



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKI, WARSAME, & SICHALE, JJA)

CIVIL APPEAL NO. 75 OF 2018

RATEMO OIRA & CO. ADVOCATESAPPELLANT

VERSUS

MAGEREZA SACCO SOCIETY LTD.....RESPONDENT

(Being an Appeal from the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (Bor, J.) dated 31st May, 2017

in

Miscellaneous Application No. 54 of 2015)

JUDGMENT OF THE COURT

The issue before us is whether or not an advocate is entitled to full instruction fees upon receipt of instructions, and whether the subsequent progress of the matter is irrelevant.

The respondent, **Magereza Sacco Society Ltd** engaged the services of **Ratemo Oira & Co. Advocates**, the appellant, in the purchase of Land Reference No. 12979/4 and IR No. 68946 allegedly valued at Kshs.8.8 Billion.

The appellant claims to have conducted due diligence on behalf of the respondent and rendered legal services by drawing the sale agreement and the transfer of the property. However, the Respondent failed to pay the agreed deposit of Kshs.300,000,000/= and the transaction collapsed.

Thereupon, the appellant filed an Advocate/Client Bill of Costs dated 28th January, 2015 which was dismissed by the **Hon. S. Mwayuli** on grounds *inter alia*, that there was no sale agreement or executed transfer document to show that the transaction took place and that the appellant failed to attach receipts to prove expenses incurred. The appellant filed a reference seeking to set aside the order of the Deputy Registrar. The Court (**Lady Justice Gitumbi**) obliged and found that some of the issues raised by the appellant had not been addressed directly and consequently ordered that the Bill of costs be taxed afresh before the Learned Deputy Registrar, **Hon. Isabella Barasa**.

Upon hearing the matter, the Taxing Officer taxed off Kshs.139,152,740/= from the Bill and allowed at Kshs.118,260/=. Specifically, the taxing officer taxed the instruction fees at Kshs.100,000/= which in her opinion was fair and reasonable, given that the bill originated from a transaction that was not completed. The Court also found that from the evidence before it, the services offered by the appellant were to conduct due diligence on the property.

The appellant being dissatisfied with the ruling of the Deputy Registrar, appealed against the said ruling by way of reference dated 28th November, 2016 before **Lady Justice K. Bor** under **Rule 11 (2) of the Advocates (Remuneration) Order 2009**. In the reference, the appellant sought, *inter alia*, to set aside or vary the ruling of the Deputy Registrar in taxing its Bill of Costs at Ksh.100,000/= as the basic instruction fee.

The High Court in a ruling dated 31st May, 2017 agreed with the taxing officer and expressed itself as follows

“Going by the document that were place before the taxing master the court finds that the taxing master applied the correct principles in arriving at the figure she awarded. The receipts for fuel and other disbursements which were annexed to this reference were not placed before the taxing master.

While urging that the bill ought to be taxed based on the value of the property of Kshs.8.8 billion, the Applicant is relying on schedule 1 of Advocates Remuneration Order. The court agrees with the findings of the Deputy Registrar that Rule 18(f) of the Advocates Remuneration Order is the applicable rule since the transaction was not completed and the remuneration is that prescribed by schedule V.”

It is the foregoing that prompted the appeal before us which is premised on 26 grounds of appeal. In a nutshell, the appellant takes exception to what it regards as an error of the learned Judge to consider that the full instruction fee to transact a conveyancing is earned the moment the advocate is engaged and that the said fees must take into account the value of the subject matter.

Mr. Ratemo, learned counsel for the appellant, submitted that the award of Kshs.100,000/= as instruction fees was an error in principle by the Judge and the Taxing Officer. Counsel submitted the Advocate/Client Bill of Costs application dated 28th January 2015 ought to have been assessed based on the value of the subject matter valued at Kshs.8.8 billion and on that basis, the instruction fee awarded was too low necessitating the Court’s intervention.

