



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

MISC APP. NO. 16 OF 2013

(Consolidated with Misc. Applications numbers 13, 14, 15, 17, 41 and 42 of 2013)

KENYARIRI & ASSOCIATES ADVOCATES.....APPLICANT

=VERSUS=

1. SALAMA BEACH HOTEL LTD

2. HANS JURGEN LANGER

3. ZAHRA LANGER

4. STEFFANO UCCELI

5. ISAAC RODROT.....RESPONDENTS

R U L I N G

Introduction

1. This is the second time the Applicant and the 1st, 2nd and 3rd Respondents (the Respondents) have filed their respective References pursuant to the provisions of Rule 11 of the Advocates Remuneration Order in respect to the Applicant's Advocate-clients' Bills of Costs in the seven consolidated matters.
2. In the first Reference and counter-Reference, I referred the Bills of Costs back to the taxing officer for re-taxation.
3. The Applicant's Chamber Summons dated 14th June, 2014 is seeking for the following orders;-

(a) The decision by the learned Registrar dated 5th June, 2014 in relation to Miscellaneous Applications numbers 13, 14, 15, 16, 17, 41 and 42 of 2013 be set aside and or varied in so far as it related to instructions fees only and the Applicant's Bills of costs dated 13th April, 2013 and 10th June, 2013 respectively be taxed afresh on Item 1 only.

(b) That this Hon. Court do determine this issue of instructions fees in each of the Bills of costs aforesaid and the Deputy Registrar be directed to assess the total fees as per the directions of the Honourable court.

(c) The costs of the Application be provided for.

4. On the other hand, the Respondent's Chamber Summons dated 25th June, 2014 is seeking for the following reliefs:-

(a) That the taxing Master's decision in Misc. 15 of 2013, Misc. 17 of 2013 and Misc. 42 of 2013 with regard to instructions fees be reviewed, varied and be set aside.

(b) That the Honourable court be pleased to refuse to deduct the amount awarded as instruction fees from the amounts paid as retainer by the client be reviewed, varied and set aside.

(c) That the taxing master's holding in the following aspects be reviewed, varied and or set aside;

(i) The total amount paid by the Respondent.

(ii) The agreement between the Applicant and the Respondent was not signed.

(iii) That the only payment accounted for by the agreement was Japanese Yen 1, 160,000.

(iv) There was no evidence that the amount in the annexed schedule went to the purchase of the Applicant's vehicle.

(v) More evidence that the Applicant received the vehicle should have been adduced.

(vi) That the Honourable Court be pleased to issue any other and such further orders as it may deem fit to grant.

(vii) That the costs of the application be in the cause.

The Applicant's case

5. According to the Applicant's Supporting Affidavit, the learned Deputy Registrar entertained an erroneous interpretation of the law and thereby failed to adequately compensate the advocate; that the learned Deputy Registrar erred in law and failed to set a basic instruction fee before determining the appropriate fees and that the learned Deputy Registrar erred in law in entertaining documents filed after closure of submissions and beyond the requirement of a court order and proceeded to entertain issues already determined by the High Court (Angote J) on 20th February, 2014.
6. The Applicant deponed that in Miscellaneous Application number 13 of 2013, the learned Deputy Registrar failed to find that instructions fees is static and is earned once and is not dependent on the state the suit has reached.
7. In Miscellaneous Application number 14 of 2013, it was deponed, the learned Deputy Registrar erred in law in not finding that the declarations sought in the suit related to ownership of the subject matter which was ascertained from the valuation report on record.
8. The Applicant's case is that in Miscellaneous Application number 15 of 2013, the instruction fees is a static item which is earned once. The Applicant deponed that the learned Deputy Registrar misdirected herself and failed to note the nature of the instructions the advocate had been given

