



THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJA)

CIVIL APPEAL NO. 286 OF 2010

BETWEEN

MURIU, MUNGAI & CO. AVOCATES APPELLANT

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Commercial & Tax Division, Milimani) (Koome, J) dated 26th March, 2019

in

MISC. CAUSE NO. 699 OF 2007)

JUDGMENT OF THE COURT

1. This is an appeal under Paragraph 11(3) of the Advocates (Remuneration) Order from a decision of the High Court (Koome, J (as she then was)) rendered on 26th March, 2010 upholding the respondent's objection to a decision of a taxing officer and striking out the appellant's bill of costs.
2. The background to the appeal, in brief, is that the appellant (the advocates) acted for the respondent (the client) in connection with transfer of assets. A disagreement arose concerning the remuneration payable to the advocates. The client contended that the advocates were not entitled to charge more than a fee that had been agreed in advance. On 2nd May 2007, the advocates lodged a Bill of Costs dated 30th April, 2007 before the High Court at Nairobi seeking taxation of the costs as between advocate and client in connection with work done by the advocates for the respondent relating to the transfer of a property known as Title Number Nakuru Municipality/Block 11/38 (formerly LR. No. 451/572). The Registrar of the court (the taxing officer) taxed and allowed the bill of costs in a decision given on 11th February, 2008.
3. The client was dissatisfied with the decision of the taxing officer and filed a notice of objection dated 19th February 2008 under Paragraph 11 of the Advocates (Remuneration) Order which provides the procedure for objection to decision on taxation. The client followed through that objection and presented a chamber summons dated 9th April 2009 in accordance with Paragraph 11(2) of the Advocates (Remuneration) Order seeking to set aside the decision of the taxing officer and for the striking out of the entire Bill of Costs. The application was based on the grounds that the entire Bill of Costs was untenable on account of the fact that agreement for fees between the client and the advocate existed which disentitled the advocate from filing a Bill of Costs when legal fees for the transaction had already been agreed upon. In the alternative, the client contended that the fees allowed by the taxing officer were manifestly excessive.
4. The advocates opposed the application on the grounds that it was defective and bad in law; that there was unreasonable delay in presenting the application; and that the application was an afterthought and intended to delay the matter.
5. In the impugned ruling delivered on 26th March 2010, the learned Judge of the High Court upheld the objection by the client having concluded that the taxing officer taxed the Bill of Costs in error. The Judge proceeded to set aside the taxation. In doing so, the Judge stated thus:

“I found that the primary document which ought to have guided the court in arriving at instruction fees and all other fees payable to the advocate was the agreement entered into between the KCC and the Government of Kenya. I further found the

instructions were given to the advocates to carry out a block exercise of taking over the assets investing them to the client. The advocate was therefore supposed to file one bill of costs and instruction fees was to be based on the value of the agreement and all the work which was done by the advocates was supposed to be itemised within that bill”

6. Aggrieved by that ruling, the advocates lodged the present appeal in accordance with Paragraph 11(3) of the Advocates (Remuneration) Order complaining that the learned Judge erred: in holding that the taxing officer erred in principle in his assessment of costs; in her interpretation of Section 45 of the Advocates Act and Rules 13 and 21 of the Advocates (Remuneration) Order; in holding that the advocates were supposed to file one Bill of Costs based on the value of the agreement; and in finding that the taxing officer erred in relying on a valuation report for purposes of determining the value of the subject matter for purposes of assessing costs.

7. Appearing for the advocates, learned counsel Mr. Munge began by objecting to the client’s supplementary record of appeal lodged with the Court on 21st September 2018 on the grounds that it consists of additional evidence that cannot be admitted under the rules of the Court. He urged that the documents therein should be expunged.

8. On the appeal, counsel submitted that the learned Judge failed to appreciate that the client’s objection to the decision of the taxing officer was limited to only three items of the Bill of Costs; that the parties restricted their submissions before the Judge to those three items of the Bill of Costs; that it was not open to the Judge to strike out the entire Bill of Costs and that the Judge exceeded her mandate thereby committing an error of principle.

9. It was submitted that the issue of instructions in the form of a ‘block exercise’ was not raised by the parties and that the Judge failed to consider that the client instructed the advocates to transfer the property Nakuru Municipality/Block 11/38 (formerly LR No. 451/572) in respect of which the Bill of Costs related; and that the valuation report on the basis of which the value of the subject matter was pegged was relevant in the determination of the instruction fee.

