REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 326 OF 2016

KOSKEI MONDA & CO. ADVOCATES........ADVOCATE/RESPONDENT

VERSUS

1. DAVID SOME BARNO

2. SAMWEL WARUGU KIMOTHO

3. WINFRED NYAWIRA MAINA..........................CLIENTS/APPLICANTS

RULING

The respondent/advocate (hereinafter referred to only as "the respondent") acted for the clients/applicants (hereinafter referred to only as "the applicants") in Nairobi HCCC No. 165 of 2009, Magnate Ventures Ltd. *v* David Some Barno, Samwel Warugu Kimotho, Winfred Nyawira Maina and Emanga Ne Sameta Investments Ltd. (hereinafter referred to only as "the original suit"). The applicants were the 1st, 2nd and 3rd defendants in the original suit.

The plaintiff in the original suit, Magnate Ventures Limited (hereinafter referred to only as "the plaintiff") sued the applicants and Emanga Ne Sameta Investments Ltd.(hereinafter referred to only as "the 4th defendant") for specific performance of an agreement for sale dated 30th April, 2008 that the plaintiff had entered into with the applicants in which the applicants had agreed to sell to the plaintiff a portion of a parcel of land known as Nairobi/Block72/2881 measuring 4.25 acres at a consideration of Kshs.53,000,000/-. The plaintiff averred that pursuant to the said agreement, it paid to the applicants a sum of Kshs.10,000,000/- as a deposit. The plaintiff averred that the applicants failed and/or refused to fulfill their part of the said agreement for sale despite the extension of the completion period and only offered to refund the deposit without interest. The plaintiff averred that after the filing of original suit the applicants transferred to the 4th defendant a parcel of land known as Nairobi/Block 72/3174 which is the portion of Nairobi/Block72/2881 which they had sold to the plaintiff. Nairobi/Block72/3174(hereinafter referred to only as "the suit property") was sold to the 4th defendant at a consideration of Kshs.68,000,000/-. The plaintiff sought judgment against the applicants and the 4th defendant jointly and severally for:

a. A declaration that the transfer of the suit property by the applicants to the 4th defendant on 21st April, 2009 was fraudulent, null and void.

b. Specific performance of the agreement for sale dated 30th April, 2008 between the plaintiff and the applicants and vacant possession of the suit property.

c. All necessary and consequential accounts, directions and inquiries.

d. An injunction restraining the 4th defendant from selling, transferring, leasing, charging and/or otherwise dealing with Nairobi/Block 72/2881 or the suit property.

e. Damages in the sum of Kshs.15,000,000/- together with interest on the deposit of Kshs.10,000,000/= at court rates from 30th April, 2008 until payment in full in lieu of or in addition to specific performance.

f. Costs of the suit

g. Any other or further relief as the court may deem appropriate.

On 9th November, 2011, the original suit was marked as settled in terms of the consent letter dated 3rd October, 2011 which provided as follows:-

"1. BY CONSENT this matter be and is hereby marked as settled between all the parties as the defendants have transferred and registered flat No. A6 in Block 7 erected on L.R No. 18591/9 in favour of the plaintiff's nominee M/s Stanley Ngethe Kinyanjui.

2. The 1st, 2nd and 3rd defendant's advocates Koskei Monda & Co. Advocates must forward the lease to the Plaintiff's lawyer within 48 hours of execution of this consent by the plaintiff's advocates.

3. Each party will bear its/her own costs."

Following the settlement of the original suit a dispute arose between the applicants and the respondent which represented them in the original suit over legal fees. The respondent, Koskei Monda & Co. Advocates, filed its advocate/client bill of costs on 24th November, 2016 for taxation against the applicants. The bill of costs by the respondent, Koskei Monda & Co. Advocates was drawn in the sum of Kshs.1,831,224.50. The said bill of costs was taxed by the taxing officer, Hon. I. N. Barasa, Senior Deputy Registrar at Kshs.1,477, 062.42 on 2nd October, 2017.

The applicants were dissatisfied with the ruling of the taxing officer on the taxation of the said bill of costs and filed a reference to this court seeking to set aside the same. In their reference brought by way of chamber summons dated 10th October, 2017, the applicants challenged the decision of the taxing officer on the entire bill of costs that was filed by the respondent, Koskei Monda & Co. Advocates and urged the court to refer back the entire bill for taxation by another taxing officer. The applicants contended that the taxing officer erred in law in applying the provisions of schedule VI(1) of the Remuneration Order, 2009 while addressing the issue of the instruction fees. The applicants averred further that the taxing officer erred by determining the value of the subject matter of the suit from the pleadings. The applicants also faulted the taxing officer for her alleged failure to give credit to the applicants for the sum of kshs.350,000/- that they had already paid to the respondent. The applicants averred further that the taxing officer erred in holding that there was no agreement on fees between the applicants and the respondent. The applicants averred further that the taxing officer erred in holding that the value of the subject matter that was in dispute in the original suit was Kshs.68,000,000/-. The applicants contended that the value of the house that was transferred to the plaintiff in the original suit following an out of court settlement that the parties had reached was Kshs.3,000,000/- a fact that was borne out in the letter dated 3rd December, 2010 from the plaintiff's advocates that was ignored by the taxing officer. The applicants averred further that the taxing officer erred in failing to appreciate that the plaintiff in the original suit had only paid a deposit of Kshs.10,000,000/- out of the total purchase price of Kshs.53,000,000/- that was agreed between it and the applicants and that after the transaction failed, the plaintiff was refunded Kshs.5,500,000/-. The applicants averred that the taxing officer erred in awarding the respondent a sum of Kshs.1,477,062.42/-.