Relying on ***Premchand Raichand Ltd & Anor vs. Quarry Services of East Africa Ltd & others (1972) EA 162***; it was submitted that the instruction fee payable to an Advocate should be based on the value of the subject matter, the complexity of the work to be carried out and all other circumstances of the case and that the decision of the Taxing Master can only be interfered with if it is so high or so low as to amount to injustice to one party. According to counsel, it did not matter whether the fee will be paid in full or less but the Advocate was entitled to his legal fees. Counsel emphasized that the appellant diligently acted on behalf of the respondent but the respondent failed or neglected to complete their part by paying the agreed down payment of Kshs.300,000,000/=.

The learned Judge was also faulted for not taking into account that the taxing officer had erred in principle by taxing the matter using **Schedule V** of the Advocates Remuneration Order 2009 instead of **Schedule I** and as a result arrived at the wrong decision.

Miss Tarrus who was holding brief for **Mr. Mwongela** for the respondent submitted that for an Advocate to be entitled to instruction fees assessed on the value of the subject matter, the transaction must be carried out to completion. Counsel relied **on Schedule 1(c) of The Advocates (Remuneration) Order 2009** which provides:

Purchaser’s Advocate

For investigating title to a freehold or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any) Scale fee as set out in 1(a) above.

Counsel further emphasized that under the **Law of Contract Act, Section 3 (3)**, a contract for the disposition of an interest in land must be in writing, signed by the parties and attested to. In her view conducting due diligence, facilitating payments of rates and rent without evidence of an executed sale agreement and transfer did not amount to a complete conveyance.

Relying on the case of ***Joreth Limited vs. Kigano & Associates [2002] eKLR***, counsel submitted that in the absence of a sale agreement and conveyance to ascertain the instruction fee due, the taxing officer was entitled to use his discretion to assess such instruction fee as it considered 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. Counsel concluded that since the conveyancing transactions were never completed, the appellant was not entitled to full instruction fees pegged on the value of the subject matter.

We have considered the record, submissions by learned counsel and the law. We are conscious of the fact that the appeal herein is akin to a second appeal and are cognizant of the following sentiments of this Court in ***Civil Appeal 220 of 2004, Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR***:

“The appeal to this Court from the decision of a judge on reference from a taxing officer is a kin to a second appeal and should be governed by Section 72(1) of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72(1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.”

The intention of the legislature to cater for remuneration in instances of complete and incomplete business is evident in the following provisions of The Advocates (**Remuneration) Order 2009**), which we shall reproduce here for ease of reference:

Rule 18

Remuneration of advocate in non-contentious matters.

Subject to paragraph 22, the remuneration of an advocate in respect of conveyancing and general business (not being in any action or transacted in any court or in chambers of any judge or registrar) shall be regulated as follows, namely –

Sales, purchases and mortgages of land.

(a) in respect of sales, purchases and mortgages of immovable property or an interest therein, the remuneration is to be that prescribed in Schedule I:

(b) ...

(c) ...

(d) ...

(e) ...

Uncompleted transactions and other business.

(f) in respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and all other business of a non-contentious nature, the remuneration for which is not herein before provided, the remuneration is to be that prescribed in Schedule V.

The wording above is very clear. The remuneration of an Advocate in respect of a sale or a purchase of immovable property or an interest therein under **Rule 18 (a)**, can only occur once property passes to the purchaser upon execution of a valid contract of sale and until the agreed conveyancing formalities which vest the legal title to the purchaser are completed.

Blacks' Law Dictionary 9th Edition defines a conveyance as “*the voluntary transfer of a right or of property.*” It is not in dispute that the purchase of Land Reference No. 12979/4 and IR No. 68946 allegedly valued at Kshs.8.8 Billion was unsuccessful. There was no conveyance. The conveyance was not completed. This must surely render **Rule 18 (a)** which directs the application of **Schedule 1** where there is a sale or purchase of immovable interest; futile in this matter. The only available option is remuneration under **Schedule V** as stated under **Rule 18 (f)**. The learned Judge was correct in so holding.

Indeed, it is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client. (See **Civil Appeal No. 280 of 2015, Desai Sarvia & Pallan Advocates vs. Tausi Assurance Company Limited [2017] eKLR**). However, it must be noted that an Advocate will be entitled to payment of a reasonable fee which is commensurate with the work done. The business of taxation of costs must ensure a delicate balance between the guiding principles aptly pronounced by the **Premchand case** which include: the “Court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to Courts but the worthy” and “the general level of the remuneration must be such as to attract worthy recruits to the profession”. What is a reasonable fee in the circumstance can only be adjudicated by a taxing master by application of his discretion.

