



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. MISC. CASE NO. 340 OF 2014**  
**IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF TAXATION BETWEEN ADVOCATE/ CLIENT**  
**IN**  
**SALE OF PROPERTY L.R. NO. 6725/225**  
**(ORIGINAL NO. 6725/11/12) NAIROBI**  
**CHIMAKO HOMES LIMITED (VENDOR)**  
**TO**  
**KENYA FRESH PRODUCE EXPORTERS LTD (PURCHASER)**  
**BETWEEN**  
**NZAKU & NZAKU ADVOCATES.....ADVOCATES/RESPONDENT**  
**VERSUS**  
**CHIMAKO HOMES LIMITED.....CLIENT/APPLICANT**

**RULING**

Coming up before me for determination are two applications. The first one is Notice of Motion dated 26<sup>th</sup> February 2015 brought by the Client/Applicant under **Rule 11 of the Advocates Remuneration Order and Section 3A of the Civil Procedure Act** seeking for orders that the court be pleased to order a stay of execution of the Advocates/Respondent's taxed bill pending the hearing and determination of these proceedings. The Client/Applicant also seeks orders to set aside the ruling the taxing master delivered on 5<sup>th</sup> February 2015.

This Application is premised on the grounds enumerated on its face together with the Supporting

Affidavit of Fredrick Mutumba Kiluva, a director of the applicant company, sworn on 26<sup>th</sup> February 2015 in which he averred that the Respondent informed him that he had filed and taxed his bill of costs at Kshs. 2,788,080/- on 5<sup>th</sup> February 2015 to their detriment. He further averred that he instructed an advocate to lodge a notice of objection to the ruling. He further averred that he believes that the decision given by the court was based on an error of law as the taxing master failed to consider the fact that the Applicant had not been served. He added that the taxing master acted contrary to the law as the ruling had no basis in law and that the fee arrived at was manifestly high considering the fact that the Respondent failed to act upon the instructions to completion thus necessitating the company to get services of another advocate to complete the transaction. He also contended that the taxing master failed to appreciate the fact that there was no service of the bill of costs and the hearing notice on the Applicant. Further, he averred that the taxing master failed to appreciate that the Respondents bill of costs is not maintainable in law for the reasons that the parties had agreed on legal fees to carry out the transaction. He stated that he feels that the Respondent is guilty of non-disclosure and he ought not to benefit from the court of equity as he had not come with clean hands. He further contended that the taxing master erred in law by allowing item 1, 2, 6 and 7 on the bill of costs when there was no justification for them at all and that it is only fair that the ruling be set aside and the bill of costs be taxed on merit.

This Application is contested. The Advocates/Respondents filed the Replying Affidavit of Steven Nzaku, an advocate of the High Court of Kenya, sworn on 29<sup>th</sup> July 2015, in which he averred that the Applicant was duly served with all the pleadings and there is an affidavit of service sworn by one Peter Mwangi Njoroge on 2<sup>nd</sup> February 2015 as proof of this. He further stated that this Application is premature owing to the fact that there are no reasons given by the taxing officer for her decision as required by law. Further, he stated that other than the Applicant running away with the conveyance, he has not been served with any document to terminate instructions. On those grounds, he stated that he wants this Application struck off with costs to the Respondent.

Parties canvassed this Application by way of written submissions. The Client/Applicant in its submissions stated that they were never served with the bill of costs and hearing notices. He stated that the parties had agreed on legal fees to be paid and therefore the Respondent is stopped from denying that he had made a promise to the client on the fees to be paid. He relied on the case of **D. Njogu & Co. Advocates –vs- National Bank of Kenya Limited [2009] eKLR** where the court held that the advocate cannot seek to steal a match on the client and secure a benefit by invoking the illegality of the retainer agreement. He also relied on the case of **D. Njogu & Co. Advocates –vs- National Bank of Kenya Limited [2007] eKLR** where the court held that an advocate who had entered into an agreement with a client in regard to the payment of legal fees could not wriggle out of the agreement by claiming that the agreement was contrary to the law allegedly on account of the fact that the agreed legal fees was prohibited by the law as it was below the scale statutorily provided by the **Advocate Remuneration Order**.

The Advocates/Respondents filed their submissions in which they said that the Client/Applicant filed this objection in disregard to the procedures under Rule 11 of the **Advocates (Remuneration) Order 2009**. They submitted that whereas the Client/Applicant had filed its objection in time, it did not wait for the taxing master's reasons on the items taxed before making this Application. He further submitted that the taxing master did not violate any known legal principle established under the law adding that the Client/Applicant instructed the Advocates/Respondents as vendors of L.R. No. 6725/225 for a purchase price of Kshs. 187,000,000/= and paid Kshs. 250,000/= as part legal fees. They submitted that the Client/Applicant's taxed bill of costs is unattainable in law for the reasons that the parties had agreed on legal fees to carry out the transaction.

I have considered the pleadings filed by the parties herein and the authorities they have relied on. This is a reference of the taxing master on the Advocate/Respondent's Bill of Costs dated 3<sup>rd</sup> December 2014. The principle in dealing with a reference is that this court cannot interfere with the taxing officer's decision on taxation unless it is shown that the decision was based on error of principle or the fee awarded was manifestly excessive as to justify interference. In the leading case of **Joreth Ltd-vs- Kigano & Associates (2002) 1 EA 92** the Court of Appeal was categorical that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial

discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law. It was further stated that therefore this court's work at this point is to look at the pleadings and satisfy itself that in taxing the bill and arriving at the impugned decision, the taxing master committed an error of principle or that the amount of fees awarded by the taxing master is excessive to amount to an error in principle or that the taxing master applied the wrong principles of law.