- and that in Misc. Application number 17 of 2013, the deputy registrar failed to consider the fact that his firm defended the 1st, 2nd and 3rd Respondents in a suit for a claim for Ksh.95,000,000 and that his firm also raised a counter-claim against the Plaintiff in that suit for Kshs.84,000,000.00.
9. The Applicant has argued that in Misc. Application number 41 of 2013, the learned Deputy Registrar erred by arguing that watching brief is not participating in proceedings and that in Misc. Application number 42 of 2013, the learned Deputy Registrar failed to consider the subject matter and refused to adequately compensate the advocate for the work done. According to the Applicant, the valuation report showing the value of the villa was indicated in the client's valuation report.
 10. In opposing the Respondent's Application, the Applicant filed Grounds of Opposition in which he averred that the Respondents' Application should be struck out because the learned Deputy Registrar ordered the Respondents to produce documents on oath to prove the allegations of payments made to the Applicant; that the Deputy Registrar declined to consider some of the documents that were supplied by the Respondents on merit; that the issue of retainer is now *res judicata* and that the issues raised by the Respondents in the Affidavit are fictitious and suspect.

The Respondents' case

11. The Respondents deponed that the Applicant has not denied that there was an agreement for the purchase of the motor vehicle; that T & T Tour and Tech company indeed made payments to the Applicant at his request and the statement of payments confirm that position and that the Deputy Registrar erred in the computation of money already paid from the hotel and assessed it at Kshs.5,784,550/-.
12. According to the Respondents, the Applicant has been paid in full and in fact he has been paid more than what was covered in the retainer agreement.
13. It is the Respondent's case that the Deputy Registrar erred in law and fact in declining to deduct the total amount of Ksh.6,358,309.05/- awarded as instructions from the amounts paid as retainer by the client; that the learned Deputy Registrar erred in law and fact in Misc. 42 of 2013 in taxing the same under Schedule VI(O) and in further holding that the value of the subject matter was yet to be established in HCC No.84 of 2010 whereas the value had been determined vide a Ruling dated 6th May, 2014; that the learned Deputy Registrar erred in law and fact in Misc. 17 of 2013 in holding that the advocate was entitled to full instruction fees and that the learned Deputy Registrar erred in law and in fact in Misc. 42 of 2013 in holding that the bill of costs was taxed and reduced to Ksh.17,900,720 whereas the instruction fee in the bill of costs was re-taxed on 17th April 2014 at 200,000/-.
14. The Respondents finally deponed that the Applicant should be ordered by this court to provide bank papers and documents, cash account, receipts and or any other papers and documents for any and all monies received from the Respondents.
15. The parties filed their respective submissions which reinstated their depositions in the affidavits. I have considered the said submissions and the cited authorities.

Analysis and findings:

16. When I referred the consolidated Client-Advocate Bills of Costs to the taxing officer for re-taxation, I directed that the money that had been paid by the client to the advocate pursuant to the appointment letter or any other payments made to the advocate in respect to the pending suits should be deducted from the taxed amount. The taxing officer was also to direct the production of bank papers and documents to ascertain what the Respondents had paid to the Applicant.
17. The Applicant's reference is only in respect to the instruction fees. The Applicant is contesting the instruction fees that was awarded by the taxing officer in all the eight matters.
18. The Respondents are not contesting the instructions fees that was awarded by the taxing officer except in Miscellaneous Application numbers 15, 17 and 42 of 2013.
19. The Court of Appeal in **Joreth vs Kigano & Associates (2002) EA 92** set out the various factors that are to be considered by the taxing officer in determining instruction fees. These factors include 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 parties.

20. In the case of **Kipkorir, Titoo & Kiari Advocates vs Deposit Protection Fund Board(2005) 1 KLR 528**, the Court of Appeal held as follows;-

“On a reference to a Judge from the taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the Taxing officer erred in principle in assessing the costs – an example for an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles.”

21. In **Arthur Vs Nyeri Electricity Undertaking(1961) EA 497**, the predecessor of the Court of Appeal held that where there has been an error in principle the Court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional circumstances.

22. On the question of what happens in a matter where the value of the property is not ascertainable from the pleadings, judgment or settlement, the Court of Appeal in the *Joreth* case (*supra*) held that the taxing officer was entitled to use his discretion in assessing the instruction fees and in doing so, the factors to be taken into account included the nature and the importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.

