



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APP. NO. 150 OF 2017

NJERI KARIUKI ADVOCATE.....APPLICANT/ADVOCATE

VERSUS

MARY WAMAITHA KAITTANY.....RESPONDENT/CLIENT

RULING

1. On 14/3/2018, Njeri Kariuki Advocate (**the advocate**) brought a reference under Rule 11 (2) of the Advocates Remuneration Order seeking an order setting aside the assessment of the taxing officer rendered on 28/2/2018 in relation to the advocate's advocate/client bill of costs dated 4/8/2017 and filed on the same day. The bill of costs related to conveyance services relating to Land Reference Numbers 12422/207, 12422/343 and 12422/344. The taxing officer awarded the advocate a sum of Kshs 63,635.60. Aggrieved by the award, the advocate challenged the award through the reference.

2. The impugned aspect of the taxing officer's decision relate to Items 1 (instructions fees); 2 (letter for the Town Clerk); 3 (receiving and perusing letters from the client); and 14 (letter to client).

3. The reference was premised on the following grounds:-

a. that the taxing master erred in law and acted contrary to the clear provisions of the Advocates Remuneration Order and in particular as regards to taxation of items 1, 2, 3 and 4 of the Advocate/Client Bill of Costs;

b. that the taxing master erred in law and by applying the provisions of the Remuneration Order 2006 as the appropriate order while addressing the issue of instruction fees hence fell in error thereof;

c. that the taxing master erred in law by determining the value of the subject matter from the agreements of sale;

d. that the taxing master erred in law by concluding that the consideration for the transactions was provided in the deeds;

e. that the taxing master erred in law by finding out or considering the current market price for the parcels of land;

f. that the taxing master erred in law and fell in error by not holding that the instruction fees ought to have emanated from the value of stamp duty or average current market price of the parcels of land;

g. that that taxing master erred in law and fell into error by awarding Kshs 63,635.60 to the applicant; and

h. that it is only fair and just that the taxation of the Advocate/client Bill of Costs dated 4th August, 2017 be referred back to another Taxing Master with appropriate directions thereof or the court deals with it as it deems appropriate and just.

4. The client opposed the reference through a replying affidavit sworn by her advocate, Edwin Omulama Onditi on 13/4/2018.

5. The reference was canvassed through written submissions. The advocate submitted that the taxing officer fell into error by applying the wrong Schedule of the Advocates Remuneration Order to tax the bill. She contended that in conveyance practice, instruction fees is charged at the time of completion of the conveyance and not at the time of receipt of instructions. She further contended that in the matter before the taxing officer, the client withdrew instructions on 17/12/2015 before completion of the conveyance. Counsel contended that the taxation was wrongly based on the consideration captured in the transfer documents instead of basing it on the assessed stamped duty.

6. The advocate further submitted that assessment of instruction fees at a cumulative sum of Shs 51,035 for work undertaken on three (3) parcels of land over a period of 9 years was unreasonable and disproportionate to the scope and extent of the work undertaken by the advocate and amounted to an injustice. She added that the taxing officer failed to take into account the value of the subject matter which was

Kshs.154,310,000.

7. The advocate added that the nature of instructions given and the extent of services rendered by the advocate were clearly outlined in item 1 of the bill of costs yet the taxing officer failed to take into account the fact that what remained to be done to complete the conveyance was minimal. Lastly, the advocate faulted the taxing officer for failing to comply with paragraph 13 A of the Advocate Remuneration Order. She urged the court to allow the reference.

8. In response, the client outlined that the principle upon which a superior court reviews a taxing officer's decision. Secondly, she submitted that the deeds of transfer which were presented to the taxing officer were unambiguous in terms of the consideration and the taxing officer properly based her assessment on the consideration set out in the deeds of transfer presented to her. She argued that cumulatively, the consideration was Kshs 1,200,000 and the taxing officer properly pegged instructions fees at 1.5% of the cumulative consideration and adjusted it accordingly to Kshs 50,000. She added that the taxing officer's decision to strike out items 2, 3 and 14 was proper and in tandem with paragraph 20 (1) (h) of the Advocates Remuneration Order. She urged the court to dismiss the reference.

