



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC APP. NO. 221 OF 2017**

**IN THE MATTER OF THE SALE AND TRANSFER OF LAND REFERENCE**

**NO. 209/17235, APARTMENTS NOS:7 AND 8 NAIROBI**

**OTIENO OKEYO & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**PROF: GLADYS NABUBWAYA OPINYA.....RESPONDENT**

**RULING**

1. This is the respondent's/client's chamber summons dated 8<sup>th</sup> September 2018 brought under paragraph 11(2) of the Advocates Remuneration Order, 2009. The Advocates Act Cap 16 Laws of Kenya and all other enabling provisions of the law:-

*(a) That this honourable court be pleased to set aside the decision of the Taxing Master dated 28<sup>th</sup> August 2018 t tax and award item No. 3 in the Bill of Costs dated 1<sup>st</sup> November 2017 as drawn.*

*(b) That this honourable court be pleased to inquire into the circumstances under which the subject leases were registered when stamp duty was paid using erroneous pin and land refence numbers.*

*(c) That the applicant/advocate be and is hereby ordered to rectify and effect the necessary changes on the stamp duty and lease document herein at his own cost.*

*(d) That the respondent/client to refund the applicant/advocate the sum expended on stamp duty after the aforesaid rectification exercise.*

*(e) That costs of this application be in the cause.*

2. The grounds are on the face of the application and are:-

*(a) That by acknowledging that the documents availed by the applicant confirmed that it (applicant) 'paid' stamp duty using an erroneous PIN Number and property number, the taxing master thus erred in law and in fact in taxing item No. 3 in the Bill of Costs dated 1<sup>st</sup> November 2017 as drawn.*

*(b) That the taxing master erred in law by misdirecting herself that she was not in a position to inquire as to how it was possible to effect the transfer over the properties using an erroneous PIN and property number, and thereby taxing item no. 3 in the Bill of Costs dated 1<sup>st</sup> November 2017 as drawn.*

*(c) It is only fair and just that this honourable court inquires into the crucial question of how it was possible to effect the transfers over the subject properties using an erroneous PIN and property number before requiring the respondent to pay the applicant any money expended on this account.*

3. The application is supported by the affidavit of Prof. Gladys Nabubwaya Opinya, the respondent/client sworn on the 8<sup>th</sup> September 2018.

4. The application is opposed. There are grounds of opposition by the applicant/advocate dated 30<sup>th</sup> December 2018.
5. On the 19<sup>th</sup> September 2019 the court with the consent of parties directed that the application be canvassed by way of written submissions.
6. It is the respondent's/client's submissions that the principles applicable to a review of taxing master's decision are well canvassed in the case of **KTK Advocates vs Baringo County Government [2017] eKLR**. The sole issue of contention herein is the decision of the Taxing Master in her Ruling dated 28<sup>th</sup> August 2018 to tax and award item No. 3 of the subject Bill of Costs as drawn. The applicant/advocate used an erroneous PIN that did not belong to the respondent/client and he recorded an erroneous description of the subject properties by using a land reference number belonging to a different property having no affinity with the respondent/client. The applicant/advocate was aware that he had made a big error, hence his refusal to provide supporting documents to those payments to the respondent/client when the latter asked for them so that she could work on a refund. She has put forward the case of **Laurence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 others [2017] eKLR**.
7. The taxing master's decision was based on an error of principle for she took into account irrelevant factors (that the leases were registered or that the stamp duty went into government collection account) and omitted to consider relevant factors (veracity of the instruments used to perfect title). The taxing master has power to order for the production of books, papers and documents to enable her determine whether a claim for payments is justified or not. It must therefore follow that she is vested with inherent jurisdiction to inquire into the validity or otherwise of those books, papers and documents. The taxing master acted in contradiction of paragraph 16 of the advocates remuneration order, which expressly binds her as regards to the manner she is to exercise her discretion by awarding item No. 3 as drawn in the subject bill of costs. She prays that the application be allowed.
8. It is applicant's/advocate's submissions that the client has brought this application in contravention of Rule 11(1) of the Advocates (Remuneration) Order which requires a party aggrieved by the decision of the taxing master must write to the taxing master objecting to the decision within 14 days of the decision. He has relied on the cases of **Eliud Kipchirchir Bett vs Mwenda Thurairira [2017] eKLR**, **Odera Obar & Co. Advocates vs Ally Enterprises & Others Civil suit No. 241 of 2013**. This application ought to be dismissed on this ground.
9. Prayers 2, 3 and 4 cannot be subject of the review application as they do not arise from the decision of the taxing master and were never issues in the taxation of the advocate-client bill of costs. These prayers are therefore misplaced and ought to be dismissed.
10. The taxing master's decision is an award and any party aggrieved can only petition the high court for review on grounds that the same is too high or too low. The subject conveyances were concluded in 2015 and the client has had the benefit of and continues to so have the benefits of the subject conveyances and possessions of the conveyed properties at the advocates costs. He prays that the application be dismissed with costs.
11. I have considered the chamber summons and the affidavit in support. I have also considered the grounds of opposition, the written submissions and the authorities cited. The issue for determination is whether this application is merited.
12. I have gone through the advocate/clients bill of costs dated 1<sup>st</sup> November 2017. Item 3 provides that on 4<sup>th</sup> June 2015 stamp duty of Kshs.1,040,300/- was paid. The taxing master allowed the item as prayed. In her ruling dated 28<sup>th</sup> August 2018 she observed:-

"I am persuaded that the applicant is entitled to the monies he expended on account of the stamp duty of the leases. The deposit slips is in the applicant's name. I tax item 3 as drawn"

13. **Rule 11** of the advocates (remuneration ) order provides that:-

***"1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to where he objects.***

***2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of his objection."***

There is no evidence that the client herein gave such notice in writing to the taxing master.

14. In the case of **Joreth Limited vs Kigano & Associates [2002] I EA 92** the Court of Appeal was categorical that a taxing officer in assessing costs to be paid to an advocate in an advocate-client bill of costs is exercising discretion. That such discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law.

I am unable to find that the taxing master in her decision dated 28<sup>th</sup> August 2018 failed to apply the correct principles of law. I therefore decline to interfere with the said decision.

15. I agree with the advocates submissions that prayer 2, 3 and 4 of the chamber summons dated 8<sup>th</sup> September 2018 cannot be subject of review as the issue did not arise from the decision of the taxing master.

16. As the client is not claiming that the award is too high or too low, I decline to interfere with the decision of the taxing master dated 28<sup>th</sup>

August 2018.

17. The upshot of the matter is that I find no merit in this application and the same is dismissed with costs to the advocate/applicant.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>TH</sup> day of JUNE 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Advocate/applicant

.....Advocate for the Client/Respondent

.....Court Assistant