



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 731 2012

IN THE MATTER OF THE ADVOCATES ACT, CAP 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

R U L I N G

1. This is an Application by the Applicant/Advocates by way of Notice of Motion dated 11th September 2013. It is brought under the provisions of **Rule 11 (2)** of the *Advocates (Remuneration) Order* and seeks the review and/or the setting aside of the Ruling of the Taxing Officer delivered on 19th June 2013. There is a further prayer that the Applicant's Bill of Costs dated 4th December 2012 be remitted back with appropriate directions for taxation before another Taxing Officer. Alternatively and further, the Application asks of this Court to give such further directions or orders as it may deem fit in respect of item No. 1 of the said Bill of Costs.
2. The Application is supported upon the following grounds:

“1. The Taxing Master erred in fact and in law in assessing item 1 of the Bill of Costs.

2. The Taxing Master used the wrong principles of law in assessing the appropriate fees due to the applicant under item 1 of the Bill of Costs.

3. The Taxing Master erred in law and fact in finding that the Respondents Notice of Motion dated 3rd May 2013 and filed on 9th May 2013 was heard and allowed by Mr. Justice Havelock on 9th May 2013 in the absence of an order to that effect on the file.

4. The Taxing Master erred in law and fact in finding that the Respondent had written and filed submissions to the Applicant's Bill of Costs when none had been

filed at all.

5. **The Taxing Master erred in law and fact in considering and giving weight to the Respondent's submissions whereas as a matter of fact the Respondent had not filed any submissions neither served the Applicant thereby prejudicing and/or sacrificing the right of the Applicant to reply to the Respondent's submissions, if any.**
 6. **The Taxing Master erred in law and fact in finding that the Applicant did not draft the Agreement for Sale but merely effected amendments which were effected in the final draft and failed to appreciate that the Applicant did in fact act for the Vendor in the sale transaction as reflected in clause 21 of the Agreement for Sale and the Applicant was therefore entitled to full instructions fees in accordance with scale.**
 7. **The Taxing Master misdirected herself in finding that the Sale Agreement was never registered and failed to appreciate that a Sale Agreement cannot be registered but only a Transfer neither could non-registration of the Sale Agreement have any impact on the fees due to an Advocate.**
 8. **The Taxing Master failed to consider and appreciate at all the substantial value of the subject matter involved as reflected in the Agreement for sale and the importance of the sale transaction to the client in assessing the instructions fees under item 1.**
 9. **The Taxing Master considered irrelevant and extraneous factors in assessing the instruction fees under item 1 and thereby ended up arriving at the wrong decision.**
 10. **On the whole, the learned Taxing Master misdirected herself and ended up awarding an amount of Kshs. 200,000/- which is not commensurate to the work undertaken considering the value of the subject matter amongst other relevant factors".**
3. The Supporting Affidavit of **George Kang'ethe** was sworn on 11th September 2013. The deponent declared that he was an advocate of this Court practising under the name and style of the Applicant herein. On 4th December 2012, his firm had filed an advocate/client Bill of costs in the total amount of Shs. 3,648,652.40. The deponent then went on to detail the proceedings before the Taxing Officer and the fact that this Court had issued directions for both parties to appear before the Taxing Officer at a mention before Court 9th May 2013. The Respondent had failed to appear before the Taxing Officer but on 15th May 2013 the taxation proceeded and by a Ruling delivered on 19th June 2013, the Taxing Officer had taxed and allowed the Applicant's Bill of Costs at Shs. 205,652/-. Thereafter, Mr. Kang'ethe went into details as to how, in his opinion, the Taxing Officer had erred in law and in fact, as well as using the wrong principles of law in assessing the appropriate fees due to the Applicant under item No. 1 of the Bill of Costs. To this end, the deponent, to a large extent, repeated the grounds in support of the Application as set out above.
 4. One **Jared Omari Mituga** swore a Replying Affidavit on the part of the Respondent dated 12th November 2013. He believed that the Applicant's Application before Court was bad in law and without any merit whatsoever. Further, he believed that there was neither an error of principle nor a manifestly high award of costs given by the Taxing Officer based on the work done by the Applicant to warrant a review of the said Ruling. The deponent then went on to detail what he had been informed by the advocate who had attended on behalf of the client as regards the proceedings before the Deputy Registrar on 15th May 2013. That advocate had been late and did not contribute to the proceedings but had noted that the Ruling had been reserved for 22nd May 2013. The Ruling was not ready on that date or indeed on 27th May 2013. Finally, the same was delivered on 19th June 2013 when the Applicant was not present.
 5. When the parties' counsel appeared before Court on 29th January 2014, Mr. Kang'ethe for the Applicant informed me that it was challenging the award of Shs. 200,000/- allowed by the Taxing Officer for item No. 1 of the Applicant's said bill of costs. The Applicant had no problem with the

