



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 225 OF 2016

KIMANI RICHU & ASSOCIATES ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

CENTURION HOLDINGS LIMITED.....CLIENT/RESPONDENT

R U L I N G

1. On 14/3/2017, M/s Kimani Richu & Associates Advocates (**the advocate**) brought a reference by way of chamber summons dated 13/3/2017 seeking an order setting aside the decision of the taxing officer delivered on 7/2/2017 in relation to the advocate's bill of costs dated 2/9/2016. The bill of costs relates to conveyance services rendered by the advocate in relation to an aborted sale contract involving two properties, Land Reference Number 12565/37 and Land Reference Number 12565/38.

2. The advocate seeks the following specific orders:

- a) That the decision of the taxing master delivered on 7th February 2017 in so far as the same relates to the reasoning and determination pertaining to the taxation of the bill of costs dated 2nd September 2016 be and is hereby set aside.**
- b) That the Honourable Court be pleased to refer the matter back for re-taxation of the bill of costs and with proper directions thereof.**
- c) That in the alternative to prayer 2 the Honorable Court exercises its inherent jurisdiction and be pleased to re-tax the bill of costs by increasing the amount payable to the Advocate under the Advocates (Remuneration) Order 2014 and/or make such other or further orders as regards the bill of costs in issue.**
- d) That the costs of this application be borne by the Respondent**

3. The application is premised upon the following grounds set out on the face of the application and in the supporting affidavit sworn by Kihara Ndiba on 13/3/2017: (i) the taxing officer exercised her discretion wrongly in taxing the bill of costs below what the respondent had submitted on, failing to consider that the subject matter was valued at Ksh 85,000,000 and failing to determine the adequate and appropriate instruction fees to be paid to the applicant pegged on the value of the subject matter; (ii) the taxing officer failed to lay a firm basis for assessment of instruction fees at Ksh 100,000 which sum is too low as instruction fee in the circumstances and represents an error of principle on part of the taxing officer and is not in accord with the applicable rules; (iii) the learned taxing officer erred in law and fact by stating that the applicant did not indicate the applicable schedule of the remuneration order on which the bill had been drawn and in assuming that the advocate had prepared the sale agreement yet the bill of costs clearly indicated that the advocate was the purchaser's advocate; (iv) the taxing officer erred in failing to consider the submissions filed by the advocate; (v) the taxing officer misdirected herself by taxing Item 1 under Schedule 5 of the Advocates (Remuneration)

(Amendment Order) whereas the applicant had submitted that the applicable schedule was Schedule 1 as the subject matter was a non-contentious matter involving sale and purchase of immovable property; (vi) the minimum instruction fee on the subject transaction whose consideration was Ksh 85,000,000 would have been Ksh 1,300,000 if the taxing officer had applied the applicable rate under Schedule 1 of the Advocates (Remuneration) (Amendment) Order 2014; (vii) the taxing officer failed to appreciate the value of the advocates' documents showing that the advocate was actively involved and gave skills and expertise which the client did not contest; (viii) the taxing officer erred in stating that the advocate did not complete the conveyance while on the face of the applicant's documents, it was clear that the advocate investigated the title, adjusted and approved the sale agreement to ensure that the interests of the client were taken care of, was actively involved, prepared and sent the transfer instruments to the vendor's advocates with a view to finalizing transfer of title and gave skills and expertise until the completion date of 10/6/2014 when the documentation to pass title was not completed; (ix) the taxing officer erred in law and fact by failing to consider the interest of the parties, the complexity of the matter, the prevailing economic conditions, professional time expended by the advocate on the matter and all other relevant circumstances of the cases; and (x) the advocate was entitled to full instructions fees calculable on the basis of the purchase price as soon as the agreement for sale was ready.

