



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION NO. 23 OF 2012
IN THE MATTER OF THE ADVOCATES ACT, CAP 16
AND IN THE MATTER OF TAXATION OF COSTS

BETWEEN

WAMBUGU, MOTENDE & CO ADVOCATES.....RESPONDENT

VERSUS

KAMAL BHUSAN JOSHI.....1st APPLICANT

KAMAL JOSHI INVESTMENT LIMITED.....2nd APPLICANT

KENYA KNITTING & WEAVING MILLS LIMITED.....3RD APPLICANT

MOTEX KNITWEAR MILLS LIMITED.....4TH APPLICANT

RULING

Reference on taxation

[1] I have before me a chamber Summons Application dated on **2nd December, 2014**, seeking the following orders.

- a. **THAT, this Honourable court be pleased to set aside the decision of the Taxing Master made on 16th September, 2013.**
- b. **THAT, this Honourable court be pleased to order that the Advocates Bill of costs dated 18th January, 2012 be referred back to the Taxing master with appropriate directions for taxation or be dealt with as this Honourable court may consider appropriate in the circumstances.**
- c. **THAT, the costs of this Application be borne by the Advocate/Respondent.**

Arguments by the Applicants

[2] The application is premised on the grounds in the body of the Application, the supporting Affidavit sworn by **Kamal Bhushan Joshi**, dated on **2nd December 2014** and a supplementary affidavit sworn by **Kamal Bhushan Joshi** dated on **16th February, 2015**. The Applicant averred that, the Respondent was instructed on **15th September, 2008** by the Applicant to do a discharge of charge on **L.R. NO. 209/9266, L.R 209/9267, L.R NO. 37/690, LR NO. 37.691** and **L.R NO. 209/3574**. The Applicant further asserted that there was no contention on the legal fee on the discharge done as the same was agreed upon and paid over to the Respondent.

[3] The Respondent was also instructed by the Applicant to Transmit (Assent) **L.R NO. 209/3574** from the Deceased father of the 1st Applicant's name to the 1st Applicant, and from the name of the 1st Applicant to the 2nd Applicant's which is the company owned by the 1st Applicant. The transmission of the said property was done on the same day, that is to say on **23rd April, 2009**. The Respondent was given Exhibit marked "**KBJ1**" the Will written by the Deceased Father/mother of the 1st Applicant which the Respondent used to transmit this property from the father of the Deceased of the 1st Applicant to the 1st Applicant. The aforesaid Will was never brought to the attention of the taxing master. The Will did not have the value of the property.

[4] The Exhibit marked "**KBJ2**" is the Title Deed which was in the name of **Banarsi Dass Joshi**, the Deceased father of the 1st Applicant. The Transaction in the contention is on page 14 of the Application. At numbers 8, 9, and 10 of the Title shows the transaction the Respondent did simultaneously on **23rd April, 2009**. The only work the Respondent did was transmission and not conveyancing. The Exhibit marked "**KBJ1**" is a copy of the sale Agreement on **L.R.NO. 209/3574** wherein the 1st Applicant sold the said property to a company called **China Huade Constructions (K) Limited**. The Advocates who acted for the 1st Applicant in the said transaction was **M/s Nyawara & Company Advocates** for the vendor and **M/s Makhandia and Makhandia Advocates** for the purchaser. The Respondent never did any transfer or conveyancing of the aforesaid land to warrant him the amount of fees he is charging. Had the Respondent did the sale agreement and also convey the said suit premises to a third party, he is entitled to charge as per schedule 1. This sale agreement was never brought to the attention of the taxing master. The said agreement was not before the taxing master.

[5] The Applicants are disputing clause 1(g) (h) and (l) of the Advocates/client bill of costs. The work the Respondent did was on **23rd April 2009**. The Advocates/client bill of costs was filed in court on **18th January, 2012**. The bill was filed after four (4) years. The Respondent is basing his fees on the new construction building which was done by the new owner (China Huade construction (K) Ltd, and not the 1st Applicant. When the Respondent was given instructions to transmit the property under Succession Act, the new Buildings had not been constructed on the said land. By alleging that he did work amounting to **Kshs. 1,215,000,000** and is entitled to fees under schedule 1 of the Advocates Remuneration order is misleading the court.

[6] According to the Applicants, the Respondent is basing his fees on the construction agreement between the Applicant and the Company which bought the property. This construction Agreement is found in the supplementary affidavit of the Applicant marked "**KBJ2**". The Respondent never prepared this agreement. He cannot, therefore, charge the fee he is charging. The construction Agreement was prepared by Advocates known as **Kakai Mugalo & Company Advocates** for both parties. The Respondent did not act for either party.

