



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. MISC NO. 38 OF 2014

S.M. KIBIRA

T/A MUTEITHIA KIBIRA ADVOCATES.....APPLICANT

VERSUS

PRODIGY PROPERTIES LIMITED.....RESPONDENT

RULING

The Applicant filed the application dated 31/7/2014 seeking to vary or set aside the ruling of the taxing master delivered on 17/7/2014 which struck out its bill of costs dated 3rd February, 2014. The Applicant urges the court to order that its bill of costs be taxed afresh by another taxing officer.

The application is premised on the grounds that in arriving at the decision to strike out the bill of costs, the taxing master failed to take into account the definition of account as spelt in the Advocate's Act and the provisions of paragraph 31 of the Advocates Remuneration Order which state that the costs for the investigation of title and the preparation and registration of any discharge is payable by the borrower. The Applicant also contends that the taxing master failed to take into account paragraph 33 of the Remuneration Order which provides that where an advocate is concerned for both mortgagor and mortgagee he shall charge the mortgagee's advocate fees and one half of the mortgagor's advocate fees.

The Applicant relies on paragraph 3 of the letter of Kimondo Gachoka & Co. Advocates dated 5/3/2012 addressed to the Applicant which stated as follows: -

“That we will pay to you your respective handling charges for the respective partial discharges of charge and attendant correspondence as per schedule 1 paragraph 2 B and schedule V of the Advocates (Remuneration) (Amendment) order 2009 plus value added tax and disbursements within 14 days after the date of registration of each respective partial discharge of charge time being of the essence”

The taxing master found that there was no retainer agreement between the Applicant and the Respondent. He further found that the Applicant was representing Co-operative Bank Limited in the transaction while the Respondent had its own advocates. The taxing master also took into account the fact that the bank had paid the Applicant the sum of Kshs. 2,250,000/= from the Respondent's account as fees for the preparation of the discharge under duress which the Respondent could sue to recover.

Parties elected to go by the submissions they filed before the taxing master. The court has read the submissions.

The background to this case is that the Respondent developed housing units on L.R. Number 12715/515 and L.R. Number 12715/516. These titles were charged to the Cooperative Bank to secure certain

facilities granted to the Respondent. The Respondent needed to process subleases for the individual apartments. To do this, the Respondent's advocate had to give their professional undertaking to only use the titles for the purpose of processing and registering the partial discharges of charge. The letter from Cooperative Bank to the Applicant that forwarded the original grants for the two properties is dated 28/2/2012. It expressly mentioned that the Respondent had engaged the firm of Kimondo Gachoka and Company Advocates while the Applicant was instructed to attend to the matter on behalf of the Bank.

The Applicant's letter to Kimondo Gachoka dated 1/3/2012 set out the scope of the Applicant's instructions as mainly safeguarding the Bank's interests while proposing to forward the two original titles. The Respondent's Advocates gave the professional undertaking vide their letter of 5/3/2012. From the documents attached to the bill of costs, it seems the Discharge of Charge was prepared in respect of the two plots and registered at the Lands office on 21/8/2012. The Applicant's letter of 25/7/2012 to the Bank explained the headwinds the Applicant ran into while trying to register the discharges of charge. It appears that a fresh charge had to be prepared which they refer to as a replacement charge in respect of the two properties. The Applicant was paid the sum of Kshs. 2,250,000/= by the Bank which was drawn from the Respondent's account.

The Applicant raised bills of costs for partial discharges of charge for all the apartments developed. The Respondent objected to the taxation of the Applicant's bill of costs on the basis that there was no retainer agreement between the Applicant and Respondent. The taxing master upheld that objection.

The question this court has to determine is whether the taxing master failed to consider any relevant factor and secondly, if he misdirected himself and caused an injustice to warrant this court to interfere with the exercise of his discretion.

In **John Maina Mburu t/a John Maina Mburu & Company Advocates v George Gitau Munene (Sued as Administrator of the Estate of Samuel Gitau Munene) & 3 Others** [2015] eKLR it was held that the court cannot interfere with the taxing officer's decision 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 interference that it was based on an error of principle.

The Court is not persuaded that the taxing master's decision was based on an error of principle; or that the taxing master failed to consider any relevant factor in considering the preliminary objection raised to the taxing the bill of costs; or that he misdirected himself and caused an injustice to warrant this court to interfere with the exercise of his discretion.

The court is of the view that the taxing master applied the correct principles. There was no retainer agreement between the Applicant and Respondent. The Applicant was acting for Co-operative Bank and not the Respondent. The application dated 31/7/2014 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 14th day of December 2017.

K. BOR

JUDGE

In the absence of Advocates for the Applicant & Respondent.

In the presence of Mr V. Owuor- Court Assistant