4. The client opposes the application through a replying affidavit sworn on 27/3/2017 by its counsel, James Singh Gitau. The client's case is that: (i) 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 she delivered her award; (ii) the taxing officer did not err in principle as alleged by the advocate; (iii) the material conveyance had aborted due to, *inter alia*, the advocate's negligence.
5. The application was canvassed through written submissions. In submissions dated 25/5/2017, the advocate argued that the taxation was based on a wrong principle because the assessment of instruction fee at Ksh 100,000 was unreasonable and disproportionate to the scope and extent of the work done by the advocate and amounts to an injustice. The advocate further contended that the taxing officer failed to take into account the value of the subject matter of the Bill which was Ksh 85,000,000. The advocate relied on the decision of Warsame J in **Kagwimi Kangethe & Company v A. A Kawir Transporters Limited (2014) eKLR** in which the court held that in assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject matter.
6. The advocate further submitted that the taxing officer at paragraph 2 of her ruling erroneously stated that the advocate had not indicated the schedule under which the bill was drawn yet the bill was clearly marked as having been brought "**In the Matter of the Advocates (Remuneration)(Amendment) Order 2014 (Schedule 1, 5 and 6 Thereof)**" and the nature of instructions given and services rendered were clearly outlined in Item 1 of the bill. It was further contended that submissions had been made before the taxing officer indicating that the bill related to non-contentious matter involving sale and purchase of immovable property and was to be assessed under Schedule 1 of the Remuneration Order.
7. The advocate relied on **Hayanga & Co. Advocates v Royal Garden Developers Limited Milimani Misc. Application No. 305 of 2004** and submitted that the fact that the transaction was not completed was not sufficient reason to deny the advocate full scale fees, and contended that the taxing officer ought to have examined the advocate's documents which indicated that the advocate had substantially concluded the task.
8. The advocate further submitted that in taxation under Schedule 1 of the 2014 Remuneration Order, scale fees on sales and purchases is to be calculated cumulatively on the basis of the consideration or value of the subject matter. The advocate submitted that based on the commutative approach, the instruction fee payable to the advocate based on the sale price sum of Ksh 85,000,000) is Kshs 1,300,000 plus VAT at 16% (Ksh 208,600), making a total of Kshs 1,508,000.
9. The advocate added that if the court were to find that the applicable Schedule to the bill of costs is Schedule V, the court should review instructions fees to Ksh 1,508,000 taking into account the true nature of the instructions given to the advocate by the client and the extent of services rendered in carrying out the instructions. The advocate urged the court to interfere with the taxing officer's discretion because she made grave errors of principles in her assessment of instruction fees.
10. In response, the client filed written submissions dated 13/6/2017. Counsel for the client submitted that a judge may not interfere with the taxing officer's exercise of discretion in taxation unless it is shown that either the decision was based on an error of principle or the sum awarded was manifestly excessive or low as to justify an inference that it was based on an error of principle. Counsel relied on **First American Bank of Kenya v Shah & Others**.
11. Counsel added that the work undertaken by the advocate in the material transaction was non-contentious and was governed by Paragraph 18 (f) of Part II of the Advocates (Remuneration) (Amendment) Order 2009 as amended by the Advocates (Remuneration) (Amendment) Order 2014. Counsel contended that, by dint of these provisions, the applicable Schedule is Part II of Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014.
12. Counsel contended that the duty undertaken by the advocate in the present matter was limited to conducting an official search at the lands registry and receiving and perusing the sale agreement from the vendor's advocate. He contended that the taxing officer properly found that the advocate only prepared the contract and did not complete the conveyance. Counsel contended that the taxing officer correctly applied Schedule V of the Advocates Remuneration Order. Counsel urged the court to dismiss the reference.
13. I have considered the substance of the reference, the rival affidavits and the parties' rival submissions. I have also considered the principle upon which this court exercises jurisdiction to interfere with the taxing officer's exercise of discretion in the taxation of bills.
14. Two issues emerge for determination in this reference: (i) whether the taxing officer applied the wrong schedule and wrong principles in assessing the bill of costs; and (ii) whether the instruction fee of Kshs100,000 assessed by the taxing officer in an unfinalized conveyance of two parcels of land valued at Kshs 85,000,000 was manifestly and/or grossly low in the circumstances of the case as to amount to an injustice.
15. The present reference emanates from instructions given to the advocate to act for the client who was a purchaser in a contract involving LR No 12565/37 and LR No 12565/38. The purchase price of the two properties is captured in the subsequent agreement for sale at Kshs 85,000,000. From the material presented to the taxing officer, the agreement for sale was executed and a deposit of Kshs 17,000,000 was paid. However, the vendor did not avail the completion documents. Consequently the conveyance aborted. Subsequently, on 2/9/2016 the advocate brought a bill of costs in which he sought instruction fees of Kshs 1,300,000 based on the purchase price of Kshs 85,000,000.
16. In a ruling dated and delivered on 2/9/2016, the taxing officer; taxed off Kshs 1,200,000 and assessed the advocate's instruction fee at Kshs 100,000. She stated thus:-

Before me is a bill of costs dated 2nd September 2016. It relates to non-contentious business. The Applicant carried out a conveyancing transaction in respect to the sale and purchase of L.R. Numbers 12565/37 and 12565/38 measuring approximately 0.1890 and 0.1980 hectares or thereabouts. The purchase price for these properties was K.Shs. 85,000,000/-. The parties to the transaction were Kathumo Holdings Limited as Seller and Centurion Holdings Limited as the purchaser.

The parties executed an agreement for sale over the said properties. The transaction was however not completed as Kathumo Holdings Limited were unable to complete the sale.

I note that the Applicant did not indicate the schedule that the bill has been drawn under. Rule 20 of the Advocates Remuneration Order provides that scale charges shall include all work ordinarily incidental to a transaction, and in the case of a conveyance, transfer or mortgage shall include taking of instructions to prepare the necessary deed or document, investigation of title, report on the title to the client, preparation or approval or adjustment of the deed or document, settlement of the transaction if in the town of the advocates practice, obtaining by correspondence any necessary consent or clearance certificate, registration of the deed and correspondence between an advocate and his client.

