



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 224 OF 2016

KIMANI RICHU &

ASSOCIATES ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

CENTURION HOLDINGS LIMITED.....CLIENT/RESPONDENT

RULING

1. On 14/3/2017, M/s Kimani Richu & Associates Advocates (**the Advocate**) brought a reference by way of chamber summons application dated 13/3/2017 against Centurion Holdings Limited, seeking an order setting aside the taxing officer's decision of 7/2/2017 in so far as it relates to the reasoning and determination pertaining to the taxation of Item Number 1 of the Bill of costs dated 2/9/2016. The application is premised upon the following grounds:

a) That taking into account the value of the subject matter and all the other relevant circumstances, the instructions fees allowed under Item 1 of the Bill of Costs herein at Ksh 440,000 is so low;

b) That if that amount is allowed to stand, the Applicant/Advocates would suffer gross injustice as the taxation of the advocate/client bill of costs is contrary to the established principles of taxation and application of the provisions of the Advocates (Remuneration) Order in determining instructions fees.

c) That a notice of objection was filed in time on 14th February 2017 and the taxing officer requested to record and furnish to the advocate/applicant her reasons for the decision on the taxation of the Bill of Costs in terms of the provisions of paragraph 11 (2) of the Advocates (Remuneration) Order.

d) That the taxing master supplied reasons for the taxation on 9th March 2017 and the reference is thus filed within the prescribed period of fourteen (14) days.

2. The application is supported by an affidavit sworn on 13/3/2017 by Kihara Ndiba. Annexed to the affidavit are copies of the ruling, plaint, notice of objection to taxation, and letter from the taxing officer dated 2/3/2017.

3. The advocate's case is that the taxing officer erroneously reckoned instruction fees at Ksh 440,000 based on the sum of Ksh 17,000,000 which was only a portion of the value of the suit property, and omitted to take into account the other limbs of the prayers sought in the plaint, namely: (i) an order of specific performance; (ii) general damages for breach of contract; and (iii) an order directing the defendant to disclose the outstanding loan amount owing to NIC Bank Limited in regard to the charge registered against the suit properties, Land Reference Number 12565/37 and Land Reference Number 12655/38. The advocate contends that the taxing officer ought to have taken into account the consideration in the sale agreement of the suit properties which constitute the value of the suit properties. It is contended that the purchase price of the suit properties was Ksh 85,000,000.

4. The client opposed the reference through a replying affidavit sworn by James Singh Gitau Advocate on 27/3/2017. Annexed to the said affidavit are copies of the bill of costs, plaint in HCCC No. 946 of 2014, parties' written submissions on the bill of costs, ruling of the taxing officer, and pleadings in HCCC 414 of 2016.

5. The client's case is that the taxing officer exercised her discretion correctly and taxed the bill based on the applicable provisions of the Advocates (Remuneration) (Amendment) Order 2014 and considered all there was to be considered before rendering the award. It contends that it instructed the advocate to represent it in a purchase of two properties but the transaction aborted. The client then instructed the advocate to sue for a refund of Ksh 17,000,000 that had been paid as deposit towards purchase of the suit properties.

6. I have considered the tenor and import of the reference, the rival affidavits in support and against the reference, and the parties' rival

submissions. I have also considered the relevant legal framework and the prevailing jurisprudential principles applicable to the reference.

7. The following two issues emerge for determination in this reference: (i) whether the taxing officer applied the correct principles in assessing instruction fees; and (ii) whether the sum of Ksh 440,000 assessed as instruction fees was manifestly and/or grossly low in the circumstances of the case as to amount to an injustice.

8. The principle to be applied when assessing instruction fee in a bill of costs are well settled. The Court of Appeal in the case of **Joreth Ltd v Kigano & Associates** outlined the principle as follows:

We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any discretion by the trial judge and all other relevant circumstances

9. Similarly, the principles upon which a judge of the superior court interferes with the taxing officer's exercise of discretion are well settled. **Ojwang J** (as he then was) captured these principles in the case of **Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others [2006]** as follows:-

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... 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 factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state, not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.

10. I have carefully examined the ruling of the taxing officer and the pleadings in the suit giving rise to the bill of costs which culminated in the impugned ruling. I have done so with a view to ascertaining what the subject matter of the suit property was and whether it was possible to determine the value of the subject matter from the pleadings, judgment or settlement in the matter as the case may be. For avoidance of doubt, the pleadings are not contested and were presented to the taxing officer.

