



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. MISC. APPLICATION NO. 3 OF 2017

ODERA OBAR & CO. ADVOCATES.....ADVOCATE

VERSUS

JET PROPERTIES AND APARTMENTS LIMITED.....CLIENT

RULING

1. On 16/1/2017, M/s Odera Obar & Company Advocates (the **advocate**) brought a bill of costs dated 16/1/2017 consisting of 19 items, itemizing a total of Kshs 1,715,245, and sought the court's assessment of the bill. On 4/7/2017, the taxing officer of the court (Hon S Mwanyuli DR) assessed the advocate's costs at Kshs 480,524.20 less Kshs 192,000 already paid to the advocate. Aggrieved by the assessment, the advocate brought a reference by way of chamber summons dated 17/7/2017 seeking an order setting aside the decision of the taxing officer. That reference is the subject of this ruling.

2. The advocate objects to the taxing officer's decision on items 1, 3,4,5,6,7,8,9 and 10 of the bill of costs on the following grounds:

1. The taxing officer committed an error of principle in failing to appreciate that the applicable scale of the Advocates Remuneration Order is the one in effect when the work was done. Therefore, in applying the scale in the Advocate's Remuneration Order of 2009 to work done after 1st April 2014 when the Advocate's Remuneration Order of 2014 had amended the said Advocate Remuneration Order of 2009, the taxing officer erred.

2. The taxing officer fell in an error of principle by failing to appreciate the precise nature and scope of instructions and significantly that the various instructions to the advocate to prepare the different documents/instruments under items 2,3,6,8 of the bill of costs were separate and distinct instructions, chargeable separately.

3. It was an error on the part of the taxing officer to fail to appreciate and to consider the amount involved, the necessary work done and the professional input and industry by counsel in preparing the distinct documents in discharge of the client's instructions before arriving at her decision disallowing items 2, 3, 6 and 8 of the bill of costs.

4. In the wake of the glaring and uncontroverted evidence of the meeting held between the parties on the 20th day of September 2013, the taxing officer erred in disallowing item 1 and concluding that the advocate had not discharged the burden of proof.

5. In taxing off items 4, 5, 7, 9 and 10 of the bill of costs, the taxing officer failed to appreciate that under Schedule 5 of the Advocates Remuneration Order, the costs for the said work are items allowable in addition to the instruction fees. In the circumstances, the taxing officer failed to appreciate the modes of assessing fees under Schedule 5 Part II of the Advocates Remuneration Order

3. The reference was canvassed through written submissions. The advocate argued that the taxing officer committed the following fundamental errors of principle which justify interference by this court: (i) she failed to appreciate that the applicable advocate remuneration order is the one in existence at the time the various services were rendered; (ii) she failed to apply the correct formula for assessing instruction fees under Schedule V of the advocates remuneration order; (iii) she failed to give due consideration to all relevant factors thereby arriving at an erroneous finding that the advocate was entitled to one instruction fees for the different transactions in respect of which the client had engaged the advocate; and (iv) she erred in failing to appreciate that the advocate earned their full fees when the various instruments for the four different transactions were ready.

4. Counsel for the applicant relied on the following caselaw: (i) **Joreth v Kiganjo (2002) 1 E.A 92**; (ii) **First American Bank of Kenya v Shah & others (2002) 1 E.A 64**; (iii) **Hayanga & Co Advocates v Royal Garden Developers Limited, Misc Application No 305 of 2004**; (iv) **Kipkorir Titoo and Kiara v Deposit Protection Fund Board, Civil appeal No 220 of 2004**; (v) **Adipo & Co Advocates v Kenya Pipeline Company Limited, Misc. application No. 686 of 2008**; (vi) **Anthony Thuo Kanai t/a Thuo Kanai Advocates v John**

Ngugi, Misc application No 259 of 2013; (vii) Desai Sarvia & Pallan Advocates v Jambo Biscuits (K) Limited Misc. Application No 3 of 2013 and; (viii) Desai Sarvia & Pallan Advocates v Tausi Assurance Company Limited Civil appeal No 280 of 2015. The advocate also relied on the Digest on Civil Case Law and Procedure Volume IV by George Odunga (as he then was). The advocate urged the Court to set aside the taxing officer's decision and remit the bill back for fresh taxation.

5. The client opposed the reference through written submissions dated 5/4/2018. The client submitted that it gave instructions to the advocate only once, on 22/9/2013, to represent it in the sale of 72 apartments in Golden City Estate, erected on Land Reference Number 18991/4. It contended that in the circumstances, instructions fees is payable only once. It relied on **Nyangito & Co Advocates v Doinyo Lessos Creames Limited (2014) eKLR** and **Desai, Savia & Pallan v Jambo Biscuits (Kenya) Limited (2014) eKLR**. Secondly, the client argued that because instructions were given on 22/9/2013, the taxing officer correctly applied the 2009 Remuneration Order. It contended that the sole factor to be considered when deciding the right remuneration order to apply is the year in which instructions were given, not the year in which the work was done.

