



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC APPLICATION NO. 138 OF 2015

IN THE MATTER OF THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

IN THE MATTER OF TAXATION OF ADVOCATE CLIENT BILL OF COSTS

BETWEEN

OCHIENG' OGUTU & CO ADVOCATES.....ADVOCATE

VERSUS

PHILIP OMONDI AMING'O.....CLIENT

RULING

1. On 30/3/2016, the taxing officer of this court, S Mwayuli, taxed the advocate's bill of costs dated 11/5/2015 and amended on 9/11/2015 at Kshs 197,539.36. Dissatisfied with the assessment, the client, Philip Omondi Aming'o, brought this reference through a chamber summons dated 6/6/2016 challenging the award in relation to Items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, and 24.

2. The reference was premised on the following verbatim grounds:

- a) That the honourable taxing master erred in principle and law in enforcing an alleged agreement on fees of Kshs 205,000/- when no such agreement was produced at all in evidence.*
- b) That the honourable taxing master erred in principle and law in arriving at full instruction fees of Kshs 205,000/- which sum was excessive in the circumstances, since the advocate had only partially discharged his instructions/mandate after only perusing, reviewing, completing and witnessing the sale agreement. His instructions were terminated by the client (who was dissatisfied with his service) long before completion documents were called, transfer prepared, engrossed, completed and registered, issuance of title and exchange of consideration. The excessive sum constitutes an unjust enrichment to the advocate and defeats the established principle of fairly reimbursing an advocate reasonable compensation for professional work done.*
- c) That the honourable taxing master erred in law and principle in allowing excessive sums for drawing, receiving and perusing letters exchanged between the advocate and the client, and a disclosed sum of Kshs 2,100/- for attendance of taxation contrary to the scales provided in the advocates (Remuneration) Amendment) Order 2014 and thereby constituting an unjust enrichment.*
- d) That the honourable taxing master erred in law and principle in allowing a sum of Kshs 1,000/- for service of the Bill of Costs upon the Respondent when the Notice of Taxation and the Bill of Costs were actually served upon the client by G4s Courier Services whose actual costs was not produced before the taxing master.*
- e) That the honourable taxing master erred in law and principle in wrongly invoking Article 159(d) of the Constitution of Kenya (2010) and dismissing the client's merited Notice of Preliminary Objection dated 22nd June 2015 (and filed in court on 25th June 2015) despite the Bill of Costs being frivolous vexatious, grossly incompetent, fatally defective and constituting a flagrant abuse of the court process for contravening the mandatory Rule 69(1) (a), (b) and (3) of the Advocates (Remuneration) (Amendment) Order 2009. Of importance, no evidence of any substantial injustice or prejudice being, suffered by the advocate was led before the taxing master to justify the decision to invoke Article 159(d) of the Constitution of Kenya (2010) which was raised by the advocate wrongly invoked by the taxing master in a vacuum.*
- f) That the honourable taxing master erred in principle and law in failing to properly exercise her judicial discretion by awarding thrown away costs for the merited aforesaid notice of preliminary objection, when invoking Article 159(d) of the Constitution of Kenya (2010) and in fairly balancing the competing rights of the parties hereto.*

g) That the honourable taxing master erred in principle and law in allowing amendments to the Bill of Costs wrongly and unprocedurally effected, without the leave of the court foremost obtained, and without at all according the Client/Objector an opportunity to be heard on the matter contrary to the fundamental rules of natural justice enshrined in the Constitution of Kenya (2010). The Client/Objector had validly objected to the amendments through Grounds of Opposition dated and filed in court on 15th January 2016 which the Honourable Taxing Master completely overlooked and ignored.

h) That the taxing master fell in grave error when she completely ignored and/failed to accord the Client/Objector's replying affidavit sworn on 7th September 2015 (and filed in court on the following day), Grounds of Opposition dated and (filed in court on 15th January 2016), Written Submissions dated 22nd June 2015 (and filed in court on 25th June 2015) and Reply to the Applicant's submissions dated 9th November 2015 (ad filed in court on 13th November 2015) the serious attention and the weight it deserved.

3. The reference was supported by an affidavit sworn by the client on 6/6/2016. It was canvassed through written submissions dated 14/5/2018. The advocate opposed the reference through a replying affidavit sworn by Mr Ochieng Ogutu on 22/1/2018 and written submissions of even date.

4. In his written submissions, the client reiterated the grounds set out in the reference. He also relied on the submissions made before the taxing officer. Secondly, he contended that the taxing officer had failed to provide any reasons for the taxation. Thirdly, he argued that there was no agreement for fees produced before the taxing master to warrant the award in respect of Item 1. Further, he argued that the material conveyance was not completed and therefore Schedule 1 was inapplicable, contending that the taxing officer should have applied Schedule 5. He urged the court to assess instruction fees at Kshs 30,000/-. Further he urged the court to set aside the taxing officer's assessment in respect of drawing, receiving and perusing letters and service of the bill of costs. The client further faulted the taxing officer for relying on Article 159(d) of the Constitution to allow amendments to the original bill of costs.