9. I have considered the entire record which was before the taxing officer, the grounds set out in the reference, and the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The single issue falling for determination in this reference is whether the taxing officer committed any error of principle or violated any legal framework in the impugned decision.

10. The principles upon which a judge of the superior court interferes with the taxing officer's exercise of discretion in taxation are well settled. A superior court will not interfere with the award of the taxing officer merely because it thinks the award is too high or too low; it will only do so if it is demonstrated that the taxing officer's decision was based on an error of principle or if the taxing officer's award is manifestly high or low as to amount to an injustice to one party or the other; or if the taxing officer did not exercise discretion judiciously or failed to bring his mind to bear on the question in issue. See **Republic vs Ministry of Agriculture and 2 Others, Ex parte Muchiri W'Njuguna & Others (2006)**.

11. In the present matter, all that the advocate presented to the taxing officer was the bill of costs. She did not bother to file any affidavit to present to the taxing officer any relevant documents she wished the taxing officer to rely on. The client took liberty to file a replying affidavit dated 27/9/2007 and exhibited various deeds of transfer. The deeds of transfer contained consideration. The advocate did not challenge the evidence presented by the client. Consequently, the taxing officer based her assessment on the deeds of transfer presented by the client.

12. In my view, it was incumbent upon the advocate to place before the taxing officer evidential materials to demonstrate the value or consideration which she wished the taxing officer to take into account. To fault the taxing officer at this point yet the advocate did not place before her any material to give a contrary figure relating to value/consideration is, in my view, not proper. I note from the record that it is only at the point of filing written submissions in relation to the present reference that the advocate attempted to attach purported evidential documents to the written submissions. Regrettably, this was unprocedural and too late in the day. She needed to present her evidential materials before the taxing officer at the time of taxation not at the time of filing written submissions relating to the reference.

13. Similarly, both parties opted not to present submissions before the taxing officer. The net result was that the taxing officer based her decision on the evidential material before her. There were no evidential material or submissions controverting what the client present to the court.

14. In my view, in the absence of any other evidence demonstrating that the consideration set out in the deeds of transfer was only nominal, the taxing officer properly acted in tandem with the requirements of paragraph 21 of the Advocates Remuneration Order. I therefore see no misdirection or breach of principle on part of the taxing officer.

15. The second limb of the advocate's grievance is that the taxing officer failed to grant items 2, 3 and 14 of the bill of costs. The taxing officer's decision on items 2 to 30 of the main bill was as follow:-

"Items 2 to 30 relate to correspondences. There are correspondences which can be charged while others cannot. Correspondences between an advocate and his client are included in the instruction fees, as is correspondence to obtain any necessary consent or clearance certificate but excluding land control consent. Consequently, items 2, 3, 5, 6, 7 and 8 are taxed as drawn. The rest of the items are taxed off as they form part of the instructions fee."

16. It is therefore clear that item 2 was allowed as drawn. Items 3 and 14 were properly taxed off because they related to correspondence between the advocate and the client. The taxing officer taxed off items 1, 2, 3 and 14 of the **itemized disbursements** on the ground that there was no proof. I have observed that the advocate did not present any evidential material to support the bill of costs. There was therefore no proof of the disbursements itemized as 1, 2, 3 and 14. In my view, the taxing officer properly taxed off the four disbursement items.

17. It is therefore the finding of this court that based on the materials presented to the taxing officer by the parties to the bill of costs, the taxing officer properly discharged her mandate. Consequently, the reference under consideration fails for lack of merit. Because of the history of this matter, each party shall bear their own costs of the reference.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Sang for the advocates

Ms Okumu holding brief for Mr Omulama for the client

June Nafula - Court Clerk