IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 197 OF 2014

BETWEEN

VIPUL PREMCHAND HARIA…………………………...… APPELLANT

AND

KILONZO & CO. ADVOCATES …………........…….….…. RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ogola, J.) dated 5th December, 2013

in

Misc. Appln. No. 35 of 2010)

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JUDGMENT OF KIAGE, J.A

What we have to determine in this appeal is whether, as argued by the appellant **Vipul Premchand Haria** (the client), the High Court (Ogolla, J.) erred in not setting aside the decision of the taxing master in a fee dispute between the client and the firm of Kilonzo & Co. Advocates (the advocate), the respondent herein. The taxing master T. Ngugi, a Deputy Registrar of that court, had by a ruling dated 15th October, 2012 allowed the advocate's bill of costs seeking some **Kshs. 7,831,247** from the client as drawn. This was for legal representation in Divorce Cause No. 69 of 2005 and HCCC No. 21 of 2005.

Dissatisfied with that decision the client filed an application dated 31st October, 2012 seeking to set aside taxing master's decision. The application, expressed as brought under **Order 22 Rule 52** of the **Civil Procedure Rules** and **Rule 11(1)** and **(2)** of the Advocates Remuneration Order was based on grounds, *inter alia*; that the client had paid **Kshs. 5,700,000** as fees, but the advocate did not finalize the divorce matter; the taxing master failed to take into account the fees already paid; and the **Kshs. 7,831,247** costs taxed by the taxing master were manifestly excessive and not commensurate with the work done.

Even though the advocate raised objection that the client's application contravened the provisions of **Rule 11(2)** of the Advocates (Remuneration) Order, 2009 (ARO) as no reference had been filed by the client so as to grant him audience, the learned Judge, rejected that contention as being a mere technicality and expressed the view that the client had filed a valid reference. He then proceeded to decide the application on its merits as per the impugned ruling.

The client's grievances against the ruling as can be gleaned from the memorandum of appeal are that the learned Judge erred by, inter alia;

- ***Finding against evidence that there was no proof of payment of Kshs. 5,700,000 as fees.***
- ***Deciding to interfere with the Deputy Registrar's decision which meant the advocate could charge any fee he wished.***
- ***Failing to consider the reasonableness of the fees charged when no basis had been laid for Kshs. 5,000,000 instructions fees which was manifestly excessive implying an error of principle.***
- ***Failing to interfere with the taxing master's decision which combined schedules V and VI of the Advocates Remuneration Order.***

The client proposed to ask this Court to set aside the learned Judge's ruling.

Prior to the hearing of the appeal both parties filed written submissions which were highlighted before us by **Mr. Wandabwa**, learned counsel for the client and his learned counterpart, **Ms. Kilonzo** for the advocate.

It was contended for the client that the learned Judge erred and misdirected himself in two respects, namely; his interpretation and application of **Schedule V** of the ARO on the basis of which he

failed to set aside the taxing officer's ruling, and; in finding no proof of payment already made with the consequence of allowing manifestly excessive and exorbitant taxation against the client.

Mr. Wandabwa urged that whereas **section 22** of the ARO provides that an advocate may elect to charge his remuneration under Schedule V and signify such election in writing to the client before or contemporaneously with the rendering of his bill of costs, it behoves the taxing master to consider the complexity, voluminousness, importance and complexity of the matter. Moreover, the fees must be fair and reasonable. Counsel pressed that as the taxing master neither bore in mind nor exercised any of these considerations, her decision ought to have been reversed. The learned Judge therefore fell into error in not doing so, especially when he expressed himself as not having found any documents prepared by the advocate on the basis of which we could make a finding or even comment on the complexity or importance of the matter.

Citing in aid the cases of ***PREMCHAND RAICHAND LTD &*** ***ANOR vs. QUARRY SERVICES OF EAST AFRICAN et al*** ***(N. 3) [1972] 1 EA 162*** and ***JORETH vs. KIGANO & ANOR*** ***[2002] 92***, a decision of this Court, Mr. Wandabwa besought us to reverse the learned Judge and remit the matter to the taxing master for the purpose of arriving at a reasonable fee in accordance with established principles.

In answer to those submissions, Ms. Kilonzo posited that even though the learned Judge stated that he did not have the documents before him by which he would have determined complexity and importance of the matter, that did not mean that the taxing master did not have the advantage of them. She urged that the receipts exhibited by the client did not amount to **Kshs. 5.7m** and were all taken into account by the taxing master, who gave a credit for the same. Fees were paid in only one matter, and the client was trying to obtain an undue credit in the matter before court on which he paid nothing, for fees he paid in a different matter. Counsel concluded that the onus of demonstrating before the learned Judge that the taxing master had erred lay on the client but he failed to discharge it, and we ought not to interfere with the concurrent findings of the two courts below.