11. From the plaint, the client sued M/s Kathumo Holdings Limited in Milimani ELC 946 of 2014 for the following relief:

a) An order for specific performance against the Defendant

b) General damages for breach of contract against the defendant

c) An order against the defendant directing them to disclose the outstanding loan amount owing to NIC Bank Limited in regard to the charge registered against all that property known as Land Reference Number 12565/37 and 12565/38 Nairobi in favour of NIC Bank Limited

d) In the alternative and without prejudice to the above, the defendant be ordered to refund the deposit of the purchase price paid to their advocates by the Plaintiff amounting to Kenya Shillings Seventeen Million (17,000,000) with interest thereon at commercial rates.

e) Costs of this suit together with interest thereon at such rate and for such period as this honourable court may deem fit.

f) Any other remedy that this honourable court may deem fit to grant.

12. Secondly, the subject matter of the suit were the two properties, Land Reference Number 12565/37 and Land Reference Number 12565/38. The value of the two properties (subject matter of the suit) is contained in Paragraph 4 of the Plaint which reads thus;

Particulars of the said Agreement

To the extent that they are material to this suit, the terms of the agreement were inter alia that;

The defendant would sell the land free from all charges, mortgages and encumbrances.

The purchase price was Kenya Shillings Eighty Five Million (85,000,000/)

The Purchaser shall upon execution, pay the deposit to the Vendor amounting to Kenya Shillings Seventeen Million (Ksh 17,000,000/)

The completion date shall be the Sixtieth (60th) day after the date of signing of the agreement or such earlier date as the parties may agree in writing.

13. Did the taxing officer pay due regard to the value of the subject matter which was pleaded in paragraph 4 of the plaint? The answer is in the negative. In her ruling dated 7/2/2017, the taxing officer stated *inter alia*:

Before me is a bill of costs dated 2nd September 2016. The respondent instructed the applicant to file suit in Nairobi ELC. 946 of 2014: Centurion Holdings Limited v Kathumo Holdings Limited v Kathumo Holdings Limited. The bill of costs has been drawn under Schedule 6 of the Advocates (Remuneration Amendment) Order. I have perused the parent file in Nairobi ELC 946 OF 2014: Centurion Holdings Limited v Kathumo Holdings Limited. The plaintiff sought the following orders against the Defendant: an order of specific performance, general damages for breach of contract, an order of disclosure, a refund, together with interest thereon at commercial rates of the deposit of Ksh 17,000,000/- to the defendant, costs of the suit and any other orders. Assessing the instruction fees based on the liquidated prayer in the plaint, the minimum instruction fees is Ksh 440,000/- assessed pursuant to paragraph 1(b) of Schedule 6 of the Order.

14. It is clear from the foregoing that of the subject matter of the suit were the two properties and the value of the two properties was ascertainable from the pleadings because it was expressly stated in paragraph 4 of the Plaint. It is also clear from the ruling of the taxing officer that even after she itemized the reliefs sought, she only picked on the alternative liquidated relief and proceeded to assess instruction fees based on that one alternative item as if the suit was all about one liquidated prayer. The suit sought specific performance of the sale contract whose subject matter were two properties valued at Ksh 85,000,000 and this figure was expressly captured in the pleadings. The taxing officer ought to have taken into account the value of the subject matter (Ksh 85,000,000) together with other prayers sought in the plaint and the statutory matters stipulated under the Remuneration Order. I am therefore persuaded that she failed to take these matters into account and proceeded on the wrong principles.

15. Had the taxing officer taken into account the value of the subject matter which was Ksh 85,000,000 as opposed to the sum of Ksh 17,000,000 on which she assessed instruction fees, the resultant instruction fee would have been much higher than the figure which the taxing officer arrived at. I am therefore convinced that the sum of Ksh 440,000 was arrived at in error and is inordinately low and would amount to gross injustice if it were to remain undisturbed.

16. For the above reasons, the Advocate's reference by way of chamber summons dated 13/3/2017 is allowed in terms of Prayers 1 and 2. Each party shall bear their own costs of the application.

The File shall be remitted back to the taxing officer to reconsider Item 1 of the bill of costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Kihara Advocate

Mr Etusa Advocate for the client

Ms Halima - Court Clerk