REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 62 OF 2017

MUKELE NGACHO & CO. ADVOCATES……...…ADVOCATE/RESPONDENT

VERSUS

EMANGA NE SAMETA INVESTMENTS LIMITED……..CLIENT/APPLICANT

RULING

The respondent/advocate (hereinafter referred to only as "the respondent") acted for the client/applicant (hereinafter referred to only as "the applicant") 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 applicant was the 4th defendant in the original suit.

The plaintiff in the original suit, Magnate Ventures Limited (hereinafter referred to only as "the plaintiff") sued David Some Barno, Samwel Warugu Kimotho, Winfred Nyawira Maina (hereinafter referred to only as "the 1st , 2nd and 3rd defendants" respectively) and Emanga Ne Sameta Investments Ltd.(the applicant) for specific performance of an agreement for sale dated 30th April, 2008 that the plaintiff had entered into with the 1st, 2nd and 3rd defendants in which the 1st, 2nd and 3rd defendants 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 1st, 2nd and 3rd defendants a sum of Kshs.10,000,000/- as a deposit. The plaintiff averred that the 1st, 2nd and 3rd defendants 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 1st, 2nd and 3rd defendants transferred to the applicant 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 applicant at a consideration of Kshs.68,000,000/-. The plaintiff sought judgment against the 1st, 2nd and 3rd defendants and the applicant jointly and severally for:

(a) A declaration that the transfer of the suit property by the 1st, 2nd and 3rd defendants to the applicant 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 1st, 2nd and 3rd defendants and vacant possession of the suit property.

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

(d) An injunction restraining the applicant 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 applicant and the respondent who represented it in the original suit over legal fees. The respondent, Mukele Ngacho & Co. Advocates, filed its advocate/client bill of costs on 11th April, 2017 for taxation against the applicant. The bill of costs by Mukele Ngacho & Co. Advocates/respondent was drawn in the sum of Kshs.2,793,849.68. The said bills of costs was taxed by the taxing officer, Hon. I. N. Barasa, Senior Deputy Registrar at Kshs.1,452,324.24 on 2nd October, 2017.

The applicant was dissatisfied with the ruling of the taxing officer on the said bill of costs and filed a reference to this court seeking to set aside the same. The applicant filed its reference by way of Chamber Summons dated 6th October, 2017. In its reference the applicant challenged the taxing officer's decision on items 1, 2 and 14 of the respondent's bill of costs dated 10th April, 2017. The applicant urged the court to set aside the taxation in respect of the said items and proceed to either tax the same or refer the same for taxation afresh by another taxing officer. The applicant challenged the decision of the taxing officer on various grounds. The applicant contended that having regard to the circumstances under which the original suit was brought and determined, the sums which were allowed under items 1, 2 and 14 of the respondent's bill of costs were excessive. The applicant averred that the taxing officer erred by treating the purchase price of Kshs.53,000,000/- that was to be paid by the plaintiff in the original suit to the 1st, 2nd and 3rd defendants for the suit property as the value of the subject matter of the suit. The applicant averred that although the purchase price that was agreed between the plaintiff in the original suit and the 1st, 2nd and 3rd defendants was Kshs.53,000,000/-, the plaintiff had only paid a deposit of Kshs.10,000,000/- and that the suit was compromised and settled at the earliest opportunity when the 1st, 2nd and 3rd defendants transferred to the plaintiff another property together with a refund of Kshs.5,500,000/-. The applicant contended that the taxing officer erred by failing to take into account the fact that the original suit was not complex and that the case was settled out of court without a hearing. The applicant averred that failing to take in account the said factors led the taxing officer to arrive at a wrong decision.

The reference was argued by way of written submissions. The applicant filed its submissions on 1st November, 2018 while the respondent filed its submissions on 26th October, 2018. I have considered the ruling by the taxing officer dated 2nd October, 2017 on the respondent's bill of costs against the applicant dated 10th April, 2017 and the reference by the applicant together with the supporting affidavit. I have also considered the replying affidavit by the respondent and the submissions by the respective advocates for the parties. In the case of Nyangito & Co. Advocates *v* Doinyo Lessos Creameries Ltd. [2014] eKLR that was cited by the applicant, 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."**

The applicant's complaint over the decision of the taxing officer was limited to her assessment of instruction fees. The applicant faulted the taxing officer's use of Kshs.68,000,000/- as the value of the subject matter of the suit. The applicant contended that the value of the subject matter of the suit should have been determined from the settlement that was reached by the parties under which the plaintiff in the original

suit was refunded a sum of Kshs.5,500,000/- and also given a flat. The applicant contended further that the taxing officer erred in using general damages that was claimed by the plaintiff in the original suit as part of the value of the subject matter of the suit. The applicant contended that general damages are not awardable for breach of contract and as such the taxing officer erred in including the sum of Kshs.15,000,000/- that was claimed by the plaintiff in the original suit as damages as part of the value of the subject matter of the suit.

