



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**MISC.CAUSE NO. 182 OF 2015**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 AND IN THE MATTER OF  
TAXATION BETWEEN THE ADVOCATES AND CLIENT**

**AND**

**THE MATTER OF SALE AND PURCHASE OF 1875 SHARES IN NAIROBI THEATRES  
LIMITED**

**MWAI & COMPANY ADVOCATES....ADVOCATES/RESPONDENT**

**AND**

**RICHARD WANGONDU MAKANGA.....CLIENT/APPLICANT**

**RULING**

1. This is a Ruling in respect of a chamber summons dated 10<sup>th</sup> October 2016, brought by Richard Wangondu Makanga the client/applicant herein. The Applicant had instructed the firm of Messers Mwai & Co. Advocates the Advocate/Respondent to purchase 1875 Shares in Nairobi Theatres Limited. Nairobi Theatres Limited was the owner of a property known as Embassy Cinema erected on three pieces of land known as LR Nos.209/525/38,209/525/39 and 209/525/40. The agreed purchase price was Kshs.180,000,000/=. The Applicant made a deposit of Kshs.24,000,000/ but the transaction was not completed as the same was rescinded and the deposit refunded.
2. The Respondent demanded for their fees which the applicant declined to pay forcing the Respondent to file a bill of costs which was duly taxed at Kshs.2,610,000/= inclusive of VAT. The Applicant was aggrieved with the taxing officer's decision to base the taxed amount on item No.1 on Schedule I of the Advocates Remuneration Order of 2009. The Applicant then filed a reference to this court seeking setting aside of the taxing officer's taxation on item No.1 of the bill of costs including VAT thereof.
3. The Applicant contends that as the transaction was not completed, the bill on item No. 1 should have been assessed based on schedule V of the Advocates Remuneration Order of 2009.
4. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 29<sup>th</sup> March 2017 in which the Advocate/Respondent contends that the Applicant's reference to the court is based on mis-interpretation of the applicable law and that he earned his fees on instruction and that schedule V of the Advocates Remuneration Order of 2009 is not applicable in the present case.

5. I have considered the applicant's application as well as the opposition thereto by the Advocate/Respondent. I have also considered the submissions by the parties. The only issue for determination in this reference is whether the taxing officer applied the correct schedule in determining the instruction fee in item No. 1 of the bill. I have gone through the submissions in support of the bill before the taxing officer as well as the submissions in opposition to the same. I have also read the Ruling of the taxing officer which contains her reasons for deciding to tax the bill under Schedule 1 of the Advocates Remuneration Order of 2009.

6. There is no contention that the transaction was not completed. The deposit of Kshs.24,000,000/= was refunded . The bill before the taxing officer had 37 items. The taxing officer rejected items Nos. 2 to 37 on the ground that there was no evidence that the Advocate/ Respondent had made an election under paragraph 22(1) of the Advocates Remuneration Order 2009 for her to consider the items under schedule V of the 2009 Remuneration Order .Despite having arrived at this finding, she proceeded to assess instruction fees based on schedule 1 of the Advocates Remuneration Order 2009 arguing that fees is earned on instruction and does not depend on the outcome of the transaction. This is where the taxing officer erred because she failed to address herself to paragraph 18 (a) and (f) which should not be read in isolation.

7. Paragraph 18 (f) provides as follows:-

***“In respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed, and in respect of other deeds or documents, including settlements deeds of gift inter vivos, assents and instruments vesting property in new trustees, and all other business of a non-contentious nature, the remuneration for which is not herein provided, the remuneration is to be that prescribed in schedule V” emphasis added.***

8. The Advocates Remuneration Order has made provision for business which is not completed. There is no contention that the transaction was not completed as the same was rescinded and deposit made refunded. The correct schedule which was to be applied was schedule V. I therefore find that the taxing officer was wrong to tax item No. 1 based on Schedule 1 of the Advocates Remuneration Order of 2009. I therefore set aside the taxing officer's ruling as relates to item No 1 and direct that the bill be referred back for fresh taxation in accordance with part II of Schedule V before a different taxing officer. The applicant shall have costs of this application.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **19th** day of **September, 2017**.

**E. O. OBAGA**

**JUDGE**

In the presence of;-

M/s Njuguna for M/s Maina for applicant

Court Assistant: Hilda

**E. O. OBAGA**

**JUDGE**