IN THE COURT OF APPEAL

AT NAIROBI

(WAKI, NAMBUYE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 203 OF 2018

BETWEEN

ANDY FORWARDERS SERVICES LIMITED......................1ST APPELLANT

PETER MUTHOKA...2ND APPELLANT

AND

OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES...RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Olga Sewe, J.) dated and delivered on 22nd September 2017 ***in***

H.C.MISC. C.APPL. No. 135 of 2014)

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JUDGMENT OF THE COURT

1. This appeal stems from a dispute between advocate and client over legal fees payable. The respondent, the law firm of Ochieng' Onyango Kibet and Ohaga Advocates (the advocates) was retained by the appellants, Andy Forwarders Services Limited and Peter Muthoka (the clients) to institute suit, being Nairobi High Court Civil Case No. 149 of 2012, against Price Waterhouse Coopers Ltd and four others (the defendants). In that suit, the clients sought, among other reliefs, declarations and injunctive orders to restrain the defendants from circulating or publishing a forensic investigation report in which it was alleged that the appellants had breached statutory and fiduciary duties that had led to substantial loss. The suit was defended but was subsequently compromised before trial.

2. The advocates and the clients were unable to agree on the remuneration payable by the clients for work done in connection with that suit. Consequently, the advocates filed an advocate-client bill of costs before the High Court in Misc. Civil Application No. 135 of 2014 in which they sought certification of costs against the clients for the amount of Kshs.91,214,851.06. The clients contested two items in that bill of costs, namely item 3 on instruction fees, initially claimed at an amount of Kshs.39,142,500.00 and subsequently amended to Kshs.13,862,000.00; and item 5 on getting up fee of Kshs.4,620,666.67.

3. Following arguments by counsel for the parties on the two contested items in the bill of costs, the taxing officer, the Deputy Registrar of the High Court, in a ruling delivered on 31st July 2015, allowed the sum of Kshs.3,000,000.00 only under item 3 of the bill of costs relating to instructions fees. Item 5 on the

bill of costs relating to getting up fee was disallowed altogether. The total bill of costs was taxed and allowed in the sum of Kshs.5,623,851.06. As the clients had already paid a deposit of Kshs.1,648,000.00 to the advocates, a certificate of costs dated 13th August 2015 was issued by the High Court Registrar for the balance of Kshs.3,975,851.06 as the amount payable by the clients to the advocates. The clients were not satisfied.

4. On 21st August 2015 the clients presented an application to the High Court, a reference under Rule 11(2) of the Advocates Remuneration Order, 2009 among other provisions, seeking: and extension of time within which to make that reference; and secondly, an order to set aside the said ruling of the taxing officer given on 31st July 2015. They also sought an order that the bill of costs should be referred for fresh taxation before the taxing officer.

5. That application was heard by **Olga Sewe, J**. before whom the clients contended that the delay in presenting the reference was occasioned by inadvertent error in capturing the date of the ruling in the diary; that the taxing officer misdirected herself and wrongly exercised her discretion in awarding Kshs.3,000,000.00 as instruction fees on unclear and unreasonable grounds.

6. The main contention by the clients before the Judge was that the taxing officer should have based the instruction fee on a Deed of Settlement in her determination of the value of the subject matter.

7. In its impugned ruling given on 22nd September 2017, the High Court granted the clients prayer for extension of time and deemed the reference as duly filed. The prayer to vacate and set aside the ruling of the taxing officer and to refer the matter for fresh taxation was, however, declined.

8. In declining the reference, the High Court was not persuaded that the taxing officer had committed any error of principle in the taxation. The Judge expressed that the taxing officer had properly guided herself on the applicable law and principles for determining instructions fee; and that the Deed of Settlement which the clients asserted should have formed the basis for determining the value of the subject matter for purposes of assessing the instruction fee was not availed to the taxing officer. Dissatisfied, the clients lodged the present appeal.