In the case of *Chokaa and Company Advocates –v- The Deposit Protection Fund (2007)*, the Court stated at page 3;

“I have looked at both schedules 1 and V of the Advocates (Remuneration) Order. The fee payable to a vendor’s advocate under Schedule 1, First Scale, paragraph 1 is:-

For preparing and completing contract, answering any preliminary enquiries, deducing title (including any necessary abstraction to a freehold or leasehold property, answering any requisitions on title, perusing and completing conveyancing or assignment)

In the present case, the Applicant only prepared the contract. He did not complete it; nor does he appear to have answered any preliminary enquiries or deduce title. He did not peruse and complete any conveyance. So, he was not entitled to any fee under paragraph 1 of the First Scale of Schedule 1, or under any of the other scales of that schedule. Schedule 1 simply does not provide for a fee for preparation only (without more) of the sale agreement.

Under what Schedule, then, should the Applicant’s bill of costs have been taxed? Schedule V provides for fees in respect of business the remuneration for which is not otherwise prescribed, or which has been the subject of an election under paragraph 22 of the Advocates (Remuneration) Order. There was no such election in this matter. I also find that the fee for drawing only a sale agreement (without more) is not otherwise prescribed. Taxation of such fee under Schedule V would therefore be appropriate.” (Emphasis mine)

The Applicant provided a copy of the agreement for sale dated 10th April 2014 signed by Kathumo Holdings Limited and Centurion Holdings Limited, duly executed by the Respondent and witnessed by the Applicant. The Applicant also provided a bundle of correspondence. Consequently, guided by the provisions of the law and the authority cited above, the present bill of costs falls for taxation under Schedule V of the Advocates Remuneration Order.

On instructions, the schedule provides such fee having regard to the care and labour required the number and length of the papers to be perused, the nature or importance of the matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case as may be fair and reasonable. I am of the considered opinion that an instruction fee of K.Shs. 100,000/- will suffice in the present case. K.Shs. 1,200,000/- is taxed off the instruction fees.

17. The taxing officer contended that because the conveyance was not completed, the advocate’s instruction fees would not be assessed under Schedule 1 of the Remuneration Order. She then proceeded to tax the bill under Schedule V of the 2014 Remuneration Order and assessed instruction fees at Kshs100,000. The first question to be determined in this appeal is, was the taxing officer right in taxing conveyance work under Schedule V?

18. The Advocate Remuneration Order is a remuneration code which stipulates how an advocate is to be remunerated once the advocate is retained to render professional services. It contains a costing of the services ordinarily rendered by advocates. Because it is a code which specifies what a particular service would cost, it has been split into various schedules, each schedule containing the costing of a particular category of services. The First Part of Schedule 1 relates to services rendered by an advocate in relation to sales and purchases of land. The Second Part of Schedule 1 relates to services rendered by an advocate in relation to debentures, mortgages and charges. The third part of Schedule 1 relates to services rendered by an advocate in relation to negotiation of sale of property by private treaty or loan secured by mortgage. Suffice to say, that the various rendered in the profession have been carefully categorized and costed taking into account the actual professional labour that those services entail on the part of an advocate. In my view, and for the above reasons, if a conveyance service were to be rendered by an advocate and subsequently the advocate’s fee is taxed under a schedule that does not cover conveyancing services, there is a real danger of the taxing officer arriving at a figure that is not in tandem with the services rendered by the advocate. This figure could either be inordinately high or inordinately low. In my view, whether a conveyance was finalized or not, the taxing officer should be guided by the relevant schedule which covers those services and which contains the costing of the particular services. This is because, a rational assessment ought to have a baseline. The baseline in conveyance fees is the instruction fees stipulated for a completed conveyance. It is this baseline which the taxing officer would use to come up with a proportionate remuneration for an incomplete conveyance brief, properly taking into account the actual services rendered by the advocate up to the point when the conveyance aborted. Use of any other baseline or failure to be guided by the correct schedule would constitute a wrong principle and would inevitably give wrong results.

19. In the present reference, the taxing officer applied Schedule V in assessing fees in respect of services relating to sale and purchase of land. Her view was that an incomplete sale/purchase of land is not provided for under Schedule 1. That in my view was an error. The taxing officer should have taxed the bill based on Schedule 1 which provides the costing of land sale and purchase services. While applying Schedule 1 she would be required to take into account the extent of the advocate’s services and what remained to be done to complete the conveyance. That way she would have arrived at a rational figure.

20. For the above reasons, I am persuaded that the instruction fees of Kshs100,000 which the taxing officer arrived at in relation to the aborted conveyance of property worthy Kshs 85,000,000 was manifestly low and does not accord with the services rendered by the advocate

as per the materials placed before the taxing officer.

21. Consequently, I will allow the chamber summons dated 13/3/17 and remit the bill of costs herein to the taxing officer for fresh taxation under Schedule 1 of the Advocates (Remuneration) (Amendment) Order 2014.

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 Etuso Advocate for the Client

Ms Halima - Court Clerk