In this case, it is not disputed that the Advocate/Respondent acted for the Client/Applicant in a sale transaction of L.R. No. 67255/225 for a sum of Kshs. 187,000,000/=. This is evidenced by the letter of instruction dated 7<sup>th</sup> August 2014 where the Advocate/Respondent agreed to undertake the legal issues in the sale of the said property. There is no evidence that the parties indicated the legal fees to be paid in this undertaking. The parties agree that the Client/Applicant paid Kshs. 250,000/= to the Advocate/Respondent as legal fees but the Client/Applicant changed advocates and appointed the firm of M/s Mungala & Co. Advocates to have taken over the sale transaction. There is no evidence that any further monies were paid by the Client/Applicant as legal fees. The Client/Applicant alleged that they had an agreement for the amount to be paid as fees but did not exhibit a copy of that agreement and in the absence of such agreement the parties are guided by the **Rule 18 of the Advocates (Remuneration) Order, 2009** therefore the Advocate/Respondent had the right to file the bill of costs in order to realize his legal fees.

My finding on whether or not to set aside the ruling of the Tax master turns on the issue of whether or not this Application is premature. The Advocate/Respondent has contended that this Application was filed prematurely since the taxing officer had not given her reasons for arriving at the said decision and seeks to have the said Application struck off. From the pleadings in the court file, I note that the Client/Applicant filed his objection to the ruling of the Deputy Registrar and requested for the registrar's decision on 13<sup>th</sup> February 2015. This Application was filed on 2<sup>nd</sup> March 2015. The taxing master has not written her reasons for reaching her decision. The provisions as to the time for filing of a reference are found in **Rule 11 of the Advocates Remuneration Order**. It provides that,

*“(1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

*“(2) the taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection”*

The Courts' power under **Rule 11 of the Advocates (Remuneration) Order** is meant to be exercised to meet the ends of justice so that the applicant is not barred from filing a reference such as this one. The Court of Appeal in **Kipkorir, Titoo & Kiara Advocates –vs. - Deposit Protection Fund Board [2005] 1KLR 528** gave the implication of a Taxing Officer's failure to record and furnish reason for her decision as follows,

*“If a taxing officer totally fails to record any reasons and to forward them to the objector as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”*

In this particular instance, the Client/Applicant has not demonstrated to this court that he requested for the reasons behind the impugned ruling. In the circumstances, it would appear to me that this Application was indeed premature.

The issue of service of the Bill of Costs dated 3<sup>rd</sup> December 2014 upon the Client/Applicant was raised. I have perused the court file and noted that there is an affidavit of service of Peter Mwangi Njoroge sworn on 2<sup>nd</sup> February 2015 stating that he served the Client/Applicant in its offices at Group Four Security Offices at Mombasa Road opposite St. James Hospital, Nairobi. I note that the Advocate/Respondent was

the advocate of the Client/Applicant before they fell out. It is therefore obvious that the Advocate/Respondent knew the offices of the Client/Applicant therefore the claim made by the Client/Applicant that it was never served appears untrue. The Client/Applicant has also not disputed the location stated by the process server as their offices.

The final matter to address is whether the taxing master failed to apply the principles of taxation and that the sums awarded were not justified. Under **Schedule VI of the Advocates Remuneration Order clause (1)**, it is provided in the proviso that:-

***“(i) the taxing office, in the exercise of this discretion shall take into consideration.....the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduction of the proceedings, a direction of the trial judge, and all other relevant circumstance”.***

**Looking at the** foregoing principles, my finding is that the taxing officer considered the value of the subject matter as presented to him, the complexity of the matter involved and the duty and care in arriving at the figure awarded. In the circumstances, I do find that there was no error of principle committed by the taxing master and that the amounts awarded were reasonable and not excessive in the circumstances of the case.

The upshot of this is that this court will therefore not interfere with the discretion of the taxing master. Chamber Summons dated 26<sup>th</sup> February 2015 is therefore dismissed with costs to the Advocates/Respondent.

**The second application** for determination is the Advocate/Applicant's Notice of Motion dated 6<sup>th</sup> March 2015. This Application is brought under **section 51 (2) of the Advocates Act and Order 11 Rule 1 of the Civil Procedure Act** seeking for orders that:-

1. This court be pleased to adopt the certificate of taxation dated 6<sup>th</sup> February 2015 of Kshs. 2,788,080/- and judgment be entered against the Client/Respondent.
2. This court be pleased to issue a decree in respect of the Certificate of Taxation dated 6<sup>th</sup> February 2015 and that the Advocate/Applicant be at liberty to execute for recovery of the same and interest therein in such a manner as a decree of this Honourable Court.

This Application is premised on the grounds stated on its face together with the Supporting Affidavit of the Steven Nzaku, an advocate of the High Court of Kenya practicing as Nzaku & Nzaku Advocates, sworn on 6<sup>th</sup> March 2015. He averred that on 5<sup>th</sup> February 2015, the Deputy Registrar taxed and awarded him Kshs. 2,788,080/= and on 6<sup>th</sup> February 2015, a Certificate of Taxation was issued to him in respect to the costs thereof. He stated that an order of this court adopting the Certificate of Taxation as a judgment and subsequently as a decree of the court is therefore necessary to enable execution by him.

This Application is not opposed. This court gave the Client/Applicant ample time to file his response to this Application on 15<sup>th</sup> June 2015 but the reply was never filed.

**The Advocates Act provides the** procedure of the recovery of advocate's costs after taxation of bills of costs and certificate of taxation is issued is to seek entry of judgment based on the certificate after which a decree is issued for execution.

**Section 51 (2) of the Advocates Act** states that,

***“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”***

In light of my finding in the first application and since this second Application is not opposed, this Application is allowed with no order as to costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2016.**

**MARY M. GITUMBI**

**JUDGE**