



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 262 OF 2013

ANTHONY THUO KANAI t/a

A. THUO KANAI ADVOCATES.....APPLICANT

VERSES

JOHN NGIGI NG'ANG'A.....RESPONDENT

**IN THE MATTER OF A. THUO KANAI ADVOCATES ADVOCATE/CLIENT TAXATION
ARISING FROM THE MATTER OF:**

**AGREEMENT FOR SALE AND TRANSFER IN RESPECT OF THE PROPERTY KNOWN AS
MAISONETTE NO. 33 BANDHARI ESTATE AND SERVANTS QUARTERS ON LR. NO.
209/19055(ORIGINAL NUMBER 209/12744/5), NAIROBI**

RULING

The Applicant's Case

This ruling is on an application by way of Chamber Summons dated 3rd February 2014 brought by the Applicant, who was the Advocate for the Respondent in the purchase and transfer in respect of the property known as Maisonette No. 33 Bandhari Estate and Servants Quarters on L.R No. 209/19055 (Original Number 209/12744/5), Nairobi. The Applicant claims that they filed a Bill of Costs after the Respondent failed to pay their fees, which Bill of Costs was taxed and a ruling dated 26th November 2013 delivered on the same.

The Applicant is now seeking orders pursuant to paragraph 11 (1) & (2) of the Advocates (Remuneration) Order that this Court varies and/or sets aside the Taxing Officer's ruling dated 26th November 2013 in relation to items No. 1, 29 and 2 to 69 of the Bill of Costs dated 8th March 2013, by increasing the amount payable to the Advocate under the Advocates (Remuneration) Order 2009, Schedule V Part II. Further, that this Court exercises its inherent jurisdiction and allows such fees in the above items as it shall deem fit and/or make such other or further orders as regards the Bill of Costs in issue.

The grounds for the application are set out in the chamber summons and in the supporting affidavit and supplementary affidavit both sworn by Anthony Thuo Kanai on 3rd February 2014 and 22nd April 2014 respectively. These are that the Taxing Officer misdirected himself in law and fact by assessing the instruction fees under Schedule 1 paragraph 1 of the 2006 Advocates (Remuneration) Order, whereas the Bill of Costs was filed under Schedule V and the Advocates (Remuneration) Order 2009 which is the applicable order as the subject sale agreement is dated 22nd January 2009 and the subject charge is dated 29th March 2011.

The Applicant also objected to the ruling on item No 29 on the ground that the taxing officer failed to award instruction fees on the charge of Kshs 5,440,000/=, failed to give any reasons thereof, ignored both parties submissions in this regard and instead put it together with items 2 to 69. Further, that the Taxing Office failed to award the Applicant costs under items Nos. 2 to 69 without any legal basis, and that contrary to his ruling Schedule V does not apply to contested matters only but applies to non-contentious matters as well upon the election of the Advocate.

It was also argued with respect to these items that the Taxing Master ignored and/or failed to appreciate the value of the Applicant's list of documents in support of the items which the Respondent did not contest, and that there was no compliance with paragraph 13A by the Taxing Master if further documentary evidence was required. Lastly, the Applicant objects to the ruling on the items on disbursement on the ground that no reason is given for the reduction.

The Applicant further stated that they gave notice in writing to the taxing officer as required by rule 11(1) of the Advocates (Remuneration) Order in a letter dated 9th December 2013 and filed in court on the said date, which was within the required 14 days, and objected to the ruling on certain items that were listed in the said letter. However, that the Taxing Officer failed to record and forward the reasons for his decision on the objection items as required under the mandatory provisions of Rule 11(2) of the Advocates (Remuneration) Order, but instead wrote a note dated 21st January 2014 on the objection letter to the effect that "Reasons for the ruling in the taxation are in the file. The advocate to file reference." The Applicants stated that they thus filed the application herein after the said Taxing Officer's note.

