



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 61 OF 2012

GIUSEPPE BOZZOLASCO.....PLAINTIFF

=VERSUS=

1. ANNELIESSE S. FELLER

2. RUGA VILLA WATAMU LTD

3. CORRADO PILOTTI

4. JAMES G. MOUKO.....DEFENDANTS

RULING

Introduction:

1. On 29th January 2013, the Plaintiff discontinued his suit as against the four Defendants with costs. The 1st, 2nd and 3rd Defendants (the Defendants) filed their Bill of costs on 28th February, 2013 in which the three Defendants were claiming for Kshs.2,614,009.
2. On 9th October 2013, the Taxing Officer taxed the Bill of Costs at Kshs.962,870 and subsequently issued a certificate of costs for the said amount.
3. The Defendants are aggrieved with the said taxation and have filed this Reference pursuant to the provisions of Rule 11(2) of the Advocates Remuneration Order.
4. In the Reference, the Defendants have prayed for the following orders:

(a) That the decision of the Taxing Officer delivered on 9th October 2013 in as far as the same relates to taxation of item 1 of the party and party Bill of costs dated 28th February 2013, the quantum of the award and the reasoning with respect to the said award be set aside.

(b) That the Honourable court be pleased to refer the matter to another Taxing Officer for re-taxation of item 1 of the Bill of Costs herein and with proper directions thereof.

(c) That the costs of this application be borne by the Plaintiff.

The Applicants' case

5. The Application is premised on the grounds that the Taxing Officer erred in principle by relying on the Advocates Remuneration Order 2006, a repealed law and that having relied on the Advocates Remuneration Order 2006, the instruction fees that was allowed under Item 1 is manifestly low as to represent an error of principle on the Taxing Officer.
6. The Defendants have further contented that in considering what amounts to receiving instructions and representing the 1st, 2nd and 3rd Defendants, the Taxing Officer ought to have considered that the firm of Muli and Ole Kina Advocates were separately instructed by each of the Defendants and that it was involved in representing each of the Defendants separately.

The Respondent's case

7. The Plaintiff/Respondent's advocate filed Grounds of Opposition in respect to the Reference. According to the Respondent, the Application contravenes the mandatory provisions of Rule 11 (1) and (2) of the Advocates Remuneration and that the separate pleadings for the 1st and 2nd and 3rd Defendant were unnecessary and improper.

Submissions

8. The Defendants'/Applicants' counsel submitted that the suit having been filed on 13th December 2012, the applicable Remuneration Order should have been that of the year 2009 and not 2006.
9. Counsel submitted that considering that the claim by the Plaintiff was for a colossal sum of Kshs.66,120,000, a lot of care and attention had to be employed in the handling of the case; that the Defendants were accused of being responsible of different issues affecting them individually and that the Defendants indeed filed separate defences. Consequently, it was submitted, the Taxing Officer was wrong to treat the defences as one.
10. The Applicants' counsel finally submitted that the Taxing Officer ought to have relied on Schedule VI 1(c) of the Advocates Remuneration Order 2009 as read together with Schedule VI 1(a).
11. On the other hand, the Plaintiff's/Respondent's counsel submitted that the Applicants failed to comply with the provisions of Rule 11 (c) of the Advocates Remuneration Order by failing to specify the grounds of their objection; that the Taxing Officer applied the right Remuneration Order and that Legal Notice Number 50 of 2009 only affect Schedules I and II.
12. On the issue as to whether the Taxing Officer was right in consolidating the 1st, 2nd and 3rd Defendants' instructions fees, counsel submitted that the work done by the Applicants' counsel fell within the perimeters of Rule 49 and Schedule VI because the work done was for contentious business. Counsel submitted that just as the Applicants' counsel had filed one Memorandum of Appearance for the 1st, 2nd and 3rd Defendants, one pleading would have sufficed. Counsel relied on the provisions of Rule 62 of the Advocates (Remuneration) Order.
13. Counsel finally submitted that this was a rather straight forward matter and that generally a suit under a contract does not involve a great study of the applicable law.

