



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO 241 OF 2016

KIMANI RICHU & ASSOCIATES ADVOCATES.....APPLICANT

=VERSUS=

MATHARA HOLDINGS LIMITED.....RESPONDENT

RULING

1. On 28/3/2017, Hon S Mwayuli, Deputy Registrar (the **taxing officer**) rendered a ruling on the advocate/client bill of costs dated 9/9/2016. The bill was drawn at Kshs 50,872,660 by M/s Kimani Richu & Associates Advocates (the **advocate**) against M/s Mathara Holdings Limited (the **client**). The taxing officer taxed the bill at Kshs 24,629,497 in favour of the advocate. Aggrieved by the award, the client, through M/s LJA Associates brought a reference by way of chamber summons dated 13/4/2017 seeking a review of the award in respect of Items 1, 2, 5 and 21 of the bill. Similarly, consequent to the taxation, the advocate through M/s Kihara Ndiba & Co. Advocates, brought a notice of motion dated 26/9/2017 seeking entry of judgment for the taxed sum of Kshs 24,629,497. The advocate also sought interest at 14% p.a from 19/10/2016, formal decree and costs of the cause. The two applications are the subject of this ruling.

2. I will first make a determination on the client's reference because the answer to the question as to whether or not to grant the orders sought by the advocate will depend on the court's findings on the client's reference.

3. The impugned limbs of the award relate to items 1, 2, 5 and 21 of the bill. The grounds for which the client seeks a review of the award in respect of the four items are that: (i) the taxing officer erred in law and in fact in the manner she assessed items 1, 2, 5 and 21; (ii) the taxing officer did not consider and apply provisions of the Law of Contract Act and the Evidence Act; (iii) the taxing officer used the wrong principles of law in assessing fees due to the advocate; and (iv) the costs were excessive.

4. The bill of costs presented by the advocate was supported by an affidavit sworn on 21/9/2016 by William Kimani Richu advocate. He deposed that on 24/6/2014, he was called for a meeting by Mr James Boro Karugu, Managing Director of the client, at the client's offices on Kiamara Farm along Kiambu-Kanunga-Nazareth Hospital Road. Mr Karugu informed him that he wanted to sell three of his Farms namely LR No 86/3 comprising of 305 acres; LR No 85/28 (Original Nos 85/11-13 and 26) comprising of 10 acres; and Title Number Kiambaa/Kanunga/972 comprising of 1(one) acre. Mr Karugu informed him that he wanted M/s Kimani Richu & Associates Advocates to act for him and for Mathara Holdings Ltd in the intended sale whose reserve price was Kshs 39,000,000 per acre. He contended that Mr Karugu authorized the advocate to appoint estate agents to market the properties. He added that Mr Karugu instructed the advocate to carry out due diligence on the said properties in readiness for the intended sale. Copies of the titles were availed to the advocate for that purpose.

5. Mr Richu further deposed that in the course of due diligence, the Land Registry informed him that there were no records relating to one of the titles. The advocate then initiated the process of procuring a provisional title and reconstruction of the missing file in the Lands Registry. He added that following Mr Karugu's indisposition, management of the client company changed and he was told to hand over the brief to M/s Kaplan & Stratton Advocates. The directors of the client company did not pay the advocate their fees for the services rendered hence the bringing of the bill.

6. Annexed to the affidavit in support of the bill were copies of the following documents: (i) letter dated 6/8/2014 from Kimani Richu & Associates to Mr John Gichuhi Kahenya appointing the latter to market the properties; (ii) email dated 2/8/2014 from the client to the deponent, forwarding copies of the titles; (iii) titles to the suit properties; (iv) official searches; (v) gazette notice relating to reconstruction of the land register in respect of LR No 86/3; and (v) letter withdrawing instructions.