The Applicant filed submissions dated 22nd April 2014 wherein they argued that the application was competently before the court as it was filed on 3rd February 2014, which was 13 days from the date of the Taxing Officer's note. It was further submitted by the Applicant that the Taxing Officer erred when he stated that Schedule V Part II of the Advocates (Remuneration) Order 2009 only applies to contentious matters and not to non-contentious matters, and in relying on Schedule I to tax the Bill of Costs, even though the Applicant had elected Schedule V. Further, that paragraph 22 of the Advocates (Remuneration) Order gives the Advocate the sole discretion to decide which Schedule to apply as held in the case of **Muthoga Gaturu & Co Advocates vs Corporate Insurance Company Limited, Nairobi High Court Misc. Application 433 of 2000.**

The Applicant also submitted that the Taxing Officer erred in principle by lumping up item No. 29 with items No. 1 to 62 by assuming that all related to the same fees. The Applicant explained that his instruction fee of Kshs 68,000/= was allowed by the principle in paragraph 22(2) of the Advocates (Remuneration) Order which provided that the fees charged by an Advocate under Schedule V cannot be less than those which could have been charged for the same work under another scale fee.

Further, that the minimum instruction fee on the subject charge whose value was Kshs 5,400,000/= would have been Kshs 54,440/=, if one were to apply the applicable rate under Schedule 1 of the Advocates (Remuneration) Order of 1.25%. The Applicant further submitted that under Schedule V Part II of the Advocates (Remuneration) Order, the value of the subject matter is only one of the factors to be taken into account in arriving at the appropriate instruction fees, other factors being the interest of the parties, the complexity of the matter and all other circumstances of the case.

On items 2 to 69 of the Bill of Costs, the Applicant submitted that these items can be summarized as drawing, perusing, attendance, time engaged and correspondence. Further, that under paragraph 20(1) these items are not subsumed under instruction fees but under scale charges. The Applicant explained how each of the items in item 2 to 69 are chargeable under paragraphs 1 to 5 of Schedule V Part II of the Advocates (Remuneration) Order, The Applicant submitted that the taxing officer failed to explain when the said paragraphs are applicable, and erred in holding that all the items were charged based on time, when it is only the items on time engaged and attendance that were charged on the basis of time taken.

The Respondent's Case

The Respondent filed a replying affidavit sworn on 16th April 2014 wherein he stated that the Applicant's application is untenable in law, as the same was filed in court on 3rd February 2014 out of time and without leave of the court as required under the provisions of Rule 11 of the Advocates (Remuneration) Order. Further, that the ruling and the reasons having been read by the Taxing Officer on 26th November 2013, it was incumbent upon the Applicant's advocate to file their application for review of the award within 14 days thereof which they failed to do. It was also the Respondent's position that the application was without merit, and that the Applicant had failed to prove that the taxing master erred in principle in his ruling and reasons thereof of 26th November 2013.

The Respondent contended that sufficient reasons had been succinctly set out in the Taxing Officer's ruling, and that this Court should not upset a taxation by the taxing master merely because it would have awarded a higher or lower amount unless the taxing master's decision was based on an error of principle. The Respondent averred that the Taxing Master rightfully exercised his discretion in applying Schedule 1 of the Advocates (Remuneration) Order, the matter being an uncontested matter involving a commercial (conveyance) work done by the Applicant. Lastly, the Respondent stated that items 2-69 in the Applicant's Bill of Costs are incidental to the work done by the Applicant, and the same were rightfully taxed off and thus the taxing master did not err in his ruling.

The Respondent's counsel filed written submissions dated 6th May 2014, wherein he stated that it is settled that a Court cannot interfere with a taxing master's decision on taxation, unless it is shown that either the decision was based on an error of principle or the fee awarded was so manifestly excessive to justify an inference that it was based on an error of principle, as held by Ringera J. (as he then was) in **First American Bank of Kenya vs Shah and Others, (2002) E.A.L.R. 64** .