Analysis and findings

14. The issues for determination in this Reference are as follows:-

- (a) Whether the Applicable Advocates (Remuneration) Order is one which is pursuant to L. N. 159/2006 or L.N.50/2009.**
- (b) Whether each and every Defendant was entitled to instruction fees.**
- (c) Whether the Taxing Officer erred in assessing the said instruction fees.**
- (d) Whether the Applicant had complied with Rule 11.**

15. It is not in dispute that this suit was filed by the Plaintiff/Respondent in the year 2012 by which time L.N. Number 50 of 2009 had been published. However, L.N. 50 of 2009 amended the

- principal Order by deleting Schedules I and II only.
16. This Reference is only in respect to the chargeable instruction fees under Schedule VI which is provided in L.N. 159 of 2006 and not L.N. 50 of 2009. The applicable Advocates (Remuneration) Order for the purpose of ascertaining instruction fees is therefore L.N. Number 159/2006 as correctly indicated in the Ruling of Taxing Officer.
 17. The Ruling of the Taxing Officer was delivered on 9th October 2013 in the presence of the Respondent's counsel and in the absence of the Applicant's counsel.
 18. The record shows that on 18th October 2013, the Applicant's counsel informed the Deputy Registrar that the Applicants were aggrieved by the said Ruling and intended to file a reference thereof. In the same letter, counsel requested to be furnished with reasons for the taxation.
 19. On the following day, the Deputy Registrar, who was also the Taxing Officer, responded to the Applicants' Advocates letter and informed him that the reasons for the taxation were contained in the Ruling delivered on 9th October 2013. The Applicant then proceeded to file the Reference on 3rd December 2013.
 20. Rule 11(1) and (2) of the Advocates (Remuneration) Order provides as follows:
 - 11(1): Should any party object to a 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 which he objects.**
 - 11(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 setting out the grounds of his objection.**
 21. I do not understand how an aggrieved party can give a notice in writing to the Taxing Officer of the items of taxation to which he objects before being furnished with the reasons of the decision of the Taxing Officer. In my view, a party can only be in a good position to point out the items of taxation to which he objects after reading firstly, the decision of the Taxing officer and the reasons thereof.
 22. That explains why more often than not, an aggrieved party asks for the reasons of the decision of the taxing officer without pointing out the items of taxation to which they object and then filing reference after being furnished with the said reasons within 14 days.
 23. That, in my view is perfectly in order considering that a Reference challenging any taxation can only be based on the decision of the Taxing officer together with the reasons thereof. It is therefore not true as argued by the Plaintiff's counsel, with respect, that the failure by the Defendants' counsel to specify the items he objects to in his letter dated 17th October 2013 is fatal to the Reference. The fact that the Applicant indicated that he requires to be furnished with the reasons in respect to the decision of the taxing officer with a view of filing a reference is good enough.
 24. Once a party is given reasons by the Taxing Officer, he is required to file a Reference within 14 days from the date of receipt of the reasons.
 25. Rule 11 (4) provides that the High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph 1 or 2 for the taking of any step, and such an application may be made by chamber summons.
 26. The reasons for taxation in this matter were given by the Taxing Officer on 19th October, 2013 when the Taxing Officer enclosed in the letter a copy of her Ruling. However, this Application was not filed within 14 days from that date neither was an application filed seeking the leave of the court to file the reference out of time.
 27. On that basis, I find that the Reference was filed out of time and without the leave of court.
 28. The other issue that has been raised in this Reference is whether the taxing officer was right to consolidate the 1st, 2nd and 3rd Defendants items 1, 2 and 3 as one item and whether she exercised her discretion judiciously.
 29. According to the Applicant's counsel, the Taxing Officer ought to have treated and taxed each of the Defendants instruction fees separately because each one of them filed their respective

defences.

30. On the other hand, the Respondent's counsel has argued that it was not necessary for the Defendants' advocate to have filed separate defences and that the Taxing Officer was right to hold that the two Defences filed for the 1st, 2nd and 3rd Defendants are similar. This is what the Taxing Officer stated:

“The next issue is whether the consent for the Applicant and I note that the Defence filed for the 1st, 2nd and 3rd Defendant are similar. The cause of action was the same and so was the defence for this reason one cannot separate the instruction fees as instructions were similar.”

31. In arriving at the above decision, the taxing officer must have been guided by the provisions of Rule 62 of the Advocates (Remuneration) Order, 2009 which provides as follows;

“Where the same advocate is employed for two or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two or more such Plaintiffs or Defendants separately, the taxing officer shall consider in the taxation of such advocates bill of costs, either between party and party or between advocates and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any party of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

32. The taxing officer therefore has the discretion to decide whether it was necessary for an advocate who is acting for more than one Plaintiff or Defendant to file separate pleadings while taxing instruction fees. If he is of the opinion that such separate pleadings were not necessary, he may disallow the costs occasioned hereby.
33. It has been held by the Court of Appeal that a taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, amongst other things, the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.
34. According to the amended Plaint filed on 7th January 2013, the Defendant was described as a German National while the 2nd Defendant was described as a limited liability company incorporated in Kenya. The 3rd Defendant was described as an Italian National.
35. According to paragraph 8 of the Plaint, the 1st Defendant was a director in the 2nd Defendant's company, which was one of the alleged proprietors of land known as Gede/Dabaso/546 (the suit property).
36. In the Plaint, it was alleged that the 1st Defendant, in her capacity as a director in the 2nd Defendant's company entered into an agreement with the Plaintiff in which they agreed to sell to the Plaintiff the suit property in the sum of Euro 580,000 which transaction seems to have fallen through, thus the suit.
37. The 3rd and 4th Defendants, on the other hand were sued solely on the basis that they witnessed the agreement between the Plaintiff, the 1st Defendant and the 2nd Defendant.
38. The firm of Muli and Ole Kina filed one Memorandum for the 1st, 2nd and 3rd Defendants (the Applicants herein). However, the said firm filed a joint Defence for the 1st and 2nd Defendants but filed a separate Defence for 3rd Defendant.
39. The 1st Defendant admitted that he was indeed a director in the 2nd Defendant's company and that he signed an agreement dated 2nd September 2012 as a director of the 2nd Defendant. The 2nd Defendant is said to have been the beneficial owner of the suit property and was willing to sell it to the Plaintiff.
40. From the averments of the Plaint and the admission made by the 1st and 2nd Defendants in their joint Defence, it is clear that the Plaintiff's claim as against the two of them could not be severed. That in my view explained why counsel opted to file a joint Defence notwithstanding that the Plaintiff sued both of them.
41. In that respect, I am in agreement with the holding of the taxing officer that the cause of action

- was the same and so was the defence. This position is however true only in respect to the payable costs for the 1st and 2nd Defendants.
- 42.As I have already stated, the 3rd Defendant was sued by the Plaintiff because him, together with the 4th Defendant witnessed the Plaintiff on the one hand and the 1st and 2nd Defendant on the other hand sign the agreement dated 2nd September 2012.
- 43.The Plaintiff does not show the relationship that existed between the 3rd Defendant and the 1st and 2nd Defendant. Indeed the Defendant denied that he was present during the execution of the alleged agreement.
- 44.It cannot therefore be said that the cause of action as against the 3rd Defendant was the same as the cause of action as against the 1st and 2nd defendants. The 3rd Defendant was entitled to defend himself separately in view of the allegations raised as against him. The separation of the Defences was therefore necessary and proper in respect to the 3rd Defendant.
- 45.Consequently, the proper view that should have been taken by the taxing officer was to consolidate the instruction fees in respect to the 1st and 2nd defendants and to award to the 3rd Defendant instruction fees separately.
- 46.The other issue that I am supposed to determine is whether the taxing officer erred in granting to the Defendants the minimum instruction fees allowed under the Remuneration Order.
- 47.It is not in dispute that the value of the suit as stated in the plaint was Kshs.66,120,000.
- 48.In the Plaintiff, the Plaintiff alleged that the 1st and 2nd Defendants were in, breach of the agreement of sale dated 2nd September 2012. The Plaintiff sought for a declaration that the said agreement was null and void.
- 49.The Defendants denied in their Defences that they were in breach of the said agreement. Before the matter could be set down for pre-trial directions, the Plaintiff discontinued the suit.
- 50.In her Ruling, the taxing officer stated as follows;

“I have considered the submissions of counsel and the complexity of the matter but I note this matter did not proceed for hearing. It was discontinued at the interlocutory stage when the defence had been filed. For this reason I will not increase the said amount”.

- 51.I agree with the statements of the taxing officer. This was a simple matter of breach of contract. The question that the Defendants were supposed to respond to was whether they were in breach of the agreement of sale of the suit property or not. The taxing officer was therefore entitled to exercise her discretion by allowing the minimum payable instruction fees.
- 52.However, I have already found that the Reference was filed out of time and without the leave of the court. I therefore dismiss the Reference with costs on that ground.

Dated and delivered in Malindi this 5th day of September 2014.

O. A. Angote

Judge