



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APP. NO. 91 OF 2015

J. K. N. KAMUNYORI & COMPANY.....ADVOCATE/APPLICANT

=VERSUS=

JOHN WAINAINA KARAU.....CLIENT/RESPONDENT

RULING

1. This is the chamber summons dated 13th August 2015 brought under paragraph 11 of the Advocates (Remunerations Order in the Advocates Act Chapter 16 Laws of Kenya, Section 1A, 1b and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provision of the law and procedure.

2. It seeks orders:-

(1) That the decision of the taxing officer to tax item 17 of the Bill of Costs filed on 13th November 2014 under Schedule V of the Advocates Remuneration Order as contained in her Ruling dated 16th July 2015 be set aside.

(2) That this Honourable Court finds and directs that the said item 17 of the aforesaid Bill of Costs should be taxed under Schedule I First Scale of the Advocates (Remuneration) (Amendment) Order 14.

(3) That the costs of this application be provided for.

3. The grounds are on the face of the application and are:-

(a) That the taxing officer erred in law and fact in finding that the transaction, the subject matter of the Bill of Costs, did not fall within the business contemplated and provided for under paragraph 23.

(b) That consequently the taxing officer erred in law and fact in concluding that the item 17 of the said Bill of Costs, on instruction fees, could not be taxed under Schedule I First Scale of the Advocates (Remuneration) (Amendment) Order 2014, and instead decided to tax the item under Schedule V of the said order.

(c) That the taxing officer erred in law and fact in finding that the business which was the subject matter of the instructions, was not completed just because the annexed copies of the sale agreement was not executed.

(d) That the taxing officer erred in law and fact in finding as a fact and the truth the submission by the respondent's advocates that the assignment was incomplete only because the applicant had not annexed executed copies of the completion documents.

(e) That the taxing officer erred in law and fact in failing to observe the maxim that he that alleges must prove because she should have required that the respondent to prove that the instructions given to the applicant had not been acted on to a logical completion.

4. The application is supported by the affidavit of John Kirk Nyaga Kamunyori Advocate sworn on the 13th August 2015 and further affidavit sworn on the 14th November 2016.

5. The application is opposed. There is a replying affidavit sworn by John Wainaina Karau sworn on the 10th October 2016.

6. On the 24th October 2016 the court directed that the reference be canvassed by way of written submissions.

7. It is the Applicant's submissions that the transaction was completed and the property sold as envisaged. He did not just review a draft sale agreement but he was the respondent's advocate throughout the transaction. He witnessed the execution of the sale agreement by the vendor. The emails sent by the respondent confirm that he was not just reviewing a draft sale agreement. He prays that the application be allowed.

8. It is the respondent's submissions that the applicant did not carryout full and/or complete instructions with respect to the drafting and execution of the sale agreement. He emailed the applicant the draft sale agreement that had initially been prepared by M/S Nyiha Mukoma & Company Advocates in order for the said applicant to review the same and further reproduce two subsequent agreements from the said draft which the respondent admits that he did. He has put forward the case of **China Wuyi & Co. Ltd vs Samson Kimetto [2014] eKLR**. The applicant has failed to prove that he carried out complete instructions and his application must fail.

9. The instructions given to the applicant fell within the provisions of paragraph 18 (f) and hence the taxing officer's decision ought to be upheld by this honorable court. The applicant was only involved in the review of a sale agreement, a draft of which was sent to him by the respondent. He prays that the chamber summons dated 13th August 2015 be dismissed with costs.

10. I have considered the chamber summons dated 13th August 2015, the affidavits in support, the replying affidavit, the written submissions of counsel and the authorities cited.

11. I have gone through the emails between the applicant and the respondent. The email dated 3rd July 2014 from the respondent to one Ibrahim confirms the instructions given to the applicant herein were to review the sale agreement which had been drafted by the purchaser's advocate. He has attached a copy of a sale agreement to his further affidavit. The same is said to have been drawn by J K N Kamunyori & Company Advocates. However, a closer look at the same shows that it is the same one forwarded to him by the respondent to review. He has not exhibited any completion documents.

12. I therefore find that the taxing officer cannot be faulted for assessing his fees under schedule 5 of the Advocates Remuneration (Amendment) Order. Paragraph 18 (f) of the said order provides that:-

“...In respect of any business referred to on this paragraph which Is not completed and in respect of other deeds or documents....and any other business of anon contentious nature the remuneration of which has otherwise not been provided for, the remuneration is to be that prescribed in schedule 5”.

13. I find no merit in this application and the same is dismissed. Each party to bear his own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9TH day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate/client

.....Advocate for the Respondent

.....Court Assistant