applicant discharged his duty of care and diligence, which, according to the Respondent was not the case. It was submitted that whereas the Taxing Master rightly observed that due care and diligence needed to be exercised at the Lands Registry and other sub-registries such as the Survey Department to verify the authenticity of the Titles before the Sale Agreement was prepared, there was no proof that this was done. The Taxing Master was also faulted for assuming that the Applicant drafted the Sale Agreement, which was not the case. In terms of omissions, the Respondent argued that the Taxing Master did not take into account the fact that the transaction was not stopped by any fault of the Respondent but was frustrated by a Court Order. For the foregoing reasons, the Respondent urged that the Award of **Kshs. 850,000** be reduced and be substituted with a maximum sum of **Kshs. 250,000**; or in the alternative, Item 1 of the Applicant's Bill of Costs dated **4 December 2012** be referred back to a different Deputy Registrar for fresh assessment.

[10] The Applicant on the other hand found it pertinent to restate the background of the matter and to stress that the initial taxation yielded a sum of **Kshs. 200,000** for Item 1, which the Applicant contested and **Havelock, J** agreed with them in a Ruling delivered on **14 May 2014**; hence the fresh taxation by **Hon. Nyakundi**. The Applicants relied on the case of **Joreth Limited vs. Kigano & Associates [2002] eKLR** to support their contention that the Taxing Officer is clothed with the power to exercise his personal discretion and to consider the pleadings and all other factors he may deem relevant in assessing the instructions fees in a bill of costs. The **First American Bank Case** (supra) and **Judicial Hints on Civil Procedure** by **Richard Kuloba**, 2nd Edition at page 122 paragraph 5, were also cited by the Applicant to emphasize the principle that a Judge sitting in a Reference should not interfere with the decision of a Taxing Officer merely because in the opinion of the Judge the amount awarded was high.

[11] The Applicant contended that, having been instructed to act for the Respondent in the sale transaction of the suit property, they attended various meetings to discuss the terms of sale and eventually an Agreement for Sale dated **3 June 2011** was drafted, approved and signed by the Vendor/Respondent and the Purchaser, **Hasbah Company Limited**. It was pointed out that the agreed purchase price was **Kshs. 256,000,000**; and that by the time the Applicant was debriefed, on account of civil proceedings filed by third parties to challenge the Respondent's ownership of the property, the Sale Agreement had been signed and the Respondent had received substantial consideration as part payment.

[12] According to the Applicant, since **Schedule V Part 2 of the Advocates Remuneration Order**, which the Taxing Officer was directed to apply, does not specify the amount to be awarded, the Taxing Officer properly exercised his discretion and considered the relevant factors set out therein, including the amount or value of the subject matter involved. Counsel relied on the case of **Ochieng' Onyango Kibet and Ohaga Advocates vs Adopt A Light Limited [2007] eKLR** in support of this argument, adding that the Respondent had not established any basis for its allegation that the awarded sum of **Kshs. 850,000** was excessive or to support the proposed sum of **Kshs. 250,000**. The Court was further urged to ignore the Respondent's contention that the Applicants did not conduct due diligence on the Titles, contending that the obligation to conduct due diligence including searches to verify Titles normally lies on the Advocate for the Purchaser and not the Advocate for the Vendor.

[13] In response to the argument that the transaction was simple and straightforward, the Applicant relied on the case of **Hayanga & Company Advocates vs Royal Garden Developers Limited [2006] eKLR** and submitted that they were entitled to full instructions fees as soon as the Agreement for Sale was ready; but that in this case the Taxing Master, in his discretion, did not award the full instructions fees due and calculable on the basis of the purchase price. It was further argued that time and energy had been expended on scrutinizing the Sale Agreement, whereupon the Respondent was paid a substantial part of

the purchase price in part payment; hence it was, according to the Applicant, immaterial that the transaction was not seen to completion. It was further contended that approving a Sale Agreement was not a mechanical act but required a careful perusal of the terms to ensure that the interests of the client were taken care of. It was thus the contention of the Applicant that the Respondent had failed to show that the Taxing Officer erred in principle to warrant interference with the award. The Applicant therefore prayed for the dismissal of the application dated **20 May 2016** with costs.

[14] Having considered the arguments advanced herein by either side, and having perused the record of proceedings to date, it is imperative to acknowledge that Court (**Havelock, J**) has had the occasion to consider a reference in respect of the Applicant's Bill of Costs dated **4 December 2012** and set aside the award of **Kshs. 200,000** on the ground that it was too low. The Court expressed itself thus:

"Where I believe the learned Taxing Officer may have gone astray is in her determination of what are fair and reasonable charges in the circumstances of the Bill of Costs before her. Quite rightly, the Taxing Officer quoted from the finding of Warsame J (as he then was) in the matter of Ochieng Onyango Kibet & Ohaga Advocates vs. Adopt A Light Ltd (2007) eKLR. In my view, however, she seems to have ignored the guidance of the learned Judge as put in his last paragraph as quoted:

"In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject."

As Mr. Kang'ethe has stated on Oath, the value of the subject matter being the property as covered by the Agreement for Sale was Kshs. 256 Million. In my opinion, the Learned Taxing Officer does not seem to have taken into account this value in assessing item No. 1 of the Applicant's said Bill of Costs."

[15] Given these clear directions, the Taxing Officer proceeded to apply his mind to the matter before him and concluded thus:

"The very critical factor in this Advocate Client bill of costs on instructions was the value of the subject matter totalling to Kshs. 256,000,000. By the time a sale agreement was drawn advocate applicant herein had been retained on behalf of the Respondent. He acted on instructions by investigating the title correspondence as between the purchaser and seller preparation of necessary documents with a view to finalize transfer of title. However, in the course of execution of instructions due to that consideration between client and advocate, documentation to pass title was not completed."

[16] The Ruling of the Taxing Officer further shows that he took into account the provisions of **Schedule V Part 2** and any argument that the works was incomplete, that the Sale Agreement was prepared by Counsel for the Purchaser or that no due diligence was undertaken by the Applicant cannot be tenable in the circumstances. As posited by the Applicant, approving a draft agreement involves diligence to ensure that the Vendor's interests are taken care of, which is what the Applicant herein says was done. It is also plain that while a Registry search was imperative for the Purchaser's purposes, it was not the case with the Vendor in whose name and possession the original Title was.

[17] There can be no doubt that the Taxing Officer took into account the fact that the transaction did not proceed to conclusion. This is evident in the excerpt of his Ruling quoted above. In any event, it is not in dispute that the Sale Agreement was finalized and signed by the parties, and that pursuant thereto the Respondent was paid sum **Kshs. 66,000,000** in part payment. In the premises, I would take the same view as was expressed in **Hayanga & Company Advocates vs Royal Garden Developers Limited [2006] eKLR** 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."

[18] In the premises, I find no merit in the Chamber Summons dated **20 May 2012** and would find and hold that the Respondent has failed to demonstrate that the Taxing Officer erred in principle in making the award of **Kshs. 850,000** as he did. In the result, I would dismiss that application with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY, 2017

OLGA SEWE

JUDGE