



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APPLICATION NO. 131 OF 2019

ANTHONY BURUGU & CO. ADVOCATES...APPLICANT

VERSUS

ELECTROWATTS LIMITED.....RESPONDENT

RULING

The Applicant brought the application dated 17/12/2019 seeking to set aside the decision of the taxing officer dated 05/12/2019 in relation to items 1, 2 and 3 of the bill of costs dated 18/08/2019 by increasing the amount payable to the Advocate in line with the sums given in the bill of costs. The Applicant further sought orders that this court exercises its inherent jurisdiction and allows such fees in the items stated above as it deems fit and make such further orders regarding the bill of costs in issue.

The application was based on grounds appearing on its face as well as the affidavit of Mr. Antony Burugu, an Advocate practicing with the Applicant sworn on 17/12/2019. Mr. Burugu deponed that he acted for the Respondent over the sale of the land known as land reference number 209/12817. A dispute arose as regards the fees payable which led to the filing of the Applicant's bill of costs which was taxed and a ruling was delivered on 05/12/2019. He annexed a copy of the ruling to his affidavit. He contended that while taxing the bill of costs, the taxing officer misdirected herself in law and in fact when she applied the provisions of Section 45 of the Advocates Act which is applicable to contentious business and yet she had found that the bill arose from non-contentious business.

He also deponed that the taxing officer ignored the attached copy of the email that they had received from the Respondent forwarding the computation to be used for determining the capital gains tax payable. He deponed that by so doing, the taxing officer erred and misdirected herself since the effect of her ruling was to allow the Respondent to pay a lesser amount than what was stated during payment of capital gains tax, while urging that this was against public policy.

He also deponed that the taxing officer erred in her ruling with respect to item 1 when she found that the sale transaction was not completed due to the failure by the Applicant to provide a copy of the registered transfer of the property or correspondence between it and the purchaser's advocates. He deponed that the taxing officer ignored paragraph 7 of the agreement of sale dated 24/09/2018 which stipulated that the purchaser's advocates would register and process title documents in favour of the purchasers. Further, that the agreement also stipulated the documents to be availed to the purchaser's advocates on completion of the transaction and added that the documentation to confirm completion was annexed to the Applicant's submissions. He contended that there was no evidence from the Respondent showing that the transaction was not completed either by cancelling the transfer or evidence showing that the Respondent was still registered as proprietor of the land. He also deponed that the taxing officer erred in disallowing item 3 for lack of proof while they had attached the agreement for sale and discharge of charge and had therefore incurred costs of writing and delivering letters to the purchaser's advocates in the process of obtaining all completion documents. He urged that the taxing officer should have awarded the proposed fee of Kshs. 10, 000/= under item 3 since it was reasonable and she had discretion to do so after considering the attached documents.

The Respondent filed the replying affidavit sworn by Steve Elkington, its managing director on 29/09/2020. He deponed that the Applicant drew and served the advocate-client bill of costs dated 19/08/2019 without filing the documents to support its case. The bill was scheduled for taxation on 12/09/2019 before the date was changed to 17/10/2019. He further deponed that on 16/10/2019, the Respondent's Advocates wrote to the Applicant informing it that the bill of costs was not served with the necessary documentation. He annexed a copy of the letter dated 16/10/2019. He deponed that the Respondent's Advocates were forced to prepare submissions on the Applicant's bill of costs without the necessary documentation which were conveniently left out from the application and that even if the documents were availed, the taxing master would have reached the same finding as the amount taxed was reasonable.

Parties filed submissions which the court has considered. The Applicant submitted that the principles upon which this court may interfere with the discretion of the taxing officer was if it was satisfied that in taxing the bill, the taxing officer committed an error of principle or that the amount of fees awarded was excessive as to amount to an error in principle. Further, that the Applicant annexed an email forwarding the computation of capital gains tax which was sent by the Respondent and which included Kshs. 520,000/= as the cost of discharge of the property and Kshs. 1,720,000/= for the conveyance, but that the taxing officer committed an error in principle when she took the view that

there was no agreement expressly signed by the parties in terms of Section 45 of the Advocates Act agreeing on the costs stipulated in the computation provided by the Applicant. It also argued that if the Applicant did not intend to incur those costs, it would not have included those figures in the computation for capital gains tax. It was also argued that the computation was not disputed and that the capital gains tax was paid as the Respondent had proposed.

The Respondent submitted that there was no reason why the court should interfere with the taxing officer's decision and that it was the duty of the Applicant to prove not only that it had instructions to act in a matter but also that it deserved to be paid the amount of money commensurate to the services it rendered. Further, that the value of the subject matter was Kshs. 57,000,000/= and in the opinion of the taxing master, Kshs. 700, 000/= was reasonable because the Applicant did not complete the transaction as he did not avail a duly registered transfer. It added that the Applicant did not deserve Kshs. 520, 000/= for item 2 relating to the discharge of charge over land reference number 209/12817 since the figure was based on the unsigned e-mail which lacked the elements of an agreement being offer, acceptance and consideration. On item 3 of the bill, the Respondent submitted that it was incumbent upon the Applicant to prove that the amount of Kshs. 10, 000/= was actually incurred and not to leave any room for speculation.

The court has considered the application, the affidavits and submissions by respective counsel as well as the ruling of the taxing master. The taxing officer found that the bill related to non-contentious business. Section 45 of the Advocates Act allows for taxation of costs in contentious business. In this court's view, the taxing officer correctly determined that Section 45 of the Advocates Act was inapplicable to the Applicant's claim when she proceeded to tax the bill. Where an agreement fixing remuneration is in place between the advocate and client, the costs of that advocate are not subject to taxation. The email sent to the Applicant which attached a computation to be used for determining the capital gains tax payable did not amount to an agreement for purposes of Section 45 of the Advocates Act.

The taxing officer based her decision on item 1 on the reasoning that the conveyance was not completed. The Applicant did not attach the correspondence in support of its costs to the bill, it actually attached them to its submissions in response to the Respondent's submissions. The Applicant attached copies of the letters dated 1/2/2019 and 4/2/2019 relating to the professional undertaking and forwarding the completion documents to the purchaser's advocates respectively.

The documents the Applicant intended to rely on in support of its bill of costs should have been attached to the bill of costs or to a further affidavit once the Respondent raised the issue of not being served with the documents supporting the Applicant's claim. It was improper for the Applicant to attach the correspondence exchanged on the sale transaction to its further submissions because by that time the Respondent had already filed its response and written submissions and would not therefore have the opportunity to address the new issues raised in the documents. It is clear that the taxing master ignored the documents which the Applicant attached to its further submissions. In the court's view that was the proper thing to do given the circumstances under which the documents had been tendered in evidence without affording the Respondent an opportunity to address this new evidence; and the fact that the Respondent sought these documents but the Applicant failed to supply them.

There is no evidence that the Applicant completed the transaction or that it received the balance of the purchase price in line with the professional undertaking the purchasers' advocates gave. There is no proof that the Applicant completed the transaction as it contended.

The Applicant has failed to demonstrate that the taxing master did not exercise her discretion properly or that she applied the wrong principles. The application dated 17/12/2019 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 16th day of December 2020.

K.BOR

JUDGE

In the presence of:-

Ms. I. Feksi holding brief for Mr. A. Burugu for the Applicant

Mr. V. Owuor- Court Assistant

No appearance for the Respondent