7. During taxation, the client's position regarding item 1 of the bill was that the advocate was never instructed and neither did the client ever enter into any sale agreements to sell the properties. The client added that a land sale contract was subject to certain formal requirements under Section 3(3) of the Law of Contract Act and there was no such contract to support the claim for instruction fees. Secondly, the client contended that there was no evidence of where the advocate got the value of the suit properties from.

8. The client's case regarding item 2 was that the claim of Kshs 25,056,000 being costs of procuring the reconstruction of the lost file at the lands office in respect of LR No. 86/3 was excessive and submitted that the reasonable fee would be Kshs 7,000 chargeable under Schedule 5

Part II rule 4 of the Remuneration Order.

9. On item 5, the client contended that the claim did not accrue because the task undertaken was not anchored on any formal instructions by the client. Lastly on item 21, the client contended that the claim ought to have been struck off because the alleged meetings were not captured in minutes and the advocate had not demonstrated that the meetings took place.

10. In her ruling dated 28/3/2017, the taxing officer set out the following as the basis upon which she proceeded to tax the bill:-

The Advocate Remuneration Amendment Order applicable is that of 2014 because the ELC Miscellaneous Cause is for the year 2016 but most importantly the alleged conveyancing transactions and communications thereto occurred in the year 2014 and beyond as per the affidavit in support of the bill of costs that was not challenged. (see attached communication to the supporting affidavit dated 2/8/2014 'WKR2' and 12/08/2015 'WKR5' respectively amongst others).

It is not in dispute that the client (Respondent) and the advocate (Applicant) have had a relationship as reflected in the supporting affidavit sworn by William Kimani Richu as well as reflected in the introductory paragraph of the Client/Respondent's submissions whereupon he expressly admits that: -

The Client and the Advocate have had a close working relationship which was terminated in September 2016 when the Client discovered that the Advocate had received Kshs.17Million and deliberately refused to inform the Client of the payment.

The taxing officer will refrain from addressing the issue of the alleged acquisition of kshs.17 million as she believes that if such monies were acquired in non-legitimate ways then the client has a variety of legal options to recover the same. The point of interest for the taxing officer is the fact that the client admits that their existed a working relationship between the client and the advocate.

11. Having outlined the above as the basis upon which she would tax the bill, the taxing officer proceeded thus:

It's the taxing officer's considered opinion that the pleadings herein being the Advocate-Client bill of costs together with the supporting affidavit with the annexures therein categorically establish the value of the subject matter as being Kenya Shillings 12,129,000,000/= (Twelve Billion One Hundred and Twenty Nine Million).

Having established the value of the subject matter, the important issue for determination then is whether or not the instruction fees is drawn to scale by the Applicant.

Since the events giving rise to the present Advocate-Client Bill of Costs arose after the date of 11/04/2014 when the Advocate Remuneration Order of 2014 was already gazetted, then the Advocate Remuneration Order applicable as earlier indicated in this ruling will be that of 2014.

What schedule then applies to the present bill of costs?

Schedule 1 of the 2014 Advocates Remuneration Order is the applicable Schedule and therefore the instructions fees will be calculated as follows: -

Kshs.12,129,000,000/=

1st 5,000,000/- = 2% x 5,000,000/-

= 100,000/-

Fees for 5,000,000/- to 100,000,000/-

=100,000+(1.5% of 5,000,000) 150,000/-

= 850,000/-

Fees between 100,000,001 to 250M

= 850,000 + (1.25% of 150M)

= 2,725,000/-

Fees for 250M to 1 Billion

= 2,725,000 + (1% of 750M)

= 10,225,000/-

Fees for 12,129,000,000/= will be

= 10,225,000 + (0.1% x 11,129,000)

=10,225,000 + 11,000,000

Total 21,225,000/-

Item No. 2 talks about instruction fees. It is the taxing officer considered opinion that instruction fees can only be chargeable once as was well laid in MISC. APPLICATION 3 of 2013 DESAI, SARUIA & PALLAN ADVOCATES – VS – JAMBO BISCUITS (KENYA) LTD [2014] Eklr

“Instruction fees are given in a suit to defend it or prosecute it to the end. It is a start alone item that should be billed as a single item” Kimondo, J.”