23. The taxing officer, while taxing instructions fees in **Misc. Application number 13 of 2013** observed as follows;-

“In Misc Civil Application No. 13 of 2013 in this matter, the Applicant had instructions to defend a bill of costs in Civil Application no. 5 of 2011.....The amount he used as the basis for instruction fees is the amount that had initially been claimed by the Applicant, while the respondent submits that the instruction fees should be based on the amount awarded in the taxation....”

24. According to the taxing officer, there is no provision for instruction fees in taxation of a bill of costs. The taxing officer proceeded to tax the instruction fee under Schedule VI (b) using the taxed figure of Ksh.2,916,814 in misc. application number 5 of 2011 and not what the Applicant had claimed in his Bill of costs. The taxing officer awarded the Applicant herein Kshs.105,752. 21 as instruction fees being the minimum amount allowed.

25. The taxing officer was right in awarding the instructions fee based on the amount that was allowed by the Court and not what had been pleaded. Indeed, in doing so, the taxing officer was guided by the decision of **Lubellellah & Associates Advocates vs N. K. Brother- Nairobi Misc. Application No.52 OF 2012** which she quoted extensively.

26. If an advocate taxes his bill of costs before a matter is determined, then the taxing officer is supposed to base the instruction fees on the basis of the pleaded amount in the pleadings. However, once an award has been made by the court, then the taxing officer is supposed to use the figure awarded by the court in calculating the payable instruction fees while taking into account the other perimeters in increasing such fees, if at all.

27. In this case, the taxing master did not err in taxing the instruction fees using the award that was made by the court in Miscellaneous Application No. 5 of 2011 and not what had been pleaded.

28. The bill of costs in **Miscellaneous Application number 14 of 2013** arose from a constitutional petition in which the Applicant was given instructions to defend the Respondents. In the Petition, the petitioner was claiming for prerogative orders. The taxing officer proceeded to tax the bill of costs under schedule VI (1)(j) which provides for fees payable in respect of prerogative orders. The minimum allowable amount is Ksh. 28,000 which the taxing officer set out before awarding the Applicant Ksh. 400,000/-.

29. In awarding the said amount, the taxing officer observed that the matter required diligent preparation as well as research. The taxing officer noted that the matter was still pending and there was another counsel on record.

30. The taxing officer went further to observe, and rightly so, that in constitutional and judicial review matters, instruction fees is not pegged on the value of the subject matter. The taxing officer relied on the case of **R vs Minister of Agriculture, ex-parte Samuel W. Njuguna**. In that case, Ojwang

- J (as he was then) stated that judicial review proceedings were purely public law proceedings and are to be considered free of any private business arrangements or earnings.
31. The Applicant has argued that the orders that were sought in the Petition were in relation to the ownership of the subject matter whose value was ascertainable from the valuation report.
 32. I am in agreement with the holding of the taxing officer that the matter that the Applicant was instructed to defend was in the nature of judicial review proceedings. In the circumstances, it was immaterial that the judicial review orders that the Petitioner was seeking were in respect to a property whose value was ascertainable save to show the complexity and the nature of the matter.
 33. Having taken into account the complexity of the matter and the research that was to be carried out by the Applicant to prepare a defence/reply, the taxing officer did not err in principle in taxing the instruction fees at Ksh.400,000/-.
 34. The bill of costs in **Miscellaneous Civil Application number 15 of 2013** arose from another bill of costs being Miscellaneous Application number 59 of 2011 – *Katunga Mbuvi & Co. Advocates Vs Salama Beach Hotel Limited*.
 35. In the said bill of costs, the Applicant had claimed for Ksh.54,562,135 which was taxed and reduced to Ksh.17,900,720/-. Using that award, the taxing officer taxed the instruction fees at Ksh.330,510.80.
 36. The Applicant has argued that the taxing officer should have not used the award to tax the instruction fees but what had been pleaded. On the other hand, the Respondents, while agreeing with the principle that the taxing officer was right in using the amount that was awarded by the court to tax the current bill brought to the attention of this court that the Bill of costs in Miscellaneous Civil Application was re-taxed and the Applicant in that matter was awarded Kshs.1,179,255. The taxing officer should not have therefore used the figure of Ksh.17, 900,720 which had been awarded at the first instance before the Bill was re-taxed.
 37. I am in agreement with the Respondents submissions. The Bill of costs in Miscellaneous Application number 59 of 2011 having been re-taxed and an award of Ksh.1,179,255 given, the taxing officer should have used that figure in arriving at the appropriate instruction fees. In the circumstances, I shall re-tax the instruction fees in Miscellaneous Application number 15 of 2013 as follows:-