9. Urging the appeal before us, **Miss. Hanan El-Kathiri**, learned counsel holding brief for **Mr. Ahmednasir**, SC for the clients relied on the appellant's written submissions which she highlighted. She reiterated that the main issue in this appeal is the value of the subject matter; that for purposes of assessing the instruction fee, the value of the subject matter in a suit can only be determined from the pleadings, judgment or settlement between the parties. In that regard the case of ***Joreth Limited vs. Kigano (2002) 1 EA 92*** was cited. Counsel submitted that in this case the suit was compromised through a Deed of Settlement and a consent filed; that in the circumstances the value of the subject matter should have been based on the settlement; and that the Judge erred in disregarding "*an express evidential finding by the taxing master that there was indeed a deed of settlement dated 7th of February 2014 and that the matter was settled before a hearing date was issued*."

10. It was submitted further that the taxation was based on an illegality and fraud on account of the failure on the part of the advocates to disclose to the taxing officer that the matter was settled and that there was in existence a Deed of Settlement which the advocates did not disclose. In that regard counsel for the clients filed a supplementary list and digest of authorities citing numerous authorities, amongst them ***Kenya Pipeline Company Limited vs. Glencore Energy (UK) Limited [2015] eKLR***, in support of the proposition that an action cannot be maintained on the basis of illegal contract.

11. It was submitted that the Judge failed to appreciate the principles of taxation as enunciated in ***Premchand Raichand Limited vs. Quarry Services of East Africa Limited [1972]EA162*** and ***Republic vs. Minister of Agriculture & 2 others, Ex parte Samuel Muchiri W Njuguna & 6 others (2006) eKLR*** and that this Court should therefore interfere with the decision of the High Court; that in line with the principles in ***Mbogo vs. Shah [1968] E A 93***, this Court has the discretion to overturn the decision of the High Court in order to do justice to all the parties; that where, as here, the taxing officer commits an error

of principle, the matter should be remitted back for fresh taxation. In that regard the case of ***Kipkorir Titoo & Kihara Advocates vs. Deposit Protection Fund Board, Civil Appeal No. 220 of 2004, [2005] eKLR***, among other decisions was cited.

12. Opposing the appeal, **Mr. Obuya** learned counsel for the advocates holding brief for **Mr. J. Ochieng Oduol** relied on the advocates written submissions which he highlighted. He submitted that the advocates acted for the clients in the suit in the High Court seeking to have adverse findings, opinions and recommendations expunged from a forensic report by Price Water House Coopers in which it was claimed losses in excess of one billion shillings had arisen due to alleged irregular outsourcing of logistic services to the 1st appellant; that through a letter dated 20th February 2013 the clients informed the advocates that the parties to the suit had reached settlement details of which were confidential to the parties.

13. It was submitted that the Deed of Settlement remained confidential and was not produced before the taxing officer but was annexed to an affidavit filed before the High Court on 13th June 2016 in connection with the reference; that the Judge correctly noted in her ruling that the Deed of Settlement was never produced before the taxing officer; that the value of the subject matter could not, therefore, be based on the settlement agreement which was neither on record nor disclosed to the advocates and neither could the value of the subject matter be determined from the pleadings. The taxing officer was therefore entitled to exercise her discretion in awarding the instruction fee in accordance with the decision in the case of ***Joreth Limited vs. Kigano*** (above), counsel urged. It was submitted that it was incumbent upon the clients, who had possession of the Deed of Settlement, to produce it before the taxing officer.

14. Counsel further submitted that when the Deed of Settlement was eventually produced before the High Court, it did not disclose the value of the subject matter and would not therefore have aided the taxing officer in assessing the instruction fee had it been produced.

15. According to counsel, the High Court rightly declined the invitation by the clients to interfere with the decision of the taxing officer as there was no basis for doing so; and that the court can only interfere with the decision of the taxing officer in exceptional cases where it is demonstrated that such decision is based on an error of principle. In that regard, counsel cited the decision in ***Thomas James Arthur vs. Nyeri Electricity Undertaking [1961] E A 92*** and the High Court decision in ***First American Bank of Kenya vs. Shah & others [2002] 1 E A 64*** and urged that the taxing officer properly exercised her discretion in awarding Kshs.3,000,000.00 as instruction fee.