The taxing officer following the direction of the Superior Court will disregard item No. 2 completely as that amounts to double instruction fees. On item No. 3, the taxing officer will rely on the proposal by the Respondent not to object to the said item and hence the same will not be interfered with (see Appendix 1 of the Respondent’s submissions) thus item 3 is taxed as drawn.

All the items 4 to 12 save for item 9, the said items are not provided for under Schedule 1 of the Advocates Remuneration Order 2014 and as a consequence all the said items 4 to 12 save for item No. 9 are completely disregarded.

Item No. 9 reflects the filing fees of the bill of costs at hand and from the receipt on record the said bill of costs was filed at Kshs.325 and therefore it means kshs.675 is taxed off.

On VAT, value added tax is chargeable under the provisions of the Value Added Tax Act and advocates are obliged to charge 16% tax on their professional fees earned from the client not for purposes of enriching themselves but solely for the purposes of remitting the said amounts to Kenya Revenue Authority (KRA). In A.M. KIMANI & CO. ADVOCATES – VS – KENINDIA ASSURANCE CO. LTD Koome, J held that *“under the VAT Act an advocate is entitled to charge VAT on instruction fees and also disbursements”*.

As a consequence therefore VAT in the bill of costs will be calculated as follows:

16% x (21,225,000 + 7,000 + 325)

16% of 21,232,325 = Kshs.3,397,172/-

In conclusion therefore a total of Kshs.26,243,163 has been taxed off from the bill of costs at hand.

The bill of costs dated 09/09/2016 is taxed at Kshs.24,629,497/=

All inclusive.

12. It is clear from the above verbatim excerpts from the decision of the taxing officer that Item No 2 (Kshs 25,056,000) was wholly disregarded and taxed off. Similarly, item Nos 5 was disregarded and taxed off by the taxing officer. It is not clear why the client has included items 2 and 5 among the contested items yet the two items were rejected and taxed off by the taxing officer. Suffice to state that, in view of the fact that there was no award in respect of items 2 and 5, this ruling will only focus on items 1 and 21 of the bill.

13. Item 1 relates to instruction fees. The client’s case is that the advocate was never instructed to act and neither did the client ever enter into any sale agreement to sell the suit property. The client contends that the taxing officer did not properly address the issue of whether or not there existed a retainer between the advocate and the client. The client further submitted that there was no sale of any property by the client.

14. The client further submitted that the taxing officer wrongly applied Schedule 1 because Schedule 1 is only applicable where the subject matter involves sales of land, debentures, mortgages and charges. Counsel contended that the applicable schedule was Schedule 5 Part II of the Advocates Remuneration Order 2014.

15. It was further submitted by the client that the figure of Kshs 12,129,000 which the taxing officer took into account as the value of the subject matter was without basis as there was no evidence to support that figure.

16. On his part, the advocate contended that the brief which the advocate was given fell within the scope of business that attracted the charges specified in Schedule 1. It was further submitted that it was clear from the ruling of the taxing officer that she relied on pleadings in assessing instruction fees and by so doing she properly discharged her mandate. It was argued that instruction fees related to non-contentious matters involving sale and purchase of immovable property.

Issues and Determination

17. I have considered the grounds set out in the reference, the parties' rival submissions, the ruling of the taxing officer giving rise to this reference, and the materials placed before the taxing officer during assessment. I have also considered the law and the applicable guiding principles. The dispute in this reference has narrowed down to items 1 and 21 of the bill of costs. This is because, whereas the reference challenges four (4) items, (items 1, 2, 5 and 21), it has emerged that two of the four items (items 2 and 5) were disallowed by the taxing officer and should not have formed part of the basis of the present reference.