6. Thirdly, the client submitted that the taxing officer used the right formula in assessing instruction fees. It contended that given that the Memorandum and Articles of Association is the only document which could be fully relied upon to determine the value of the subject matter, the taxing officer rightly considered the share capital as the value of the subject matter.

7. Fourthly, the client submitted that the advocate had not satisfied the criteria upon which this court is entitled to interfere with the taxing officer's exercise of discretion. Lastly, the client contended that the advocate had charged excessive fees by charging instruction fees under several heads yet instruction fees is charged only once.

8. I have considered the reference together with the parties' respective submissions. I have also examined the entire record which was before the taxing officer. These include the advocate/client bill of costs and the supporting affidavit of Maria Kerubo Migiro sworn on 16/1/2017 together with all the annexures to the said affidavit.

9. The principle upon which a judge of the superior court is entitled to interfere with the taxing officer's exercise of discretion is well settled and was summarized by Ojwang J (as he then was) in **Republic v Ministry of Agriculture and 2 others: Exparte Muchiri W'Njuguna & others (2006) eKLR** as follows:

"The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts"

10. One of the grounds upon which the impugned decision is challenged is that the taxing officer failed to appreciate the precise nature and scope of instructions, significantly, the fact that there were various sets of instructions through which the advocate was engaged to render professional services. I have carefully examined the materials presented to the taxing officer. In the email dated 22/9/2013, the client instructed the advocate as follows:

"SUBJECT: LETTER OF OFFER AND SALE AGREEMENT - GOLDEN CITY APARTMENTS

Dear Maria,

I refer to our meeting in your offices regarding the templates of the subject matter. This email is to formally appoint you and Richard Onsongo as advocates for the sale of Golden City Apartments. Please deliberate and develop the above so that we may commence the sale process"

11. In the email dated 26/9/2013, the client instructed the advocate to incorporate a limited liability company. The client stated thus:

"Hi Maria. Please register Golden City Apartment Management Limited"

12. In the email dated 8/10/2013, the client instructed to draw a template letter of offer. It instructed the advocate thus:

"Hi Maria. Kindly find attached letter of offer to assist you enhance a comprehensive one for our clients. Please include the following terms for each buyers

- ***10% upon letter of offer***
- ***20% upon signing of Sale agreement***
- ***10% after three months of signing sale agreement***
- ***10% after the next three months and 50% balance on completion.***

For mortgage buyers:

- ***100% upon letter of offer***

- 20% upon sale agreement and 70% balance on completion”

13. Similarly, the email dated 7/4/2014 related to a different set of instructions involving preparation of a contract to be executed between the client (developer) and the contractor. The subject of the email reads thus:

“Agreement on project commencement between the contractor and developer of Kshs 40,000,000 spread throughout entire project period”

The above emails have not been contested.

14. The totality of the foregoing is that it is clear from the evidence before the taxing officer that on diverse dates, the client instructed the advocate to undertake diverse professional assignments chargeable under the 2009 and 2014 Advocates Remuneration Orders. For instance, instructions to incorporate a limited liability company is chargeable under a specific schedule. Instructions to sale apartments are chargeable under a different schedule. So are instructions to prepare a contract between the client and the contractor. Similarly, instructions to prepare a template letter of offer cannot be said to be the same as instructions to incorporate a limited liability company. Regrettably, the taxing officer proceeded as if the advocate received instructions to undertake a single assignment. This, without saying much, was an error which renders the taxing officer’s decision untenable.

15. Equally significant, in reaching her figure on instruction fees, the taxing officer relied solely on the stamp duty paid in relation to the nominal share capital of the incorporated company. No regard was had to the subject matter of the other sets of instructions relating to the other assignments outlined above. This was a grave error of principle.

16. The taxing officer’s decision was further challenged on the ground that she used the Remuneration Order of 2009 to assess fees in respect of instructions given and work done after April 2014. It is indeed true that instructions to prepare an agreement between the developer and the contractor were given in July 2014. The 2009 Remuneration Order was replaced by the 2014 Remuneration Order on 11/4/2014. It was therefore an error of principle for the taxing officer to use the 2009 Remuneration Order to assess fees for instructions given and work done after April 2014. The material Bill of Costs properly indicated that the bill was drawn under the two sets of Remuneration Orders.

17. The totality of the foregoing is that the court finds that grave errors of principle were made by the taxing officer in arriving at the impugned decision. Consequently, in the interest of justice to the parties, I will allow the reference and remit the bill for fresh assessment by a different taxing officer of the court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JANUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Migiro for the client

June Nafula - Court Clerk