other items of the bill as taxed. The Applicant sought for the matter to be referred back to another Taxing Officer although a Judge had the discretion to interfere with the award of costs. In counsel's view, there had been a miscarriage of justice as against the finding of the Taxing Officer as the Respondent was not given a chance to respond to the submissions of the Applicant, which had been irregularly filed. He noted that the Bill of Costs had come for hearing of the taxation on 24th April 2013 when the Respondent failed to appear despite being served. Counsel recounted the events before this Court including the application made by LJA Advocates dated 3rd May 2013 which had never been served upon his firm. Mr. Kang'ethe complained that the Court had been misled in that it had directed that the Respondent should appear before the Deputy Registrar as the Taxing Officer on 15th May 2013. On that day, the Respondent did not appear and the Taxing Officer did not draw the attention of counsel to the Order made by this Court. Instead of giving directions as to the reopening of the taxation hearing as this Court had ordered, the Taxing Officer directed that she would deliver her Ruling which she did, eventually, on 19 June 2013. Counsel noted that the submissions filed by LJA Advocates on 30th April 2013 had never been served upon his firm and, with the kind of award of costs that was made, the Respondent's submissions seemed to have won the day. Counsel requested that the Applicant be given an opportunity to respond to those submissions filed on 30th April 2013.

6. Mr. Kang'ethe went on to say that there had been an error of principle when the Taxing Officer entered a figure of Shs. 200,000/- for Item No. 1 of the Bill of Costs. However, he agreed that the Taxing Officer had applied the correct schedule – *Schedule V Part II* of the *Advocates (Remuneration) Order*. The Taxing Officer had failed to consider the value of the subject matter which was Shs. 256 million. Counsel's concern was that the advocate should not be disentitled to fees because he did not draw the Agreement for Sale in relation to the subject property. Such did not require registration as detailed in the Taxing Officer's Ruling. The transaction did not go as far as the completion stage. Looking at the value of the subject matter, the figure of Shs. 200,000/- as awarded was not commensurate with the same. Counsel referred to his List of Authorities more particularly Nos. 1 and 6 (especially) in relation to the taking into account of the value of the subject matter with Nos. 2, 4 and 5 covering the point of failure to consider all the principles.
7. In reply, Mr. Mituga for the Respondent submitted that the Taxing Officer had considered both his firm's submissions as well as those of the Applicant as regards her Ruling. She had recognised the input of the Applicant as to the alterations to the Agreement for Sale but she had emphasised that the sale did not go through. In counsel's opinion the Taxing Officer had considered what she was supposed to take into account under Schedule V Part II. In his view, if the Taxing Officer had considered the oral submissions of the Applicant as well as the written submissions of the Respondent, there was no need for this Court to refer the matter back to another Taxing Officer. In this regard, counsel referred to the case of **First American Bank v Shah & 2 Ors (2002) 1 EA 64**. Mr. Kang'ethe, in a short rejoinder, noted that this Court on 9th May 2013 had given an Order setting aside the *ex parte* proceedings of 24th April 2013. Those were the proceedings during which counsel had made oral submissions as regards the taxation of the Applicant's Bill of Costs. If the proceedings were set aside, then the submissions were also set aside. Counsel was of the opinion that the right thing to do was to remit the Bill of Costs back to another Taxing Officer so that parties would have the opportunity of both being heard with regard thereto.
8. I have perused the record of this Court as regards the proceedings before me on 9th May 2013. Those proceedings were *ex parte* and I noted from the Affidavit in support of the Respondent's Application dated 3rd May 2013, that there had been a genuine mistake made by the advocates for the Respondent as to the diarising of the date of the taxation of the Applicant's bill of costs dated 4th December 2012. I note that the mistakes of the advocate should not be vested on the client and it appeared to me that, from the submissions filed by the Respondent on 30th April 2013 (albeit after the date fixed for the taxation proceedings), that there were real grounds for disputing the Applicant's Bill of Costs. Accordingly, I granted prayers Nos. 1 to 4 of the Application, certifying the same as urgent, allowing a stay of proceedings including the Ruling on the Applicant's said Bill of Costs. I also set aside the *ex parte* proceedings of 24th April 2013, as well as the Orders given on that day. I allowed the Respondent's submissions as regards the taxation filed on 30th April 2013 to be deemed as properly on record. Finally, I directed that the Respondent would appear before the Taxing Officer of this Court, along with the Applicant, when the Ruling as regards the taxation was due for delivery on 15th May 2013 at 2:30 PM. I ordered that directions