1 st million	Ksh.77,000.00
1.5% x 179,255	Ksh.2,689.00
Total	Ksh.79,689.00

38. The instruction fees in respect to **Miscellaneous Application No.15 of 2013** is therefore **Kshs.79,689** and not Kshs. **330,510.80** as awarded by the taxing officer.
39. **Miscellaneous Civil Application number 16 of 2013** is in respect to HCCC No. 118 of 2009 which is still pending. The suit was filed by the Respondents using a different advocate. The Applicant came on board at a later stage.
40. The Applicant had to file an Application to come on record on behalf of the Respondents in that suit because judgment had been entered into. The Applicant filed another Application to set aside the orders by Justice J B Ojwang (as he then was) in that suit.
41. The taxing officer, while assessing the instruction fees relied on the case of **Leornard Katunga Mbuvi T/a Katunga Mbuvi & Advocates vs Accredo Ag & Others, Malindi Civil Application number 59 of 2011** in which I held that an advocate is only entitled to claim fees in respect of work done.
42. The taxing officer held that although the Applicant pegged his instructions fees on the amount claimed in the Plaint, he is not the one who initiated the suit and cannot therefore claim the full instruction fees. The taxing officer further held that the Applicant only filed two applications upon being appointed by the Respondents to represent them in HCCC No.118 of 2009.
43. After setting out the minimum fees payable in respect to filing an application, which is Ksh.3,500, the taxing officer exercised her discretion and increased the figure to Kshs.300,000 as instruction

- fees for the two Applications.
44. I am in agreement with the reasoning and the award by the taxing officer. Instruction fees is only paid to an advocate in respect to the work done. Having not drawn the Plaintiff in Malindi HCCC No.118 of 2009, the Applicant is not entitled to the instruction fees in respect to the suit. As was held in the case of **First American Bank of Kenya vs Shah & Another (2002) 1 EA 64**, an advocate becomes entitled to full instruction fees to defend a suit the moment a defence is filed and the subsequent progress of the matter is not relevant. The same reasoning applies to the filing of a Plaintiff. The advocate who draws a Plaintiff is the one entitled to the full instruction fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done.
 45. The taxing officer did not therefore error in principle in awarding the Applicant Ksh.300,000/- as instruction fees for the Applications he drew and prosecuted in the matter.
 46. The Bill of costs in **Miscellaneous Application number 17 of 2013** is in respect to Malindi HCCC No.106 of 2010.
 47. According to the taxing officer, the Respondents instructed the Applicant to file a Defence and a counter-claim. The claim in the Plaintiff is for Ksh.95,000,000.
 48. While applying the principles in the **First American Bank of Kenya (supra)** case, the taxing officer held, and correctly so, that the moment a defence is filed, the full instruction fees is earned. The taxing officer then awarded the Applicant the full instruction fees for filing a defence in respect to the Plaintiff's claim of Kshs.95,000,000.00.
 49. However, the Applicant claims that he is also entitled to the instructions fees in respect to the counter-claim. According to counsel, a Counter-claim is a distinct suit.
 50. On the other hand, the Respondents have argued that the firm of Katunga Mbuvi was awarded instruction fees for defending the Respondents in HCCC No.106 of 2010. It would be unconscionable, it was submitted, for two advocates to be separately awarded full instruction fees for filing a Defence and Counter-claim in a matter which is still pending.
 51. It is true that the firm of Katunga Mbuvi was awarded full instruction fees to defend the Respondents in HCCC No.106 of 2010.
 52. I have perused the file and note that in HCCC No. 106 of 2010, the firm of Katunga Mbuvi filed a defence and counter claim on behalf of the Respondents on 20th May, 2011. However, the said Defence and Counter claim was set aside by the court on 9th December, 2011. The Defendants were allowed to file a valid Defence within seven days. The Applicant's firm then replaced the firm of Katunga Mbuvi and filed a Defence and Counter claim on 13th December, 2011.
 53. The only valid Defence and Counter claim on record is the one filed by the Applicant. It was erroneous, in my view, for the firm of Katunga Mbuvi to have been awarded full instruction fees on the Defence and Counter claim which had been struck out for being incompetent.
 54. The Defence and Counter claim having being struck out, it follows that there was no Defence and Counter claim on record to entitle the said firm the full instruction fees. It is the Applicant's firm that is entitled to the full instruction fees on the Defence and Counter claim that is on record. It is indeed unconscionable and unjust for two advocates to claim full instruction fees on the Defence and Counter claim twice from the same client.
 55. However, for the reasons I have given above, it is the Applicant in this matter who is entitled to full instruction fees on the Defence and Counter claim and not the firm of Katunga Mbuvi Advocates.
 56. I have perused the file and noted that other than the Defence, the Applicant also filed a Counter-claim for Ksh.84,000,000/-.
 57. A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.
 58. The Applicant is therefore entitled to instruction fees on the Counter claim. The taxing officer erred in not awarding the Applicant instruction fees on the Counter claim. I shall therefore award to the Applicant instruction fees on the Counter claim of Kshs. 1,226,500 made up as follows:

1st Kshs 1,000,000

Kshs. 77,000

transaction between him and the Respondent. Unfortunately the agreement annexed in the said affidavit does not appear to be signed though it is witnessed. However, even if it was signed the only amount I would have taxed off is JPY 1, 160,000 and this is the payment accounted for by the agreement. There is no evidence that the amount in the annexed schedule even went towards the purchase of the Applicant's vehicle.”

74. I have looked at the said agreement which was attached on the supplementary affidavit of Hans Jürgen Langer of 21st March, 2014. On the face of the agreement, the parties are indicated to be Accredo Ag as the lender and the Applicant herein as the borrower.
75. The purported agreement shows that the lender had remitted 1,160,000 JPY as a first installment which was towards the purchase of Land cruiser VX Limited costing JPY 2,320,000. The balance of JPY 1,160,000 was to be paid once the vehicle gets to Mombasa.
76. The agreement was signed on behalf of the lender in the presence of a Mr. Martin Khaemba. There is no indication that the Applicant signed the said agreement. Consequently, the taxing officer cannot be faulted for disregarding that document.
77. In their Application, the Respondents have averred that the Applicant has denied ever receiving any payments from the Respondents but has not annexed a single document to support his claim.
78. It is trite law that he who alleges has to prove. The Applicant was not under any obligation to produce documents to show how much he had been paid. The burden of showing what had been paid to the Applicant lies with the Respondents. In any event, the Respondents produced documents showing how much they had paid to the Applicant, which documents were considered by the taxing officer. The proved amount was deducted from the final taxed Bills of costs.

Conclusion:

79. In the circumstances of this case, and for the reasons I have given above, I make the following orders:-
- a. **The Applicant's Chamber Summons dated 14th June, 2014 is hereby allowed in respect to instruction fees payable on the Counter claim in Miscellaneous Application number 17 of 2013 only. The payable instruction fees on the counter claim is Kshs. 1,226,500 which shall be increased by half less VAT. The said amount shall then be added on the already taxed bill of costs.**
 - b. **The other prayers in the Applicant's Chamber Summons dated 14th June, 2014 are hereby dismissed.**
 - c. **The Respondents' Chamber Summons dated 25th June, 2014 in respect to Miscellaneous Application number 15 of 2013 is allowed. The payable instruction fees is Kshs. 79, 689 and not Kshs. 330, 510. The said amount shall be increased by a half less VAT.**
 - d. **The other prayers in the Respondents' Chamber Summons dated 25th June, 2014 are hereby dismissed.**
- (d) Each party shall bear their own costs.**

Dated and delivered in Malindi this 26th day of September, 2014.

O. A. Angote

Judge