In its response, the respondent contended that the settlement that the parties entered into in the original suit did not contain a value and that the taxing officer made a correct finding in that regard. The respondent contended that the taxing officer rightly assessed instruction fees on the value of the subject matter of the suit as was contained in the pleadings.The respondent contended that that letter which mentioned the sum of kshs.5,500,000/- which the applicant claimed to be the value of the settlement between the parties in the original suit was not filed in court and as such could not be acted upon by the taxing officer as it did not form part of the court record. The respondent also contended that the applicant used a wrong procedure in challenging the decision of the taxing officer. The respondent contended that before filing the reference, the applicant should have given a notice to the taxing officer under paragraph 11(1) of the Advocates Remuneration Order. The respondent contended that the applicant's reference should also fail on account of this irregularity.

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."**

In her ruling, the taxing officer was alive to the formula that I have alluded to above and even cited the case. The taxing officer was confronted with two conflicting arguments. The respondent had contended that the instruction fees be assessed based on the pleadings. The respondent contended that according to the amended plaint that was filed in the original suit, the plaintiff had averred that the 1 st, 2nd and 3rd defendants had agreed to sell to it the suit property at Kshs.53,000,000/-. The respondent averred that the plaintiff sought specific performance of the said agreement and damages in the sum of Kshs.15,000,000/- for breach of contract. The respondent contended that the value of the subject matter of the suit was therefore the price at which the 1st, 2nd and 3rd defendants had agreed to sell the suit property being Kshs.53,000,000/- together with the damages that was claimed by the plaintiff in the original suit. The total amount came to Kshs.68,000,000/-.

On the other hand, the applicant contended that the value of the subject matter of the suit was to be assessed based on the consent which the parties had entered into and through which the original suit was settled. The applicant contended that under that consent, the 1st, 2nd and 3rd defendants refunded to the plaintiff in the original suit a sum of Kshs.5,500,000/- which the applicant claimed to be the value of the subject matter of the suit.

Faced with these two conflicting positions, the taxing officer considered the pleadings and the consent upon which she had been urged to determine the value of the subject matter of the suit. The taxing officer observed that the consent through which the parties settled the original suit did not refer to the sum of Kshs.5,500,000/- which the applicant claimed to be the value of the subject matter of the suit. The taxing officer noted that the consent referred to a flat which the 1st, 2nd and 3rd defendants were said to have transferred to the plaintiff. The taxing officer noted that the value of that flat was not given in the consent. The taxing officer concluded that value of the subject matter of the suit could not be determined on the basis of that consent. The taxing officer therefore used the pleadings to determine the value of the subject matter of the suit. The taxing officer agreed with the respondent 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 1st , 2nd and 3rd defendants and the applicant. It was on the basis of this sum of Kshs.68,000,000/- that the taxing officer assessed instruction fees at Kshs.817,700/- under item 1 of the bill of costs. The assessment of item 2 was based on the said instruction fee of Kshs.817,700 together with other small items which were taxed under part A of schedule VI of the Remuneration Order, 2009. Although the applicant had also challenged the taxation of item 14 in the bill of costs, this item was taxed off in its entirety. Nothing therefore turns on it.

I am not in agreement with the contention by the applicant that the taxing officer erred in declining to adopt the sum of Kshs.5,500,000/= as the value of the subject matter of the original suit. I am in agreement with the respondent that the applicant came up with the said sum of Kshs.5,500,000/- from nowhere. The said amount was neither pleaded nor was it mentioned in the parties' consent in the original suit. The taxing officer was right in my view in rejecting the applicant's contention that the said sum of Kshs.5,500,000/- was the value of the subject matter of the suit.

I am in agreement with the finding of the taxing officer that the value of the subject matter of the suit could not be ascertained from the consent of the parties and that she had to determine the same from the pleadings. I had at the beginning of this ruling referred to the contents of the amended plaint which was filed by the plaintiff in the original suit. There is no doubt from the said amended plaint that the plaintiff sought from the 1st , 2nd and 3rd defendants and the applicant the recovery of the suit property and special damages in the sum of Kshs.15,000,000/- for breach of contract and interest on the deposit of Kshs.10,000,000/- that it had paid to the 1st, 2nd and 3rd defendants. The special damages and interest aforesaid was sought in lieu of or in addition to the specific performance. The subject matter of the suit was therefore the suit property and the damages that was sought by the plaintiff. There was no dispute that the plaintiff in the original suit had entered into an agreement with the 1st , 2nd and 3rd defendants to purchase the suit property at Kshs.53,000,000/-. This amount is pleaded in paragraph 4 of the amended plaint. In the circumstances, I am unable to fault the taxing officer for determining the value of the subject matter of the suit from the value of the suit property as declared by the plaintiff in the original suit and special damages that was claimed in the sum of Kshs.15,000,000/-. The assessment of instruction fees that was based on the sum of Kshs.68,000,000/- as the value of the subject matter of the suit was therefore not erroneous. Since the applicant's reference was with regard to the assessment of instruction fees only, I find no merit in the same. The taxing officer awarded the respondent minimum instruction fees based on the said value of the subject matter of the suit having taken into account all relevant factors as set out in her ruling. I find no reason to interfere with her exercise of discretion.

For the foregoing reasons, I find no merit in the chamber summons dated 6th October, 2017. The same is dismissed with costs to the respondent.

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

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Nyakundi for the Applicant

Ms. Opany h/b for Mr.Munala for the Respondent

Catherine-Court Assistant