With regard to the discretion of a taxing officer, **Rule 16** of the Remuneration Order states:

“Notwithstanding anything contained in this Order, on every taxation the officer may allow all such costs, charges and expenses as authorized in this Order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other person, or by other unusual expenses.”

This position is fortified by this Court’s statement in **Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] eKLR**, in which this Court had this to say:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.” (Emphasis ours)

The Judge of the superior court like the taxing officer was exercising her discretion and this Court cannot interfere with the exercise of such discretion unless it is shown that the learned Judge acted on the wrong principles of law; that the amount awarded is so high or so low as to amount to injustice to one of the parties; that there was a defect in the decision on the case upon merits or that the discretion has not been exercised judiciously. A Taxing Officer’s decision is not exercised judiciously where a relevant consideration has not been taken into account, or irrelevant considerations have been taken into account and this would amount to an error of principle. (See **Lucy Waitira & 2 others vs. Edwin Njagi T/A E. K Njagi & Company Advocates [2017] eKLR**)

Similarly, this Court in **Civil Appeal 206 of 2006, Kamunyori & Company Advocates vs. Development Bank Of Kenya Limited [2015]** stated;

“Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”

In our view, the learned Judge rightly addressed herself to the circumstances under which a judge can interfere with the taxing officer’s exercise of discretion and found no justification for interference. The learned Judge agreed with the taxing master that **Rule 18 (f)** of the

Advocates Remuneration Order 2009, is the applicable rule since the transaction was not completed and the remuneration is that prescribed by **schedule V**.

As admitted by both parties, the appellant did some due diligence on the property by conducting a search, facilitating payment of land rates, drafted letters, perusals, corresponding with the Office of the Commissioner of Lands and Magereza Sacco society and drafting a Transfer instrument. But in the end his efforts were all for naught.

The learned Judge considered the material placed before the Taxing Master which included: a copy of an application dated 24th October, 2012 for a certified copy of the certificate of lease for property L.R No. 12979/4, a copy of property rates payment request dated 13th July, rates clearance certificate dated 16th August, 2012, a letter dated 19th October, 2012 to the Managing Director Villa Point Company Limited on the status of the property, letters from Villa Point Company Limited dated 22nd October, 2012 and 24th October, 2012 and an undated, unsigned Transfer instrument between Renton Company Limited and Magereza Sacco Society Limited. In so doing, the Judge noted that the appellant only prepared the contract but did not complete the sale transaction and that the receipts for fuel and other disbursements which were annexed to the reference before her were not placed before the Taxing Master.

It is clear in our minds, that the learned Judge applied the correct principles of law and exercised her discretion correctly. Furthermore, the amount awarded by the Taxing officer is not too low in the circumstance and amounts to fair remuneration in view of the scope of work done by the appellant.

We therefore agree with the sentiments of the learned Judge as follows:

“This Court is of the view that it is only in contentious suits where an advocate becomes entitled to an instruction fee the moment, he is instructed but not in instances like the present case which is expressly provided for under the Advocates Remuneration Order...The Court is not persuaded that the Taxing Master failed to consider any relevant factor in taxing the bill of Costs or that she misdirected herself and caused an injustice to warrant this court to interfere with the exercise of her discretion. The taxing master applied the correct principles.”

It is clear beyond doubt that the only work done by the appellant was preparation of sale and transfer documents, which was not executed by the respondent. It is also clear that the respondent instructed the appellant to undertake sale/purchase transaction, which aborted. No deposit was paid to the appellant, making it manifest that transaction aborted in its preliminary stage. That means that the appellant’s scope and nature of work was minimal and in the early stages of the transaction while we underscore the importance of the services rendered by the appellant, we do not think, it suffered substantial or any loss in the amount determined by the taxing master and upheld by the High Court. There was no error or mistake committed by both courts and we entirely agree both courts exercised their discretion properly and appropriately.

In the end we see no reason to interfere with the High Court’s decision.

The appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of October, 2019.

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P. N. WAKI

JUDGE OF APPEAL

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M. WARSAME

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JUDGE OF APPEAL

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F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