10. Mr. Mwiti, learned counsel for the client, conceded that the bulk of documents in the supplementary record of appeal were not part of the record in the lower court.

11. In opposing the appeal, Mr. Mwiti submitted that the decision by the Judge was well founded; that the taxing officer should not have considered the Bill of Costs at all; that the matter relating to the advocates remuneration had already been determined by the Judge in previous proceeding in Misc. Cause No. 290 of 2007 between the same parties and was therefore *res judicata*; that in that case the Judge resolved that the advocates should have filed one Bill of Costs with respect to all the transactions undertaken pursuant the sale agreement.

12. Counsel drew the court’s attention to correspondence exchanged between the parties which according to him demonstrated the nature and scope of the client’s instructions. Counsel maintained that the objection by the client was not limited to certain items of the Bill of Costs as contended by the advocates but to the entire Bill of Costs.

13. It was also submitted for the client that the valuation report on the basis of which the taxing officer assessed the instruction fee was a confidential report which could not be used for purposes of assessment of costs and that the Judge was therefore right in finding that the taxing officer should not have relied on that report. It was submitted that the advocates purported to sever the block instructions in order to unjustly enrich themselves and that this matter is one of the many taxation matters pending between the parties arising from the same transaction.

14. In his brief rejoinder, Mr. Munge argued that the principle of *res judicata* is not applicable as the two taxation matters relate to different properties; that the block fee note that the advocates had submitted to the client was not a bar to taxation.

15. We have considered the appeal and submissions by learned counsel. Beginning with the objection by the advocates to the supplementary record of appeal filed by the client on 21st September 2018, it was conceded by Mr. Mwiti that the bulk of documents in the supplementary record were not part of the record in the lower court and leave was neither sought nor obtained to adduce additional evidence. We accordingly uphold the objection and make no reference to the documents in question.

16. Turning to the substance of the appeal, the main complaint by the advocates is that the objection by the client to the decision of the taxing officer was restricted to three items of the advocate’s Bill of Costs, yet the Judge struck out the entire Bill of Costs. It was submitted that this constituted an error of principle.

17. Based on our review of the record, it is true that in its notice of objection dated 19th February 2008, the client indicated that it was objecting to the decision of the taxing officer “*as regards items 1,2 and 3*” and requested for reasons for the same. However, in the subsequent chamber summons dated 9th April 2009 on the basis of which the learned Judge rendered the impugned ruling, the client complained against the decision of the taxing officer “*as far as the same relates to taxation of the entire bill of costs dated 30th April 2007 and/or as far as the same relates to items 1, 2 and 3 of the bill of costs*” and prayed for the setting aside of the decision. Indeed, in the grounds in support of the application, the client asserted that “*the entire bill of costs is legally untenable and non-maintainable in law...*”. Furthermore, the submissions made before the Judge reflect that the client’s objection to the decision of the taxing officer related to the entire Bill of Costs and not just to the three items. There is accordingly no merit in the advocate’s complaint.

18. In setting aside the taxation, the Judge was satisfied that the taxing officer had committed an error of principle in that the taxing officer had failed to appreciate that the instructions given to the advocates by the client entailed “a block exercise” of transferring assets. That conclusion is well supported by the material that was before the Judge including the advocates own letter to the client dated 17th February 2005 in which the advocates indicate that a global fee of Kshs. 11 million, excluding disbursements and taxes was acceptable with respect to the “*transfers for the properties*”. It was not until the client demanded a refund of “*overpayment*” of fees in connection with other legal matters the advocates were handling for the client that the advocates took umbrage and threatened the client that they would “*proceed to tax*

our bill based on the actual value of each and every property we have transferred or we are in the process of transferring”.

19. In the foregoing circumstances, we consider that the Judge was entitled to interfere with the decision of the taxing officer on the basis of an error of principle. (See Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No.3) [1972] EA 162 and Joreth Limited vs Kigano & associates, Civil Appeal No. 66 of 1999, Nairobi). The Judge correctly determined that the taxing officer had made an error of principle. Therefore, we do not have a basis for interfering with her decision. This appeal is devoid of merit and is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a True copy of the original.

DEPUTY REGISTRAR