[7] They also submitted on the Transmission (Transfer) i.e. Exhibit **KBJ1**" in the supplementary Affidavit of the Applicant, from the 1st Applicant's name to his company called Kamal Joshi Investments limited. The said transfer does not indicate consideration which would have entitled the Respondent to charge under schedule 1 of the Advocates Remuneration Order. This transfer does not show any amount in it. The transfer states that in consideration of love and affection the transferor hereby transfer unto the Transferee all his rights, titles and interest...Therefore, there was no consideration which will warrant the

Respondent to charge the way he is charging herein. This Transfer was never brought to the attention of the Taxing master. The Applicant had no possession of the document until the Respondent filed it in court.

[8] According to the Applicants, the Respondent misled the taxing master by using schedule 1 of the Advocates Remuneration Act instead of schedule x which deals with probate or succession. Under schedule x, the Respondent was supposed to charge minimum fees because there was no consideration. Schedule 1 deals with conveyancing which the Respondent never did. There was no material evidence placed before the taxing master to allow schedule 1 to be used in taxation. The Respondent avoided to place before the taxing master the wills he was given by the Applicant to use for transmission; and the sale agreement in order to determine that the Respondent never did the transfer in terms of schedule 1. See the principles in the case of **Kamunyori & Co. Advocates-vs- Development Bank of Kenya, Hcc Misc. Application no 975 of 2003** (Milimani unreported) as in particular the reasoning by the learned Judge where he stated;

“...the plaintiff’s cause of action is in the suit was injunction, declarations, ejection of receivers, return of the premises and properties in the possession of the receivers, return of the premises and properties, damages and costs. There was no claim for the value of the properties. In any view, the figures given in the charge or debenture could not constitute the value of the subject matter.”

See also the case of **HCCC NO. 1389 of 2001, Rosafric Limited & 3 others –vs- The Central Bank of Kenya & another. (Unreported)** where the court held,

“As regards the subject matter of the suit, it is manifest to me that the pith and marrow of the action was the plaintiff’s entitlement to the declaratory and injunctive relief pertaining to the 1st defendant’s use of certain information relevant to an investigation of a fraud involving the sum of Kshs. 274, 323,000 which information had been imparted to the 1st defendant by the plaintiffs. That being the case it is not possible by any national process to ascribe a worth in monetary terms to the subject matter of the suit for the information the use of which was sought to be prohibited was in its very nature incapable of monetary valuation or other objective estimation.”

[9] The Applicant submitted that, the Respondent cannot apply the figures in the sale agreement which he never participated. The Respondent only did a transmission which attracts minimal fees which the Applicant avers that he was fully paid. The courts trend has been that where there is no value, the party is supposed to charge minimal. Annexure **“JWW 1a”** in the Replying affidavit, is the form for Application of Registration showing five (5) properties the Respondent discharged in the lands office. The Respondent paid **Kshs. 1, 250** for discharge which means that there was no value of the property when he presented the documents for discharge. Another form attached to this annexure is dated **23/4/2009** and includes four (4) parcels of land which the Respondent worked on. The property in contention is **L.R. No. 209/3574**. The Transmission (Assent) was done on **23/4/2009** and the Respondent only paid **Kshs. 250**. This was a minimal fee because the property was being transmitted from the 1st Applicant deceased father to the 1st Applicant’s name. There was no value of the property in the document. The Respondent also transferred this parcel of land from the 1st Applicant’s name to the 2nd Applicant. The fees paid in lands office was Kshs. 250- only. He indicated in Transfer, Exhibit marked **“JWW5a” that the Transfer is in consideration of love and affection. It means that there was no value which would attract a legal fee of Kshs. 5.6 Million**. On the basis of the above, the Applicants urged the court to refer this matter back to the taxing master for re-taxing of the Advocates/client bill of costs dated 18th January, 2012.

Respondent’s submissions

[10] The application was opposed and the Respondent filed a Replying Affidavit sworn by John WaciraWambugu on 26th January, 2015. They submitted that the gist of the matter is that the Applicant instructed the advocate to conduct various transactions on their behalf in respect of several parcels of land

known as L.R. NO. 209/9268, L.R. NO. 37/690, L.R. NO. 37/691 and L.R. NO. 209/3574. The instructions have not been disputed by the Applicants. The advocate carried out the work and completed as per instructions. However, a dispute arose as to the amount of legal fees payable. An out of court settlement was attempted but was frustrated by the Applicants. Consequently, the advocate filed their bill of costs dated 18th January, 2012 on 19th January, 2012 for a total sum of Kshs.15,390,500/= (Fifteen Million Three Hundred and Ninety Thousand Five Hundred Kenya Shillings). The bill was taxed by the taxing master on 16th September, 2013 for the sum of Kshs. 5,640,815/= (five million six hundred and forty thousand eight hundred and fifteen).