16. We have considered the appeal and the submissions by counsel. For the High Court to interfere with a decision of a taxing officer on a reference, it has to be satisfied that the impugned decision of the taxing officer is based an error of principle. An award on instruction fee may be so manifestly excessive as to justify an inference that it is based on an error of principle. See ***Steel Construction Petroleum Engineering (EA) Ltd vs. Uganda Sugar Factory [1970] EA 11***.

17. The error of principle attributed to the taxing officer by the clients on the basis of which the clients maintain that the Judge should have allowed their reference is, as already indicated, that the taxing officer should have based the instruction fee on the Deed of Settlement. In addressing the question, "*what amount should the instruction fee be?*", the taxing officer referred to the case of ***Joreth Limited vs. Kigano*** (above) and stated that the value of the subject matter was a relevant consideration in determining the amount of the instruction fee. After restating the principle in that case, the taxing officer went on to say:

> ***"It is clear from the aforementioned how value of the subject matter ought to be determined. In this instance looking at the Amended Plaint filed by the Applicants herein for the Respondents in the parent suit, their prayers for judgments included 4 declarations, a permanent injunction, general damages and compensation and costs of the suit. Nowhere was there a monetary claim to state that the subject matter of the suit can be ascertained from the pleadings. The same could also not be ascertained from judgment since the matter was settled before the matter could be concluded; nor could it be ascertained from the settlement since the Applicant indicated in their***

submissions that the settlements were private and they were not privy to that information.

Consequently based on the above principles and looking at the matter at hand, it is quite clear that the subject matter in this taxation is not ascertainable and therefore the taxing master discretion applies in determining the amount of fees to award."

18. Having considered that the nature of the suit, the importance of the matter to the clients, the amount of work involved including research as well as perusal of materials and preparation of the case, the taxing officer concluded as follows:

"So in exercise of my discretion and taking into consideration the other fees and allowances to the advocates in respect of the work done to which any such allowance applies, the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances, I determine that Kshs.3,000,000/= is sufficient as Instruction Fees."

19. On its part, the High Court was not persuaded that the taxing officer had committed any error of principle so as to warrant the setting aside of the taxation and neither was it demonstrated that the amount of Kshs.3,000,000.00 awarded as instruction fee "*was so manifestly excessive and exorbitant as to amount to an error of principle*." With regard to the contention that the taxing officer should have based the instruction fee on the Deed of Settlement, the Judge noted that neither party availed it to the Taxing Officer. The Judge observed that,

"the Deed of Settlement was availed for the first time as an attachment to the 2nd Defendant's supplementary Affidavit filed herein on 13th June 2016. This was way after the reference was filed…".

20. We are unable to fault the two courts below. It is evident from the ruling of the taxing officer that she was alive to the fact that the suit had been settled before trial. The claim by the clients that the advocates concealed the Deed of Settlement from the taxing officer is not borne out by the record. In their letter to the advocates dated 20th February 2013 (contained in the supplementary record of appeal filed herein with the consent of the parties on 1st August 2018), the clients, when instructing the advocates to settle all matters, stipulated that "*the details of the settlement are contained in a deed of settlement which is confidential to the shareholders parties thereto*." In those circumstances, we do not think the clients can justifiably assert that the advocates did not disclose the Deed of Settlement to the taxing officer. There is therefore merit in the contention by the advocates that as the Deed of Settlement was not disclosed to them, it was incumbent upon the clients to produce it before the taxing officer if they intended to rely on it. Furthermore, and as submitted by counsel for the advocates, the Deed of Settlement, after it was eventually disclosed, does not disclose any value and would have been of little assistance in determining the value of the subject matter for purposes of assessing the instruction fee.

21. The circumstances when an appellate court may justifiably interfere with the decision of the High Court are absent in this case. As **Madan, JA** stated in the case of ***United India Insurance Co Ltd & 2 Others vs. East African Underwriters (Kenya) Ltd [1985] eKLR*** this Court should only interfere:

"…if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

22. In the present case, we fully agree with the Judge that the taxing officer *"properly guided herself on the applicable law and principles for determining instructions fee"*. There is no error of principle attributable to the taxing officer. We have no basis for interfering with the decision of the High Court.

23. The appeal is devoid of merit and is accordingly dismissed with costs to the advocates.

Dated and delivered at Nairobi this 5th day of July, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR