REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 242 OF 2014

(FORMERLY H.C MISCELLANEOUS APPLICATION NO. 139 OF 2012

AS CONSOLIDATED WITH H.C.MISCELLANEOUS APPLICATIONS NO 140 AND 141 OF 2012)

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN THE ADVOCATE AND THE CLIENT

ODERA OBAR & CO ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

GAOYU INTERNATIONAL COMPANY LIMITED…....CLIENT/RESPONDENT

RULING

The Applicant's Case

This ruling is on an application by way of Chamber Summons dated 23rd October 2013 brought pursuant to Rule 11(2) of the Advocates Remuneration Order, and section 1A and 3A of the Civil Procedure Act. The Applicant seeks an order to set aside that the decision of the taxing officer dated 9th October 2013 on item no. 1 of the bill of costs dated 27th February 2012. The Applicant has also sought an order that the court does exercise its inherent jurisdiction and tax item no. 1 of the bill of costs dated 27th February 2013 in such terms and such sums as it deems fit.

The grounds in support of the application are detailed in an affidavit sworn by Odera Obar Ken, Advocate, on 23rd October 2013. The Applicant's case is that on 27th February 2012, he filed a bill of costs in respect of services rendered to the Respondent in respect to a transaction for the purchase and sale of all that property known as LR No. 1/131, where the consideration was Kshs 200,000,000/. The Applicant has annexed as evidence a copy of the bill of costs and has averred that since the transaction aborted after an engrossed agreement was ready for execution, the nature and extent of work done constituted 50% of the instructions in respect to the transaction, and he accordingly claimed the sum of Kshs 1,250,000/-.

The Applicant further averred that he also filed bills of costs in High Court Miscellaneous Cases 140 of 2012 and 141 of 2012, where he claimed 50% of scale fees in the sum of Kshs 968,750/- and 528,125/- respectively, and where the transactions also aborted after respective engrossed agreements were ready for execution. The Applicant has stated that in a ruling delivered on 9th October 2013, the taxing master allowed instruction fees of only Kshs 75,000/- for each of the bills which is the minimum fee, for reasons that it was difficult to ascertain the scope of the work done by the advocate.

Being aggrieved by the said decision, the Applicant applied to the taxing officer to be supplied with the reasons for the decision. In the Applicant's view, the taxing officer misdirected himself and erred in principle and did not exercise his discretion judicially.

The Respondent's Case

The Respondent filed a preliminary objection dated 31st October 2013 opposing the reference. The grounds were that the application was fatally defective and liable for dismissal with costs. The Respondent also contended that the court lacked jurisdiction to hear and determine the reference in view of the prayers sought.

The Submissions

Parties filed written submissions on the reference and preliminary objection and the Applicant in submissions dated 6th August 2014 argued that in a taxation reference, the Judge has discretion to either re-assess the bill or remit the same for taxation before a different taxing officer.The applicant referred the court to the case of **Steel Construction & Petroleum Engineering (EA) Ltd v Uganda Sugar Factory Ltd (1970) EA 141** as well as the decisions in **First American Bank of Kenya v Gulab B. Shah, HCCC No. 2255 of 2000** and **Wambugu Motende & Co. Advocates v Attorney General Misc Civil Application No. 1091 of 2009** where the court exercised its discretion and taxed the bill. It was submitted that the Respondent's contention that the reference was defective for seeking to have the bill re-assessed by the court was not right in law since the judge had discretion to either re-assess the bill or remit it for taxation before a different taxing officer.

The Applicant submitted that the principles that guide the court in determining whether or not to interfere with the decision of the taxing officer were enunciated in the case of **Eaves v Eaves and Powell (1995) All ER 849** and **First American Bank of Kenya v Gulab P. Shah (supra),** where it was stated that it was an error of principle to take into account irrelevant facts or to omit to consider relevant factors.

While submitting that the taxing officer's conclusion that it was difficult to ascertain the scope of work done by the advocate was an error of principle, the Applicant argued that the taxing officer did not consider the notional work done by the advocate. The applicant relied on the case of **Nagarbhai Ramchand Patel v The Trustee of the property of Bhagubhai Nagarbhai Patel (1957) EA 36** where it was held that although the work necessary to be done must always be the primary criterion, it is the notional quantum of work rather than a factual quantum. The Applicant argued that in holding that it was difficult to ascertain the scope of work done by the advocate, the taxing officer failed to consider relevant factors.

