REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. (REFERENCE) APPLICATION NO. 52 OF 2015

IN THE MATTER OF THE ADVOCATES ACT CAP 16

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

OTIENO CLEVELAND OKOTH AYAYO

P/A OTIENO C.O. AYAYO & CO. ADVOCATES.............APPLICANT/OBJECTOR

AND

JUNI AWITI ASIYO...RESPONDENT

RULING

The applicant/Advocate filed a Bill of costs for Kshs.7,974,327/20 for services rendered to the Respondent/Client in respect of some noncontentious business. The Bill was by agreement of the Advocates for both parties consolidated with another arising from a criminal matter in which the applicant/Advocate alleges to have rendered services for the respondent/client. That bill was for Kshs.722,680/=.

When the matter went before the Taxing Officer she assessed the bill of costs in the noncontentious matters at Kshs.568,400/= and dismissed the bill in the criminal matter on the ground that there was no retainer. The Advocate/Applicant was aggrieved by the decision and so filed a Chamber Summons dated 21st December 2015 seeking to set aside the assessment and a fresh taxation or in the alternative a retaxation of that bill by this Court.

The gist of the application is that the taxing officer erred in principle by failing to take into account the nature and importance of the matter, the amount involved, the interest of the parties as well as the general conduct of the proceedings and further that she erred in making the find that there was no valid agrement as to the legal fees and instructions fees. Further that the taxing officer did not consider the applicant's submission to the effect that the respondent was willing to pay the legal fees as drawn in the bill; that she erred in awarding only 150,000/= on items (1), for omitting to tax item 4 and for making a finding that there was no proof for items 5-43 of the Bill of Costs.

The application was opposed on grounds that it is misconceived, bad in law and an abuse of the Court process for failure to comply with the mandatory provisions of Rule 11 of the Advocates (Remuneration) Order. Secondly that there was no valid agreement between the Advocate/Applicant and the Respondent/Client as required by Section 45 of the Advocates Act to warrant the Bill being taxed as claimed by the Advocate/Applicant. Thirdly that the Advocate/Client is not a person authorized to practice as an Estate Agent as to warrant him to be paid a commission as an agent. Fourthly that the taxing officer's decision is correct as she was guided by the relevant law.

The application was canvassed by way of written submissions. Whereas I agree with the Respondent/Client's submission that the application herein does not meet the threshold for reference as it does not comply with Order 11 of Advocates Remuneration Order the Supreme law now dictates that courts do not sacrifice merit to procedural technicalities. For that reason and in the interest of justice and expediency of the matter I shall proceed to deem the application as a reference properly filed and consider it on the merits.

The principle to guide me is that this Court can only interfere with the taxing officer's decision if it is shown that an error of principle has been committed as the taxing officer was exercising her discretion. - see.....

The non contentious services rendered by the Advocate/Applicant to the Client/Respondent as can be discerned from the documents and correspondences filed was the sub-division of Kisumu Municipality 15037 into 14 plots and the subsequent sale of those plots at a total sum of Kshs.21 Million. It is the Advocate/Applicant's contention that there was an agreement that his client would pay him Kshs.150,000/= per plot. This would amount to Kshs.2,100,000/= which he then increases by one half (1,050,000/=) to bring the sum claimed for the sub-division to Kshs.3,150,000/=. The question then is whether there was an agreement? According to the Advocate/Applicant and if I understood his submission that agreement is contained in the e-mails annexed as **OCOA2(a), OCOA2(b), OCOA 2c** and letter dated September 3, 2014 **"OCOA3".** The e-mail marked **OCOA2c** reads:-

"Juni Asiyo

To Oyayo2001

Hello Mr. Ayayo

I read the KRAVAT TAX Act of 2013 and I think VAT may not be required on land transactions (please verify this yourself because I just looked at it briefly. This would be good news indeed.

Since they have taken a hard stance then we may just have to go with the 3,500,000 per acre and we would then pay the taxes. It is unfortunate because that would reduce our tax liability. Of course if it turns out that we do not have to pay the 18% VAT then there would be no issues.

Please let me find out about the VAT.

Juni."

The fees in non contentious matters is provided for in Schedule 1 of the Advocates Remuneration Order. That does not preclude an Advocate and his/her client to reach an agreement on the fees payable. Section 45(1) of the Advocates Act makes it possible for Advocates and their clients to agree on the fees payable for services rendered. That section, whereas it does not define the form for such an agreement, requires that such an agreement be in writing and signed by the client or his agent duly authorized in that behalf. Only then can it be binding. There is no such agreement here. None of the e-mails (or letter) quoted refer to an agreement on fees. If there was it was not availed to the the taxing officer or to this Court. In any event nothing in Section 45 allows the increase of one half as the Advocate/Applicant purported to do. The taxing officer deemed it fit to award the Advocate/Applicant a sum of

Kshs.150,000/= in respect of the sub-division. This despite her finding that the item was not provided for in Schedule 1 and indeed it is not. I see no good reason however to interfere with the exercise of that discretion. There was no error of principle.

The Advocate/Applicant advanced the same argument in item 1 in drawing item 2 – instruction fees. On this item I would just as the taxing officer find that there was no agreement for payment of instruction fees at the rate of 150,000/= per plot. That being the case the assessment of instruction fees falls under Schedule 1. This is an provided under paragraph 18 of the Remuneration Order which states:-

"18. Remuneration of advocate in non contentious matters subject to rule 22, the remuneration of an advocate in respect of conveyancing and general business (not being business in any action or transacted in any court or in chambers of any Judge or Registrar) shall be regulated as follows, namely:

sales, purchases and mortgages of land.

a) in respect of sales, purchases and morgages of immovable property or any interest therein, the remuneration is to be that prescribed in Schedule 1."

The Order in issue now is the Advocates (Remuneration)(Amendment) Order 2014. Schedule 1 – First scale thereof provides that the scale fees on sales and purchases affecting land registered in any registry shall be calculated cumulatively on the basis of the consideration or value of the subject matter as follows:

"(i) Provides that from 1 to Kshs.5,000,000/= 2% of the consideration or the value of the subject matter or Kshs.35,000/= whichever is higher.

(ii) from 5,000,000 to Kshs.100,000,000 the fee prescribed in (i) plus 1.5% of the balance."

The consideration here being Kshs.21,000,000/= the fees come to Kshs.340,000/= just as assessed by the taxing officer. Unlike Schedule VI which relates to costs of proceedings in the High Court Schedule 1 does not give the taxing officer discretion to consider the nature and importance of the matter, the interests of the parties or the general conduct of the proceedings. Indeed paragraph 21 of the Remuneration Order provides that the basis of the charge shall be the sum set forth in the deed or document as the price or consideration where such consideration is indicated as is the case here. Again the schedule does not provide for an increase of the instruction fees by one half. I am satisfied therefore that the taxing officer did not err in assessing the instruction fee.

On item 3 the Advocate/Applicant claimed a sum of Kshs.2,100,000/= which he describes as:

"**land agency commission fees to get a purchaser at Agreed commission at 10% of the purchase price per unit for an estimated total value of Kshs. 21,000,000/= at Kshs.3,500,000/= per unit x 6 sub-division from Kisumu/Municipality/15037."**

This item was not allowed the reason being that as the Advocate/applicant is not a registered estate agent he was not qualified to render this service and hence it was illegal for him to do so and no fee is payable. The argument is reiterated by the Advocate for the client/Respondent.

With due respect this is a misdirection. Paragraph 20 (2)(a) recognizes that an Advocate can charge for **"prior negotiations leading up to or necessary in the completion of a bargain."** This paragraph clarifies that such fee is not included in the scale fee. Indeed the commission for negotiating sale or purchase is provided for at paragraph 27 which states:-

"commission for negotiating a sale or purchase by private contract shall apply to cases where the advocate of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other

agent."

This was a sale by private contract and there is no evidence that the client/Respondent paid a commission to an estate or other agent. The Advocate/applicant was therefore entitled to a commission for negotiating the sale. Such fees is then calculable under the fourth scale of schedule 1. I find that on this item there was an error of principle and shall remit the bill back to the taxing officer to assess the commission.

Item 4 – Drawing and execution of agreement for sale of property – was not allowed. It was not even considered. This I believe was an honest mistake on the part of the taxing officer. Moreover the same is not allowable as a separate charge. Paragraph 20 provides that scale fees shall include taking of instructions to prepare the necessary deed or documents and at Paragraph 18 it is provided that where the advocate acting for a vendor does not prepare the agreement for sale the scale fee is reduced by one third. This in effect means that had the Advocate/Applicant in our case drawn the sale agreement here the fees awarded to him item 2 would have been reduced by one third. I am therefore satisfied that there would have been no error of principle in failing to allow this item.

Items 5 to 43 mainly relate to drawing and perusal of letters and correspondences. First of all paragraph 20(1)(b) provides that correspondence between advocate and client is included in the scale fees and so is not chargeable separately. Paragraph 19 provides that the scale fees do include stationery copies of letters and charges and allowances for time of the advocate and his clerks. There was therefore no error in not allowing those items. Those items would have been allowable under Schedule V had the advocate/Applicant made an election under paragraph 22 which he did not do.

In respect of the criminal matter the person the Advocate acted for was Phoebe Muga Asiyo. The Advocates Act defines a client thus:-

"includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity has power express, or implied to retain or employ and retains or employs or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs."

By the time of the trial the Power of Attorney exhibited there had not been executed. That is indeed cited as the reason for acquittal of the accused persons in that case. In the absence of proof of express instructions from the client/Respondent for the retention of the Advocate/applicant in the matter we cannot presume that she was the principal responsible for paying his fees on behalf of her mother. Once again therefore whereas paragraph 49A of the Advocates Remuneration Order does provide for costs in Criminal cases, I find there was no error of principal in not allowing costs as against the client/respondent in that case.

The upshot is that the Advocate /applicant's reference only succeeds in respect of item 3 which is remitted back to the taxing officer who taxed the bill to proceed with haste under the Fourth scale of the First Schedule.

The reference is otherwise dismissed with costs to the Client/Respondent. It is so ordered.

Signed, dated and delivered in Kisumu this 12th day of May 2016

E. N. MAINA

JUDGE

<u>In the presence of:-</u>

Mr. Olel for the Applicant/Advocate

Miss Aduar for Respondent/Client

CC: Felix Magutu