The reference was argued by way of written submissions. The applicants filed their submissions on 25th July, 2018 while the respondents filed its submissions on 26th October, 2018. I have considered the bill of costs that was filed by the respondent, Koskei Monda & Co. Advocates, the ruling by the taxing officer dated 2nd October, 2017 and the applicants' reference together with the supporting affidavit. I have also considered the replying affidavit that was filed by the respondent in response to the reference and the respective submissions by the advocates for the parties. In the case of Nyangito & Co. Advocates *v* Doinyo Lessos Creameries Ltd. [2014] eKLR, the court stated that:

"The circumstances under which a judge of the High Court interferences with the taxing officer's exercise of discretion are now well known. These principles are:

1. that the court cannot interfere with the taxing officers discretion 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 interference that it was based on an error of principle;

2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

In the South African case, Visser *v* Gubb 1981(3) SA 753 (C) 754H – 755 C that was cited by the court in the case of KTK Advocates *v* Baringo County Government (2017) eKLR that was relied on by the respondent, the court stated as follows:

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue…. The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

In the case of Joreth Ltd. *v* Kigano & Associates (2002) E.A 92 the Court of Appeal stated as follows on the formula for ascertaining the value for the subject matter of a suit:

> **"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matter, the nature and the importance of the cause or the matter, the interest of the parties general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."**

The applicants challenged the taxing officer's decision on various grounds. One of the grounds upon which the decision of the taxing officer was challenged was that the taxing officer proceeded to tax the respondent's bill of costs while there was an agreement on fees between the parties in place. On this issue, I am in agreement with the taxing officer that the purported agreement on fees which the applicants placed before the court did not meet the conditions set out in section 45(1) of the Advocates Act, Chapter 16 Laws of Kenya. What was placed before the taxing officer was a proposal on fees by the respondent. There was no evidence that the proposal was accepted by the applicants or their agent. The proposal could not therefore amount to an agreement. The applicants also placed reliance on a letter dated 27th June, 2012 from the respondent as having confirmed the alleged agreement. According to this letter, the so called agreement on fees was made through telephone conversation and it was conditional. There was nothing in writing placed before the court showing that the applicants or their advocate had agreed to pay a fee of Kshs.750,000/-. There was also no evidence that as at 24th November, 2016 when the respondent filed its bill of costs, the alleged agreed fees had been paid. I find no merit on this ground. On the issue of instruction fees, the applicants had contended that the suit was settled by the parties when the plaintiff accepted Flat No. A 6 in block 7 erected on L.R No. 18591/9 valued at Kshs.3,000,000/-. The applicants contended that based on this settlement, the value of the subject matter of the suit should have been Kshs.3,000,000/- and not Kshs.68,000,000/= as held by the taxing officer.

I have looked at the consent that was entered into by the parties pursuant to which the original suit was settled. The consent referred to Flat No. A6 in block 7 erected on L.R No. 18591/9 having been transferred by the applicants to the plaintiff in the original suit. The value of that flat was not mentioned in the consent. The sum of Kshs.3,000,000/- was introduced by the applicants during the taxation. The letter dated 3rd December, 2010 from the plaintiff's advocates that referred to Kshs.3,000,000/= as rightly observed by the taxing officer was not part of the court record and in any event did not refer to the house that was transferred by the applicants to the plaintiff. For the foregoing reasons, I am unable to fault the taxing officer for declining to adopt the said sum of Kshs.3,000,000/= as the value of the subject matter of the suit. The taxing officer correctly determined the value of the subject matter of the suit from the pleadings which she held to be Kshs.68,000,000/-. The taxing officer agreed with the respondent and rightly so that the value of the subject matter of the suit was Kshs.68,000,000/- which comprised of Kshs.53,000,000/- being the value of the suit property and Kshs.15,000,000/- being damages which the plaintiff claimed from the applicants and the 4th defendant. It was on the basis of this sum of Kshs.68,000,000/- that the taxing officer assessed instruction fees which seem from the submissions to have been the applicant's only source of complaint against the decision of the taxing officer.

The applicants also took issue with the taxing officer's alleged failure to deduct a sum of Kshs.350,000/- which the applicants had paid to the respondent as a deposit from the amount that was assessed to be due to the respondent. Again, I find no merit on this ground. What was before the taxing officer was a bill of costs. Her role was to assess the fees that was payable to the respondent. After that assessment, the parties could take accounts if the applicants had made advance payments to the respondent. It was not the duty of the taxing officer to determine during the taxation if any payments had been made to the respondent by the applicants. In my view, nothing stops the applicants from deducting any payments they had made to the respondent when settling their taxed costs. This cannot be a ground for challenging taxation.

The upshot of the foregoing is that the applicants' reference has no merit. The Chamber Summons dated 10th October, 2017 is dismissed with costs.

Delivered and Dated at Nairobi this 24th day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Applicants

Ms. Opany for the Respondent

Catherine-Court Assistant