The Applicant referred the court to Rule 18(f) of the Advocates Remuneration Order and submitted that it made provisions for uncompleted transactions by providing that the remuneration is to be prescribed in Schedule 5. It was submitted that pursuant to Schedule 5, the taxing officer was enjoined to take into consideration the care and labour required; the number and length of papers perused, the nature and importance of the matter, the amount of the subject matter involved, the interest of the parties, the complexity of the matter and the circumstances of the case. The Applicant argued that Rule 20 of the Advocate's Remuneration Order sets out what the scale charges constitutes, including all work ordinarily incidental to a transaction. It was also submitted that under Rule 21, the basis of the charge shall be the value of the subject matter which is the sum set forth in the deed or document as the price of consideration.

It was also the Applicant's submission that the value of the subject matter was ascertainable from the engrossed agreement for sale. According to the Applicant, the taxing officer erred in principle in failing to consider the relevant factors under Rule 18(f), 20 and 21 of the Advocate's Remuneration Order. The Applicant averred that the reason given for the award of Kshs 75,000/- was not a valid reason and lacked legal foundation. It was submitted that the award of Kshs 75,000/- was unreasonable and disproportionate to the scope and extent of work done by the advocate. Reliance was placed on the case of **Green Hills Investment Ltd v China National Complete Plant Export t/a Covec HCCC No. 572 of 2000** where the court stated that the taxing officer's discretion ought to be exercised within reason, fairly and judiciously.

In further submission, it was argued that the taxing officer's failure to appreciate the difference between a draft agreement for sale and an engrossed agreement for sale constituted an error of principle. According to the Applicant, the taxing officer erred in principle by failing to appreciate the care and labour expended by the advocate in reviewing the draft agreement for sale until it was ready for execution by both parties, the number and length of the papers of the draft agreement reviewed by the advocate, the proposals for amendment suggested by the advocate which were incorporated as well as the importance of an engrossed agreement for sale vis a vis a draft agreement for sale.

With respect to the Respondent's contention that the advocate was not entitled to full fees pursuant to Rule 62A of the Advocate's Remuneration Order, the Applicant argued that the transactions for the purchase of land were non-contentious matter falling within the purview of Part II of the Advocates Remuneration Order, while Rule 62A applies to contentious matters.

The Applicant urged the court to exercise its discretion and re-assess the instructions fees to determine what is fair and reasonable instruction fees for the services rendered. The court was urged to find that the scope and extent of work done by the Applicant constituted 50% of the instruction fees due.

The Respondent's Advocate filed submissions dated 16th July 2014 wherein he argued that the application to the court to tax the bill was erroneous. Reference was made to the case of **Joreth Ltd v Kigano & Associates (2002) eKLR** where it was held that it was not in the province of a judge to re- tax a bill, and that where a judge concludes that the taxing master erred in principle, the bill should be referred back to taxation by the same or different taxing master with appropriate direction on how it should be done. Counsel relied on the case of **Attorney General v Kenneth Kiplagat (2010) eKLR** for the submission that inherent jurisdiction cannot override express regulation of law.

It was submitted that taxation of a bill of costs is a special judicial statutory role played by a taxation officer who is better experienced that a judge. For this submission, the court was referred to the case of **Bank of Uganda v Banco Arabe Espaniol, Supreme Court Civil Application No. 29 of 1999**, **Lumumba Mumma Kaluma v Sachin Shaha (2013) eKLR, Donholm Rahisi Stores (suing as a firm) v East African Portland Cement Ltd (2005) eKLR** and **Abincha & Co. Advocates v trident Insurance Co Ltd (2013) eKLR.** Counsel submitted that Rule 16 of the Advocates Remuneration Order provides for the jurisdictional function of a taxing officer.

In further submission, it was contended that a reference to the judge in terms of Rule 11 of the Advocates Remuneration Order was limited and restricted. Reliance was placed on the cases of **Abincha & Co. Advocates v Trident Insurance Co Ltd (supra), Eaves v Eaves and Powell (1995) All ER 849** and **Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya) Ltd 2014(eKLR)** for the submisson that once a court is satisfied that an incorrect quantum was arrived at and that there were errors in principle, the court should point out its recommendations, and subject the bill for re-assessment by the same or another taxation officer since the judge has no jurisdiction to tax the bill.

In respect to whether there is justification to interfere and set aside the decision of the taxing officer, it was contended that the quantum was reasonable and just in the circumstances of the case. Counsel for the Respondent argued that the taxation officer applied his discretion judicially and was alive to taxation principles which led to the variation of the Bill of Costs from what was manifesly excessive to an appropriate and fair compensation worthy of the work done by the Applicant. Reliance was placed on the

case of **Bank of Uganda v Banco Arabe Espaniol, Supreme Court Civil Application No. 29 of 1999** for the proposition that save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee.