18. It is now a settled principle of law that on a reference to a judge, the judge will not interfere with the exercise of discretion by the taxing officer unless it is demonstrated that the taxing officer erred in principle in assessing the costs or the sum assessed is manifestly excessive or manifestly low as to amount to an injustice (see **Joreth Limited v Kigano and Associates (2002) EA 92**; and **Kipkorir, Titoo and Kiara Advocates v Deposit Protection Fund Board (2005) eKLR 528**.)

19. Counsel for the client urged the court to find that there was no retainer of the advocate by the client. I will not accede to that plea for two key reasons. Firstly, the reference before me does not challenge the taxing officer's finding on the issue of retainer. It only challenges the taxing officer's award in relation to four items. Secondly, there is uncontroverted evidence that there was a client/advocate relationship between the parties. What is contested is the existence of any business between the client and the advocate falling within the scope of Schedule 1 of the Advocates Remuneration Order.

20. The taxing officer in the present reference proceeded from the premise that the bill before her related to a sale transaction involving properties whose total value was Kshs 12,129,000,000. The client contends that there was no sale of any property and there was no basis for the value of Kshs 12,129,000,000.

21. I have examined the documents presented to the taxing officer as annexures to the affidavit of Mr Richu. There was no single document suggesting that a sale transaction was ever entered into between the client and any buyer. Not even a letter of offer was presented as evidence. Similarly, there was no evidence of any instructions conveyed to the advocate retaining the advocate to handle a particular sale. In my view, without evidence of a sale transaction, the taxing officer had no basis for treating the services rendered by the advocate as business falling within the scope of Schedule 1 and attracting fees under Schedule 1. In my view, the services rendered by the advocate were not specifically provided for and ought to have been assessed under Part II Schedule 5 of the Remuneration Order.

22. The taxing officer similarly erroneously proceeded from the premise that the value of the land subject matter of the sale was Kshs 12,129,000,000. She stated thus:

It is the taxing officer's considered opinion that the pleadings herein being the advocate-client bill of costs together with the supporting affidavit with the annexures therein categorically establish the value of the subject matter as being Kenya shillings 12,129,000,000 (Twelve billion one hundred and twenty nine million). Having established the value of the subject matter, the important issue for determination then is whether or not the instruction fees is drawn to scale by the applicant.

23. It is apparent the taxing officer made a number of serious errors of principle on this aspect. First, she treated the bill of costs and the affidavit in support of the bill as pleadings. In my view, the pleadings contemplated by the Rules and the Remuneration Order are pleadings in relation to suits and include complaints, petitions, originating summons etc. To treat the bill of costs itself as a pleading from which to infer the value of the subject matter was, in my view, an error.

24. I now turn to Item 21. This item relates to alleged meetings which the advocate attended to discuss various matters arising in the transaction with the client. In my view, this item was subject to proof and ought to have been assessed under Part II of Schedule 5 and not under Schedule 1.

25. In light of the court's finding that the services which the advocate rendered up to the time the brief was terminated did not fall within the services covered by Schedule 1 of the Advocates Remuneration Order, it follows that the entire assessment proceeded on wrong principles. In my view, to uphold part of the award while remitting only the two impugned items for fresh assessment may prejudice either party to the bill. Consequently, I hereby set aside the award of the taxing officer and direct that the entire bill be remitted to the taxing officer for taxation under the correct Schedule, that is Part II of Schedule 5 of the Advocates Remuneration Order 2014.

26. In view of the above findings and decision, the advocate's notice of motion dated 26/9/2017 stands declined with no order as to costs of the notice of motion.

27. Lastly, taking into account the fact that the errors leading to the remittance of the bill of costs back to the taxing officer are not solely attributable to the advocate, I direct that each party bears own costs of the reference.

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

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B M EBOSO

JUDGE

In the presence of:-

Mr. Kihara Advocate for the Advocate

Mr. Kiragu Advocate for the Client

Ms Halima Abdi - Court clerk