



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 252 OF 2015

IN THE MATTE R OF : THE ADVCOATES ACT CAP 16 LAWS OF KENYA

IN THE MATTER OF : TAXATION OF COSTS BETWEEN CLIENT & ADVOCATE

BETWEEN

ODERA OBAR & CO.ADVCOATES.....APPLICANT

=VERSUS=

HELLEN ODIDO.....RESPONDENT

BEING THE COSTS ARISING OUT OF ARBITRATION

BETWEEN

HELLEN ODIDO.....CLAIMANT

=VERSUS=

ANNE MUTISO.....RESPONDENT

RULING

1. This is a Ruling in respect of a reference under Rule 11(2) of the Advocates Remuneration Order arising from the decision of the taxing officer delivered on 24th January 2017. The applicant Messers Odera Obar & Co. Advocates are seeking orders setting aside the decision of the taxing officer and remitting of the bill of costs dated 21st September 2015 to a different taxing officer for fresh taxation in accordance with directions of this court.

2. The applicant's objection is based on the following grounds:-

a. That in arriving at the quantum of fees allowed for instruction fees, the taxing officer erred in principle in failing to appreciate and consider the substance of the claim, the nature, the character, the gravity of the issues of law and fact involved in the proceedings before the Arbitral Tribunal.

b. That the taxing officer fell into an error of Principle by failing to appreciate that in a suit for

specific performance the value of the subject matter is the value of the property.

c. That in disallowing the various items on the bill of costs on account of want of proof, the taxing officer failed to exercise her discretion judiciously in the wake of powers and authority given under Rule 13 A of the Advocates Remuneration Order to direct the production of documents as may be necessary for determination of any matters in dispute before her.

d. That it was an error on the part of the taxing officer to fail to consider the necessary and proper cost, charges and expenses incurred as well as other necessary work for preparing the case for hearing, the professional input and industry by counsel in the conduct of the arbitral proceedings.

e. That in taxing off items 155,156,157,161,177,180,181, and 182, the taxing officer failed to appreciate the applicable charges stipulated under schedule 5 of the Advocates Remuneration Order.

f. That the taxing officer proceeded on mistaken Principles and consequently failed to exercise her discretion judicially.

3. The Court directed parties to file written submissions. The applicant filed their submissions on 5th June 2017 and further replying submissions on 28th July 2017. The respondent filed her submissions on 4th July 2017. I have considered the applicant's application as well as the submissions filed by the parties. I have also gone through the bill before the taxing officer as well as the submissions which were filed before the taxing officer.

4. Grounds upon which the decision of a taxing officer may be interfered with were well set out by Justice Riger (as he then was) in the case of **First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others (2002) I EA 64** where he stated as follows:-

“ First I find that on authorities this court cannot interfere with the taxing officer's decision on taxing unless it is shown that the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify inference that it was based on an error of principle”.

5. The bill of costs before the taxing officer related to a matter which had been referred to an arbitrator. The claimant was seeking for an order of specific performance of a contract of sale between her and one Anne Mumbi Mutiso on or about 17th October 2008. The agreement was for purchase of one acre to be excised from LR No. 5842/2/17 at Karen in Nairobi. The purchase price was **Kshs.3,300,000/=**. A deposit of **Kshs.660,000/=** was made on execution of the agreement and the balance was to be paid at completion and in exchange of completion documents. The agreements did not go through prompting the matter to be referred to an arbitrator.

6. After the arbitrator heard the dispute, the arbitrator found that no order of specific performance could be made as the property the subject of the agreement was not registered in the name of the seller. The arbitrator made an award for refund of the amount paid as deposit.

7. The applicant contends that the taxing officer should have based assessment of instructions fees on the market price of one acre of land in Karen area. The applicant had commissioned Hillside Homes Ltd to carry out a market survey of prices of land generally in Karen. The company did a market survey and found that one acre of land in Karen area would cost between Kshs.55,000,000/=on the minimum and Kshs.80,000,000/- on the maximum. The applicant used the survey report when arguing on cost before the arbitrator by asking the arbitrator to base the value of costs at Kshs 60,000,000/=. The arbitrator however did not go with that value. The applicant again used this figure in trying to convince the taxing officer to base instruction fees on the same.