While submitting that the taxation officer took into consideration taxation principles in arriving at the decision, it was contended that the value of the subject matter was not ascertainable as it was not submitted nor verified by evidence. It was submitted that the applicant drew the bill of costs on market rates and further, that there were no written instructions to validate his claim. Further, it was submitted that there was no clear record of the steps that the advocate took on the client's behalf.

The court was referred to the case of **Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya) Ltd 2014(eKLR)** where the court stated that since the bill of costs was contested, the Applicant should have presented the taxing master with all documents and material in support of the claim. According to the Respondent, since the instruction fees was not ascertainable, the taxing officer was justified to assess the instruction fees by using his discretion in considering the circumstances of the case, nature of the transaction and the general conduct of the proceedings involved. For this submisison, the court was referred to the case of **Joreth Ltd v Kigano & Associates (2002) eKLR, Tera Waigwa Waihenya & Dan Kamunya Waihenya v Cooperative Bank of Kenya (2006) eKLR and Desai, Sarvia & Pallan Advocates v Jambo Biscuits (Kenya) Ltd, 2014 (eKLR)**

In respect to the nature, scope of work and the advocate's skill and labour, it was submitted that the conveyance did not mature or arrive at its contractual stage. Counsel for the Respondent submitted that it was inaccurate for the Applicant to quantify the scope of work done as half yet there was no proof of the procedures undertaken to ascertain what stage the Applicant had reached.

While submitting that the extent of work expected of an advocate in such a transaction was a lot more than the applicant undertook to justify 50% remuneration, it was contended that carrying out a search requires an advocate to conduct due diligence and physically ascertain the validity of the title such as engaging the land registry to confirm the title is not fake, a survey to confirm that the land is not a road reserve, going through the Ndung'u Report as well as ensuring that the acreage on the title is what is on the ground. Counsel submitted that legal recompense should then make up for this effort alongside evidence of the steps undertaken and the results.

It was submitted that the review of an agreement for sale and application for search does not befit a 50% remuneration and further, that the Applicant did not draw the agreement but merely reviewed it. While submitting that the Respondent changed its advocate and appointed a different advocate who completed the transaction, it was contended that the legal fees charged by the Applicant was unreasonable and defeated the principle in Rule 62A of the Advocates Remuneration Order.

In further submission, it was argued that since the scope of work done was preliminary and not ascertainable as the transaction aborted in its preface stages, the taxation officer was left with his discretion to determine the kind of fees chargeable which was the minimum under Schedule 1(1) (a). Lastly, it was submitted that the Applicant's claim was exaggerated since apart from the correspondence, review of the sale agreement and application for search, the Applicant did not do any other work and therefore, that this did not constitute half the work done to warrant a 50% remuneration.

The Issues and Determination

I have considered the arguments made by the parties, and find that issues for determination are whether the Applicant’s application is properly before this Court and if so, whether the taxing master misdirected himself and erred in principle to warrant interference of his decison by the court.

On the first issue the Respondent argued that the Applicant’s application is defective and that this Court has no jurisdicition to tax a bill , and that its role is reassessment of the principles that ought to have been taken into account by the taxation officer and not decide on quantum. The applicable law in this regard is Rule 11 of the Advocates Remuneration Order 2009 that sets out the jurisdiction of this Court upon

reference of a Bill of Costs to it as follows:

> **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 which 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.**
>
> **(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
>
> **(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
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> **(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."**

This rule does not in any manner specify or limit the powers of this Court when an objection is made to it on the taxation of a Bill of Costs by a taxing officer. In addition section 51 of the Advocates Act is clear that the Court has power to alter a Bill of Costs and states as follows:

> **"(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.**
>
> **(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."**

The section is specific that the alteration can also be as to the amount of a Bill of Costs, and this Court therefore has the jurisdicition to alter the quantum of bill of Costs.

It is thus my finding that the Respondent's preliminary objection on this Court's jurisdiction is without merit, as this Court has discretion to direct as to how taxation of a Bill should be done, and to alter the items on, and quantum of a Bill of Costs. In addition, it is my view that the prayer sought by the Applicant that this Court "taxes item I of the Bill of Costs dated 27th day of February 2012 in such terms and such sums as it shall deem fit" does not necessarily entail requiring the Court to embark on the mechanical and actual act of taxation, but can include this Court giving directions on how such taxation should be done as was held by the Court of Appeal in **Joreth Ltd v Kigano & Associates (2002) eKLR** .