Mr. Wandabwa's brief rejoinder was to reiterate that the learned Judge categorically stated that there was no material before him and this Court should therefore interrogate both the factual and legal questions that were before him and arrive at an independent conclusion.

I have carefully considered the rival submissions made before us, the case law cited and the record of appeal. In view of conclusion that I have arrived at, I will deliberately eschew making any concrete findings regarding what fees should properly have been allowed by the taxing master. This is necessary so as to avoid any discomfiture or embarrassment for the forum within whose mandate matters taxation lie.

The question I must answer is whether the learned Judge did justice to the reference filed and urged before him by the client. Issues of whether he had paid fees to the advocate, and how much of it aside, it seems to me that the gravamen of the client's complaint before the learned Judge was that the taxing master failed to give reasons for taxing the costs at **Kshs. 7,831,247** and that the said amount was in the circumstances of the case *"prohibitively exorbitant"* and *"not commensurate with the work inadequately and partly done,"* as captured in paragraphs 10,11 and 12 of the client's supporting affidavit sworn on 31st October 2012.

Now, it is not in contest that the advocate was within rights to elect to charge fees under **Schedule V** instead of **IV** of the **ARO** and he properly informed the client in writing as he rendered the bill of costs. Once the client was dissatisfied with the bill, it fell upon the taxing master to tax it. Such taxation, much as it lies in the taxing officer's discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the taxing officer takes into consideration should be apparent from the reasons that she gives for her decision. It is those reasons that give an indication whether or not the discretion reposed in the taxing officer was properly exercised.

Where, as is the case before us, the value of the subject matter was not readily ascertainable from the pleadings, since the advocate did not represent the client to the point of settlement or judgment, which are other bases for determination of subject matter value, the taxing master is, in the language of this Court in ***JORETH Vs. KIGANO*** (supra).

> ***"..entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."***

That language, affirming that a taxing officer is entitled to consider the matters enumerated, though the list is by no means exhaustive, is appropriate where the discretion of a taxing master has been properly exercised and is to be upheld. I would venture to state that in actual fact a taxing master is not only entitled, but actually *expected* and *required* to consider the matters stated by this Court. A failure to do so amounts to a misdirection or non-direction as the case may be, which is tantamount to abuse of discretion.

In the present case, it is abundantly clear from the ruling of the taxing master that she did not consider these matters and satisfy herself thereon. After quoting the last paragraph of item 1 of the bill of costs which essentially sought to justify the plea that the fees should be taxed on a higher scale per **Schedule V** of the **ARO** because *"the matter was complex and requires the utmost care and attention of Mr. Mutula Kilonzo Senior EGH, EBS, a Senior Counsel"*, the taxing officer, without any indication that she interrogated those assertions, merely referred to **Rule 22** of the ARO and concluded her brief ruling as follows;

> ***"In this regard, the advocate as stated hereinabove contemporaneously with rendering the Bill of Costs signified to the client his election to charge under Schedule V. For that reason, the bill is taxed as drawn."***

Clearly, there were no findings made by the taxing master on the complexity, importance, interest of the parties and the general conduct of proceedings. No reasons were assigned for the blanket taxation of the bill as drawn. In fact, a proper reading of the taxing master's words seems to suggest to me that she proceeded from the assumption, patently erroneous, that so long as an advocate has signified to his client the election to charge under Schedule V, the taxing officer has no role to play in the taxation save to tax it as drawn. I think that this is a fundamental misdirection and the learned Judge should have identified and corrected it. In not doing so he erred and that error afflicted his decision with a serious infirmity.

I note also, as has been urged by the client, that the learned Judge expressed himself as being bereft of material on record upon which he could satisfy himself as to the complexity and importance of the matter yet went on to uphold the taxing master's ruling. I think, with respect, that this was an error upon error in that the learned Judge endorsed a finding by the taxing master that did not have a discernible basis.

The upshot of my consideration of this appeal is that the learned Judge was wrong not to find that the taxing officer had committed an error of principle and essentially abused discretion. For that reason I would allow the appeal, set aside the learned Judge's ruling and substitute it with an order that the ruling of the taxing master be set aside and the advocate's bill of costs be remitted to a taxing master other than T. Ngugi SPM for the proper taxation. I would grant the client costs of this appeal.

As Karanja and Sichale JJ.A are of the same opinion, those are the orders of the Court.

Dated and delivered at Nairobi this 19th day of June, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

CONCURRING JUDGMENT OF W. KARANJA, J.A

I have had the benefit of reading the Judgment of the Hon. Mr. Justice Kiage, J.A. in draft. I entirely concur with the findings and I have nothing useful to add.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

CONCURRING JUDGMENT OF SICHALE, J.A

I have had the advantage of reading in draft the judgment of my learned brother Kiage, J.A. I entirely concur with his findings and I have nothing useful to add.

Dated and delivered at Nairobi this 19th day of June, 2020.

F. SICHALE

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JUDGE OF APPEAL