8. I have gone through the Ruling of the taxing officer and the reasons given therein. The taxing officer

set out the principles guiding her and arrived at a figure of Kshs.200,000/= for instruction fees. The respondent had submitted that instruction fees should be based on Kshs.1,423,175/= which was awarded by the arbitrator. The applicant on the other hand wanted instruction fees based on Kshs.60,000,000/= which was the current market price of one acre in Karen.

9. The taxing officer could not follow either the submission by the applicant or the respondent. She considered that the issue was an arbitration where the value of what was in stake could not be ascertained. She therefore used her discretion to award Kshs.200,000/= on instruction fees. I do find that the taxing officer did not err in arriving at this figure. The taxing officer could not base instruction fees on Kshs.60,000,000/= a figure which was not the value of the subject matter of the property. This was a figure picked out from the market survey by a firm commissioned by the applicant. The survey report was not a pleading. It was only introduced in by way of submissions. If the taxing officer would have used the value of the subject matter as the applicant wanted her to do , then she would have either used the purchase price of **Kshs.3,300,000/=** or the award in the arbitration which was **Kshs.660,000/**. Equally the taxing officer would not have used the sum of **Kshs.1,423,175/=** to assess instruction fees as submitted by the respondent because that was not the award given . This was a figure incorporating the award and the respondent's share of costs of the arbitrator.

10. The taxing officer applied the correct principles in arriving at the sum of Kshs.200,000/=on instruction fees. The matter before the arbitrator was not complex as claimed by the applicant. The arbitrator spent about 35 hours in total in dealing with the matter if her rates per hour are anything to go by. The arbitrators charges were Kshs.12,500/-per hour and she found her costs to be **Ksh.531,250/-** inclusive of **VAT**. Given this background, I do not find that the taxing officer was wrong in giving a figure of **Kshs.200,000/=** as instruction fees.

11. The applicant is also contending that the taxing officer failed to exercise her powers under Rule 13A of the Advocates Remuneration to call for documents. The taxing officer had taxed off a number of items from the bill on the ground that there was no proof. The applicant argues that the taxing officers should have invoked provisions of rule 13A and 75 of the Advocates Remuneration Order to call for documents. The applicant argues that they would not have provided the documents of proof without being prompted by the taxing officer acting under the aforesaid rules.

12. The taxing officer was unable to grant the items because the proceedings arose from arbitration. It is the applicant who had presented their bill and it was upon them to prove that they deserved the amounts claimed. I do not agree with the applicant's argument that it was the duty of the taxing officer to call for documents in support of the items. The items which were taxed off included attendance before the arbitrator. The applicant should have annexed arbitration proceedings so that the taxing officer could confirm that there was such attendance. If the applicant was claiming charges for perusal, nothing would have been easier than annexing copies of those correspondence or documents. It is not proper for a party to fail to annex proof of items particularly when the proceedings are conducted outside the court and expect the taxing officer to call for such record. I do not think that this was the intention of the drafters of the rules. It would amount to waste of judicial time if parties failed to provide proof and expect the court to prompt them to do so. In this regard, I agree with the reasoning of Justice Kimondo in **Desai Sarvia & Pallan Advocates Vs Jambo Biscuits Kenya (2014) eKLR** where the Judge held as follows:-

“taxation of a bill of costs like all other aspect of litigation is based largely on evidence. It is also an adversarial process. As the bill was contested, it behoved the applicant to present to the taxing master all documents and materials in support of his claim. Having shirked that responsibility in the litigation, the applicant cannot shift the blame to the umpire. In all circumstances, the applicant was the author of his own misfortune”.

13. Based on the above analysis, I find that the taxing officer taxed the bill before her as per the known Principles. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 7th day of November 2017.

E.O.OBAGA

JUDGE

In the presence of;-

Miss Migiro for applicant

Mr Ndungu for respondent

Court Assistant: Hilda

E. O. OBAGA

JUDGE