On the second issue as to whether the taxing master misdirected himself and erred in principle, the taxing master allowed an instruction fee of Kshs 75,000/- on item 1 of the three bills of costs all dated 27th February 2012 that were originally filed on 28th February 2012 in High Court Miscellaneous Cases 139 of 2012, 140 of 2012 and 141 of 2012 . The bills of costs were in respect to advocate-client fees charged for services offered by the Applicant to the Respondent in separate land buying transactions. The Applicants 's instructions were however withdrawn before the agreements for sale were executed.

The instruction fee awarded of Kshs 75,000/- for each of the three bills of costs is the minimum fee allowed under Schedule I(1) (a) of the Advocates Remuneration Order 2009, and the reasons given by the taxing master were that it was difficult to ascertain the scope of the work done by the advocate and the sale agreement that were the subject of the three Bills of Costs were never executed. Schedule I of the Advocates Remuneration Order 2009 provides for advocate's fees in respect to sale and purchase of land, pursuant to Rule 18 of the Advocates Remuneration Order that regulates the remuneration of advocates in non-contentious matter, and specifically pursuant to Rule 18(a) of the Order. However Rule 18 (f) in addition provides as follows:

> **"In respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and all other business of a non-contentious nature, the remuneration for which is not herein before provided, the remuneration is to be that prescribed in Schedule V."**

In order to determine whether the business is completed in the purchase of land or not, one has to have regard to what items a Purchaser's Advocate can bill for under Schedule I, which are investigating title, and preparing and completing the conveyance, including perusal and completion of the contract if any. It is evident in this respect that as between the Applicant and Respondent, the conveyance was not completed as the sale agreement was not executed by the Respondent.

I therefore find that the taxing officer erred in principle in applying Schedule 1 of the *Advocates (***Remuneration) Order 2009** in place of Schedule V of the *Advocates (***Remuneration) Order 2009** arising from the foregoing reasons and above-cited provisions of the said Order. The taxing master in addition erred by awarding Kshs 75,000/- which is the minimum fee under Schedule 1(1)(a) as this amount presupposes that not only was the transaction completed, but also that 1.25% of the value of the subject matter was less than Kshs 75,000/- which was not the case herein. Similarly, the Applicant's arguments that that his instruction fees constitute half of 1.25% of the consideration is in my view not correct since this is a scale provided in Schedule I of the Advocates Remuneration Order which this Court has found is not applicable to this case.

I must also add that the taxing master did err in finding that the Applicant's work was unascertainable, and by not taking into account the work done by the Applicant which he enumerated in his submissions during taxation, and which have also been reiterated in his pleadings and submissions herein. The work rendered included preparation and sending of the letter of offer to the Vendor's Advocates, conducting searches, and reviewing and making final amendments to the draft sale agreements, and the Applicant provided evidence thereof.

I note in this regard that Schedule V of the *Advocates (***Remuneration) Order 2009** provides for two methods of assessing fees. The first is an hourly rate under Part I of the Schedule, provided the same has been agreed between and Advocate and his or her client. This part is not applicable to the circumstances of this case as no such agreement was exhibited. The second and alternative method is according to the scales provided in Part II of the Schedule. In the alternative method, costs for specific items are allowable in addition to the instruction fees, and the taxing officer is required to make an allowance for other charges when assessing the instruction fee.

In assessing the instruction fee under Part II of Schedule V, various factors are to be considered including:

a) The care and labour required

b) number and length of the papers to be perused

c) nature or importance of the matter

d) amount or value of the subject matter involved

e) interest of the parties

f) complexity of the matter

g) All other circumstances of the case.

These factors are also reiterated in the decisions in ***Joreth Limited v Kigano & Another*** **[2002] E.A. 92,** ***First American Bank of Kenya Ltd v Gulab P Shah & Others*** **[2002]1 E.A. 61** and **Republic v Minister for Agriculture & 2 Others ex Parte Samuel Muchiri W'Njuguna & 6 Others (2006) e KLR**.

I therefore accordingly order as follows:

1. That the decision of the Taxing Master in the ruling delivered on 9th October 2013 as regards items 1 of the Applicant's Advocates/Clients Bill of Costs dated 27th February 2012 and originally filed on 28th February 2012 in High Court Miscellaneous Cases 139 of 2012, 140 of 2012 and 141 of 2012 (as now consolidated in this case), be and is hereby set aside.

2. That the said Bills of Costs be referred back to another taxing officer for fresh taxation according to the principles enunciated herein.

3. Each party shall bear their own costs of the Applicant's Chamber Summons dated 23rd October 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____12th___ day of _____November____, 2014.

P. NYAMWEYA

JUDGE