- should be obtained from the Taxing Officer just as to how she would wish to proceed with the taxation proceedings before her, further.
9. In my opinion, there does seem to be some confusion as to the interpretation of my directions not made any simpler by the Respondent failing to appear before the Taxing Officer on the 15th May 2013, whether such was on purpose or otherwise. On that day, Mr. Kang'ethe was present and has been recorded as saying that the Respondent's Application dated 3rd May 2013 was premature as the Respondent could only seek to set-aside the taxation proceedings on appeal if the Ruling of the Taxing Officer is delivered. He submitted that there was no reason to delay the Ruling. He further pointed out that the Taxing Officer did not have the jurisdiction to hear the Respondent's said Application under Order 49 of the Civil Procedure Rules, 2010. He maintained that the proceedings could not be stayed and that the Ruling should be delivered. In her turn, the Taxing Officer noted the submissions by the Applicant and reserved the delivery of the Ruling on taxation until 22nd May 2013 at 2:30 PM.
 10. What I have not understood from the proceedings before the learned Taxing Officer on 15th May 2013 was whether Mr. Kang'ethe was saying that the submissions of the Respondent as allowed on record by me and dated 3rd May 2013 could not be taken into account as regards the Taxing Officer's Ruling. Certainly, at page 2 of her Ruling, the Taxing Officer has stated that she carefully considered both the oral submissions made by the Applicant and also the written submissions of the Respondent. However, Mr. Kang'ethe has stated on Oath, that he was never served with the submissions of the Respondent dated 3rd May 2013. That does not come over from the record of this Court as to what transpired before the Taxing Officer on 15th May 2013. However, I have noted in the Ruling delivered on 19th June 2013, that the Applicant's Bill of Costs was drawn under Schedule I of the Advocates (Remuneration) Order. Quite correctly, in my view, and seemingly as agreed by Mr. Kang'ethe, the Taxing Officer found that as the transaction was not completed, the correct scale to be applied was *Schedule V* of the *Advocates (Remuneration) Order*. 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 v Adopt-a-Light Ltd (2007) ECLR.** 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 Shs. 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.

11. As observed above, it does not appear that the Applicant has had an opportunity of responding to the submissions of the Respondent filed 3rd May 2013. The whole process of the taxation before the learned Taxing Officer would seem to have been put in some confusion as a result of the Respondent's said Application dated 3rd May 2013.
12. In my view, the fairest way to sort out the confusion such as it is, would be to set-aside the Ruling of the Taxing Officer dated 19th June 2013 but only as far as Item No. 1 is concerned and, in accordance with the Applicant's submission in this regard, I would refer Item No. 1 of the Applicant's Bill of Costs for taxation before another Taxing Officer for assessment. Mr. Kang'ethe has indicated acceptance with the amounts taxed in relation to the other Items contained in the said Bill of Costs. As a result, there is no need for those items to be taxed afresh. Parties may now take a fresh date at the Registry for such further Taxation as necessary. Orders accordingly.

DATED and delivered at Nairobi this 14th day of May, 2014.

J. B. HAVELOCK

JUDGE