The Respondent's counsel submitted that the application was filed out of time and the Applicant did not comply with the mandatory provisions of paragraph 11 of the Advocates (Remuneration) Order in this regard. The counsel also submitted that the Taxing Master was not in error of principle and had rendered sufficient reasons in his ruling of 26th November 2013. The counsel further submitted that while the election by the Applicant to present the Bill of Costs under Schedule V rather than Schedule 1 of the Advocates (Remuneration) Order was proper in law, they should not be allowed to steal a march on the Respondent by such an election.

The counsel submitted in this regard that the only reason why an Advocate would make an election under paragraph 22 of the of the Advocates (Remuneration) Order to tax his costs under Schedule V rather than the otherwise applicable scale is to enable him charge for matters not provided for in the other scales. Further, that in Schedule V there is no specificity in the fees charged *viv-a-vis* the value of the subject matter, and that the exercise of the courts discretion in this regard ought to be guided by the fee that would have otherwise been chargeable in the absence of an election under paragraph 22. The counsel argued that the Taxing Master was not in error in applying Schedule 1 in this regard as the instructions to the Applicant were not contested matters.

The Respondent's counsel relied on the decision in **Republic vs Minister of Agriculture & 2 Others ex parte Samuel Muchiri W' Njuguna & 6 Others, (2006) e KLR** on the rational exercise of judicial discretion, and on the decisions in **Lubuleliah & Associates vs NK Brothers Ltd, (2014) e KLR** and **Premchand Raichand Ltd & Another vs Quarry Services of East Africa Limited & Another, (1972) E.A. 162** for the position that a court should not interfere with the award of a taxing master solely because it thinks the award is too high or too low.

As regards the taxing off of items 2 to 69 of the Applicant's Bill of Costs, the Respondent's counsel submitted that the Taxing Master properly and judicially exercised his discretion in this regard since the instruction fee is an independent and static item that is charged only once, as held in **Joreth Ltd vs Kigano & Associates (2002) E.A 88 (CAK)**. Further, that while items 2-69 are provided and drawn to scale under Schedule V Part II of the Advocates (Remuneration) Order, they are not chargeable in view of the provisions of paragraph 20(1) of the Order. The counsel contended that these items represent work that is ordinarily incidental to transactions covered by items 1 and 2 of the Applicant's Bill of Costs, and

are subsumed in the instruction fees.

The Issues and Determination

I have considered the arguments made by the parties, and find that there are three issues for determination. The first is whether the reference by the Applicant to this Court was filed within time. Secondly, if it is found that the reference was filed within time, what is the applicable Advocates (Remuneration) Order and Schedule in the taxation of the Applicant's Bill of Costs? Lastly, whether the Taxing Officer erred in principle in his taxation of the items in the said Bill of Costs.

The provisions as to the time for filing of references are found in rule 11 of the Advocates Remuneration Order, which provides as follows:

“ (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 material time for filing an application to this court as set out in rule 11(2) is within 14 days of receipt from the taxing officer of the reasons for his or her decision. The Applicant herein attached as Annexure “ATK 2” a letter dated 9th December 2013 and filed in court on the same date, requesting for written reasons for the taxing officer's decision. There is a notation on the said letter apparently by the Deputy Registrar of this Court, who was the taxing officer, stating that the reasons are in the ruling and that the Advocate should file a reference. This handwritten notation is dated 21st January 2014. Time for purposes of filing a reference therefore started to run from 21st January 2014 which was the date the explanation as to his reasons were given by the taxing officer, and at the date of filing of this application on 3rd February 2014 the time limit of fourteen days had not lapsed. This application was therefore filed within time and is competently before this Court.

On the issue of the applicable Advocates (Remuneration) Order and Schedule, it is not disputed that the transactions giving rise to the Applicant's Bill of Costs is the sale agreement dated 22nd January 2009 and the charge dated 29th March 2011 in which the Applicant represented the Respondent. As at these two dates, the applicable law was the Advocates (Remuneration) Order of 2006 as amended by the Advocates (Remuneration) (Amendment) Order of 2009 which was published as Legal Notice No. 50 of 2009. The amended order is what is commonly referred to as the Advocates Remuneration Order of 2009. It is noteworthy that the Advocates (Remuneration) (Amendment) Order of 2009 replaced Schedules I and II of the Advocates (Remuneration) Order of 2006.