[11] According to the Respondent, the instant application is seeking to set aside the decision of the taxing master but only two items in the bill of costs items 1(g) and 1(h) are contested. All the other items are uncontested. The principles to guide the court in taxation are well settled in the case of Court of Appeal in **Premchand Rainchand Ltd and Another V. Quarry Services Of East Africa Ltd And Others EALR (1972) E.A 162** as follows:-.

- a. **That the costs be not allowed to rise to such a level as to confine access to the courts to the wealthy.**
- b. **That the 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 and**
- e. **The court will only interfere when the award of the taxing officer is so high or low as to amount to an injustice to one party.**
- f. **In considering the bills taxed in comparable cases an allowance may be made for the fall in value of money.**

[12] Item 1(g) related to preparation and registration of the Assent (Transfer) dated 6th April, 2009 in respect of the parcel of land known as L.R. NO. 209/3574. The property was transferred from the personal representative of the estate of Barnasi Lahori Ram Saiddas Joshi to the 1st Applicant and registration thereof was done on 23rd April, 2009. The applicable schedule in this case being transfer of an interest in land is schedule1 of the Advocates Remuneration Order, under schedule 1 the fees are based on the consideration or value of subject matter being a transfer from personal Representative, consideration or value of subject matter was not stated in the assent (Transfer). Where the value of the subject matter is not disclosed, paragraph 21 of the Remuneration Order provides for the criteria for determination of the value as follows;

"In the calculation of scale charges the basis of Charge shall, unless otherwise provided in the schedule; and irrespective of the number of titles involved or documents required to be prepared or approved by the sum set further in the deed or documents as the price or consideration or only nominal price or consideration is set forth, the value of the subject matter affected by the deed which shall be deemed to be;

- a. **The value fixed for the purpose of Stamp duty; which failing**
- b. **The sum at which the property affected has been passed for estate duty; which failing**
- c. **The last price at which sale has taken place within ten years from the date of transaction; which failing**
- d. **The estimated average market value during the preceding three years.**

[13] The Respondent is of the view that, subparagraphs (a) (b) and (c) were inapplicable to the instant matter as Nominal stamp duty of Kshs. 215 was paid on the assent, there was no estate payable and the property was last transferred on 24th April, 1972 which was beyond 10 years from the date of registration of the Assent (Transfer). In the circumstances, the only applicable part was sub paragraph (d) which provides that the value of the property can be determined by the estimated value during the preceding three years. Consequently, the applicant instructed Tysons Limited, registered valuers to establish the market value of the property at the time of transfer. Tysons Limited compiled a valuation report which estimated the open market value of the property at the transfer to be over Kshs.1,000,000,000 (One Billion Kenya Shillings). The said valuation report was placed before the Taxing Master as one of the applicant's bundle of documents, annexure "JWW8". The property measure 3.21 acres. It fronts posh Kabarnet Gardens and Kabarnet Road Off Ngong Road, it is next to retired Presidents Moi's residence. On it stands uniquely finished 90 apartments called Nine Planets. The construction of these 90 apartments commenced in the year 2008 before the transfers herein were done. See the construction agreement between Kamal Bhusan Joshi and CHINA HUADE CONSTRUCTION (K) LIMITED annexure "JWW6" annexed to the replying affidavit of John Wacira Wambugu sworn on 26th January, 2015. In addition, the 1st Applicant on 24th February, 2009 swore an affidavit and stated that the value of the property as at that date was Kenya Shillings One Billion, One Hundred and Four Million (Kshs. 1,104,000,000). On 8th December 2012 the 1st Applicant applied for a loan facility of Kshs. 300,000,000 for the purpose of completion of the project. As at December 2008, the project was at an advanced stage. On 20th May, 2009, a report was prepared by quantity Surveyors known as Gachagua Kahoro & Associates which show that the estimated outstanding work was for the sum of Kshs. 293, 703, 620/= as at 20th May, 2009. Nevertheless, the Taxing Master applied the sum of Kshs. 293,000,000 (two hundred and ninety three million) of which he relied on the submissions of the Applicants counsel and taxed off a huge amount in favour of the Applicants.

[14] On Item 1 (h), the Respondent submitted that they prepared and caused registration of the transfer which vested all interest in a parcel of land known as L.R. NO 209/3574 to 2nd Applicant from the 1st Applicant. The transfer was exempted from payment of stamp duty as the transferor was the majority shareholder. The transfer was registered on 23rd April, 2009. In the circumstance, the value of the property was to be determined by the value of the property as discussed herein above on item 1 (g). In any event, there are no sufficient grounds to set aside the decision of the taxing master. Despite the ruling on items 1(g) and 1(h), being in favour of the Applicants on the value of the property, they are still seeking to set aside the decision of the taxing master. In the circumstances, the application ought to be looked into suspiciously and with great caution as it may be a deliberate attempt to avoid settlement of the claim or a delay tactic meant to stall the wheels of justice. For a reference to have a probability of success it must be shown that the taxing master applied the wrong principles or inappropriate schedule in taxing the bill which is not the case here. The Respondent gave the following reasons;

a. The learned Taxing Master applied Schedule 1 which was the applicable schedule on items 1(g) and 1(h) as the two items involved a transfer of an interest in land from one person to another. Schedule X which is proposed by the Applicants is inapplicable herein as it deals with succession matters.

b. On the value of the subject matter, the learned Taxing Master relied on the report prepared by quantity Surveyors, Gachagua Kahoro & Associates, who estimated the outstanding work was for the sum of Kshs.293, 703, 620/= as at 20th May, 2009 and the submissions of the former Applicants', Rombo & Co Advocates.

[15] The Respondent contended that the application lacks in merit and ought to be struck out with costs as the decision of the taxing was to a large extent in favour of the applicant. In the alternative, the Respondent humbly urged the court that, in line with prayer 2 of the application, the value of the subject matter to be enhanced to Kshs.1,000,000,000 (one billion) for the purpose of taxation of items **1(g)** and **1(h)** and the taxed costs to be equally enhanced upwards. According to them, those orders will be most appropriate in dealing with the bill of costs herein.

DETERMINATION

[16] This is a reference arising from the decision of the Taxing Master made on 16th September, 2013. The court will only interfere with the discretion of the Taxing Master if she committed an error in principle or there are exceptional circumstances that will impel the court to so interfere. There are ample judicial authorities on this subject but I need not multiply them. The Applicants claim that:-

- a) The taxing master applied Schedule 1 instead of Schedule X of the Advocates Remuneration Order.
- b) Secondly, that certain important documents, namely, the Will by the Deceased father of the 1st Applicant. Sale Agreement on L.R NO 209/3574, and Construction Agreement were not availed to the taxing Master, hence, the error in principle. They stated that, in the Sale Agreement on **L.R.NO. 209/3574** the Advocates for the 1st Applicant was **M/s Nyawara & Company Advocates** and **M/s Makhandia and Makhandia Advocates** was for the purchaser. The Construction Agreement was prepared by **Kakai Mugalo & Company Advocates** for both parties. The Respondent did not prepare any of these agreements and cannot therefore charge a fee on the said agreement.
- c) Therefore, the Respondent misled the Taxing Master.

[16] There are two distinct transactions here and which formed part of the taxation. The first one is the transmission from the deceased father of the 1st Applicant to the 1st Applicant. The other is the transfer from the 1st Applicant to the 2nd Applicant which is a limited liability company. Both transactions were done on the same day by the Respondent. The transfer from the 1st Applicant to the 2nd Applicant cannot be a succession matter as argued by the Applicants. Therefore, Schedule X of the Advocates Remuneration Order would not apply. The appropriate Schedule would be Schedule 1 of the Advocates Remuneration Order. The fact that no value was indicated in the transfer or nominal registration fee was paid on the said transfer from the 1st Applicant to the 2nd Applicant does not affect the application of Schedule 1 of the Advocates Remuneration Order. The schedule provides for such situation and how value is to be determined. The Respondent explained that the transfer from the 1st Applicant to the 2nd Applicant was exempted from payment of stamp duty because as the transferor he was the majority shareholder. That does not convert it into a succession issue. Accordingly, the taxing master was correct in applying Schedule 1 of the Advocates Remuneration Order in assessing the minimum instructions fee on item 1 (g) and (h) of the bill of costs. Under the said schedule, the taxing master will apply one of the methods provided and which is appropriate to the circumstances of the case. I also note that the taxing master based her decision on the submissions of the parties, documents produced and the valuation report presented by the Applicants. The taxing master was not, therefore, misled by the Respondent as argued by the Applicants. The Applicants did not produce the documents they are now exhibiting before the court and they have not shown that they could not have availed them during the taxation even after due diligence. These are not therefore exceptional circumstances which would impel the court to interfere with the discretion of the taxing master. I dismiss the reference with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at Nairobi this 9th day of July 2015.

F. GIKONYO

JUDGE