5. In response, the advocate submitted that the taxing officer did not rely on any agreement when taxing the bill of costs, contending that the taxing officer relied on the purchase price of the property. The advocate further argued that instruction fees is charged at the time of receiving instructions and it matters not whether or not the instructions are withdrawn before completion of the work.

6. The advocate further submitted that all the other items were charged to scale and the taxing officer was right in allowing them as drawn. Further, the advocate submitted that the taxing officer properly exercised her discretion in relying on Article 159 of the Constitution to dismiss the preliminary objection, contending that the taxing officer had powers to allow or reject amendments. The advocate relied on the decision in **Republic v Ministry of Agriculture & 2 others, Exparte Muchiri W'njuguna & 6 others eKLR**. He urged the court to dismiss the reference.

7. I have considered the grounds set out in the reference together with the supporting affidavit and the client's written submissions. I have also considered the advocate's replying affidavit and written submissions. Further, I have gone through the entire record and examined the materials presented before the taxing officer, including the parties' respective submissions during taxation.

8. 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.....

9. In the present reference, the client has challenged the taxing officer's assessment in respect of Items 1 to 20, 23 and 24. I have looked at the client's written submissions before the taxing officer. During taxation, the client only challenged Item 1 (one) which related to instruction fees. He did not challenge Items 2 to 20, 23 and 24. He is now challenging those items through this reference. In my view, the purpose of an itemized bill of costs is to give the respondent the opportunity to raise objection to any particular item before the taxing officer taxes the items. Objection against any item in the bill of costs ought to be raised during taxation. To allow certain items to be assessed as uncontested items and subsequently challenge the taxing officer's award in respect of the uncontested items is untenable. If that were to be

allowed, there will be no finality in disputes relating to taxation of bills of costs. Consequently, I reject the client's challenge against items 2 to 20, 23 and 24 of the bill of costs.

10. The first key issue raised in this reference relates to the taxing officer's award in respect of Item 1. The client's position is that the award of Kshs 205,000 as instruction fees was without basis and did not take into account the fact that the conveyance was not completed. Further, he contends that the taxing officer should have applied Schedule 5. The advocate's position is that the figure of Kshs 205,000 was based on the purchase price of the property subject matter of the conveyance which was Kshs 8,500,000.

11. The professional work giving rise to the bill of costs in the present reference related to sale and purchase of land (house) in Baraka Estate, Embakasi. The client was a purchaser and he retained the advocate to act for him in the transaction. The sale agreement was dated 9/10/2014 and the purchase price was Kshs 8,500,000. The Schedule applicable to sales and purchases of land is Schedule 1 of the Advocates Remuneration (Amendment) Order 2014. In my view, the contention that the taxing officer should have applied Schedule 5 is erroneous.

12. In the present reference, the fees payable on the first Kshs 5,000,000 would be 2 (two) percent of the purchase price which translates to Kshs 100,000. The fees payable on the sum over and above Kshs 5,000,000 (which sum is Kshs 3,500,000) would be 1.5 percent which translates to Kshs 52,500. This makes a total of Kshs 152,500 before reckoning VAT at 16%.

13. Item 1 in the amended bill of costs bore two conflicting figures, namely Kshs 170,000 and Kshs 205,000. It is not clear which of the two figures the taxing officer applied. For this reasons, I will interfere with the taxing officer's taxation in respect of Item 1. I will however not remit the bill back to the taxing officer. I will instead review the assessment in respect of Item 1 to Kshs 152,500 before reckoning VAT at 16 percent.

14. Because Item 1 was the only item that was contested during taxation, the other items remain as taxed. The bill adds up to Kshs 159,895 before reckoning VAT at 16 percent. When VAT is reckoned, the figure comes to Kshs 185,475.20. When the sum of Kshs 50,000 which was paid by the client is reckoned, the net sum payable to the advocate comes to Kshs 135,479.20.

15. Lastly, the taxing officer was faulted for allowing an amendment to the bill of costs. It was contended that she should have rejected the bill of costs altogether. In my view, the taxing officer has powers under Rule 71 to allow an amendment to a bill of costs after it has been lodged. She therefore acted within the law in allowing the amendment.

16. In light of the above findings, the reference herein succeeds to the extent that the taxation in respect of Item 1 of the bill of costs is set aside and is substituted with a figure of Kshs 152,500. The total award relating to item 1 after reckoning VAT at 16 percent is Kshs 185,475.20. The overall net award after reckoning the unconstested deposit of Kshs 50,000 already paid to the advocate is therefore reviewed to Kshs 135,379.20. This is the sum which the client is liable to pay the advocate.

17. I have taken the liberty to finalize the contest regarding Item 1 because it would not make sense to remit that one item to the taxing officer. I have taken into account the fact that the bill of costs was filed in 2015. It will not be in the interest of justice to remit that one item to the taxing officer three years down the line, with the possibility of a subsequent cycle of contestation.

18. Each party shall bear own costs of this reference.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY

OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:

Mr Nganga holding brief for Mr Ogutu Advocate

Mr Ondiwa Advocate for the Client

June Nafula - Court Clerk