Therefore there was an error in principle to the extent that the taxing officer in his ruling applied the Advocates (Remuneration) Order of 2006, and particularly the rates provided in Schedule I of the said Order which have since been amended by the Advocates (Remuneration) (Amendment) Order of 2009.

As regards the applicable schedule of the Advocates (Remuneration) Order of 2009, on 21st March 2013 the Applicant filed a Notice of Election dated 8th March 2013 addressed to the Respondent, which notified of their election to proceed under Schedule V of the Advocates (Remuneration) Order of 2009. Such an election is allowed under rule 22 of the Advocates (Remuneration) Order which provides as follows:

“(1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his

remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.”

The taxing officer in his ruling found that Schedule V of the Advocates (Remuneration) Order deals with contested matters in court, and therefore applied Schedule 1 of the Advocates (Remuneration) Order of 2006 which applies to sales and purchases of land. In so doing the taxing master also disallowed items 2-69 of the Bill of Costs on the ground that the fees in Schedule I of the *Advocates (Remuneration) Order 2006* are all inclusive.

I have perused the provisions of the Advocates (Remuneration) Order of 2009 on the fees to be charged with respect to contentious and non-contentious matters, and find that the charging of fees in both types of matters is subject to election of the application of Schedule V under rule 22 of the *Advocates (Remuneration) Order*. In particular it is stated in rule 18 that the application of Part II of the *Advocates (Remuneration) Order* on remuneration in non-contentious matters is subject to the provisions of rule 22. It is therefore the law that an Advocate can elect to apply Schedule V to costs in non-contentious matters. Similar provisions with respect to costs in contentious matters are also found in rules 50, 51, 51A, 51B and 51C of the *Advocates (Remuneration) Order* whose application are also made subject to rule 22.

I therefore find that the taxing officer erred in principle in applying Schedule 1 of the *Advocates (Remuneration) Order 2006* in place of Schedule V of the *Advocates (Remuneration) Order 2009* for the reasons given in the foregoing. I also note in this regard that Schedule V of the *Advocates (Remuneration) Order 2009* provides for two methods of assessing fees. The first is an agreed hourly rate under Part I of the Schedule, and the second is the alternative method according to the scales provided in Part II of the Schedule. In the alternative method, costs for specific items are allowable in addition to the instruction fees, and the taxing officer is required to make an allowance for other charges when assessing the instruction fee.

Both parties in this regard cited several well known cases which elucidate the principles governing the assessment of costs in the application of the Schedules in the Advocates (Remuneration) Order. In the case of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162* the Court outlined these principles as follows;

- (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
- (b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
- (d) so far as practicable there should be consistency in the award made and
- (e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

In the case of *Joreth Limited v Kigano & Another [2002] E.A. 92* the court set out various factors that are to be considered in determining the instruction fee namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties. The cases cited also emphasise the principle that the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the *Advocates (Remuneration) Order 2009* including importance of the cause or matter, the amount involved, the interest of the parties, the

general conduct of the proceedings and all other relevant circumstances. (see also ***First American Bank of Kenya Ltd v Gulab P Shah & Others*** [2002]1 E.A. 61 and ***Republic v Minister for Agriculture & 2 Others ex Parte Samuel Muchiri W’Njuguna & 6 Others*** (2006) e KLR).

I therefore accordingly order that the decision of the Taxing Master in the ruling delivered on 26th November 2013 as regards items 1, 29 and 2-69 of the Applicant’s Advocates/Clients Bill of Costs dated 8th March 2013 be and is hereby set aside, and that the said Bill of Costs be referred back to another taxing officer for fresh taxation according to the principles enunciated herein. Each party shall bear their own costs of the application.

Dated, signed and delivered in open court at Nairobi this ____25th____ day of ____June____, 2014.

P. NYAMWEYA

JUDGE