



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL MISCELLANEOUS NO.78 OF 2018

PROF.TOM OJIENDA.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

(AS CONSOLIDATED WITH MISCELLANEOUS NO.E006 OF 2020)

COUNTY GOVERNMENT OF MERU.....APPLICANT

VERSUS

PROF.TOM OJIENDA..... RESPONDENT

RULING

1. Like in the other three rated matters, the court is called upon to determine chamber summons brought under certificate of urgency by the applicant herein, County Government of Meru, (hereinafter referred to as the client) dated 30/09/2020 pursuant to **Rule 11 (2) of the Advocates (Remuneration) Order, 2014**. In it, the client seeks, among other orders stay of execution of the certificate of taxation dated 23/07/2020 in **Meru H.C MISC APPL. NO.78 OF 2018**, the setting aside of the ruling on taxation delivered by the taxing master on 16/07/2020 with respect to **Item No. 1** of the bill of costs dated 19/03/2018, that the said item in the bill of costs dated 19/03/2018 be taxed by this honourable court in such other sums as may appear to be reasonable or in the alternative, the said item in the bill of costs be remitted to another taxing officer for re-taxation.

2. The grounds upon which the application is premised are set out in the body of the application as well as in supporting affidavit of Irah K. Nkuubi, the client's Ag Chief Legal Officer, sworn on 30/09/2020 in which it is contended that the respondent, (henceforth referred to as the advocate) having filed an Advocate-Client Bill of Costs dated 19/03/2018, on account of having received instructions from the client to act for it in Meru E.L.C No.44 of 2015, the bill was by a ruling delivered on 16/07/2020 taxed in the sum of **Ksh.5,000,000** for instructions fees. The decision aggrieved the client who then wrote two letters dated 29/07/2020 and 16/09/2020 asking for the taxing master's reasons of taxation which reasons were sent via email on 16/09/2020 at 4.16 P.M upon which the current application was filed.

3. The client faults the sum of Kshs 5,000,000 awarded for instruction fees as colossal and excessive and attributed same to error in principle leading to a decision contrary to the law by misapprehending the nature of the suit, by improperly exercising his discretion and by failure to properly apply his mind to the law applicable on taxation as cited to him in the submissions.

4. The application was opposed by the advocate on the basis of the replying Affidavit sworn on the 29.10.2020, whose gist was that he had actually sought to recover the sum of Kshs 32,266,213.50 but the taxing master while exercising his discretion taxed the bill in the sum of 8,781,910 thus taxing off some 24,000,000 or thereabouts. The advocate then considers the reference to have no basis as no error had been demonstrated with appreciation that there is a discretion on the taxing master to increase the basic fees stipulated under the Remuneration when due regard is given to the value of the subject matter, complexity of the matter and the interests of the parties hence the sum taxed was reasonable. That the value of the subject matter was never contested by the client was underscored as having influenced the taxing master's decision.

5. Both sides filed written submissions and let it to court to make a determination on the basis of papers filed. For the client, submissions were made to the effect that there was no acquiescence by the client on the value of the suit land and that taxing master was at fault for awarding an excessive amount Kshs 5,000,000 for instruction fees based on no reason. It is submitted that the value of the suit land was first stated in the respondent's fee note dated 20/07/2015 as there was no agreement on fees between the parties. The client relied on ***First American Bank of Kenya v Shah & others (2002) 1 E.A.64*** to support its position.

6. The advocate submitted that the petition was of importance not only to the client but also to the general public as it involved property rights in land. That the taxing master took into account the nature of the case and the interest of the parties in awarding the sum of Kshs 5,000,000 for instruction fees. That the value of the subject matter is not disputed by the client. He implored this court to find that the amount awarded by the taxing master was fair and just and the same should stay. It was concluded that the client's application should be set aside and the certificate of taxation dated 23/07/2020 be executed as drawn. The advocate relied on **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No.3)[1972]EA 162 as cited in the case of Brampton Investment Ltd v Attorney General & 2 others (2013) eKLR, Simpson Motor Sales (London) v Hedon Corporation (1964) 3 ALL E.R. Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna (2006)eKLR, Kagwimi Kang'ethe & Company Advocates v Penelope Combos & anor as cited in the case of Governors Balloon Safaris Ltd v Skyship Company Ltd & anor (2015)eKLR** to support his submissions that taxing master's discretion ought not be interfered with on every slight provocation.

7. Unlike in the other related matters in which the contestation transcended beyond instructions fees, in this matter, the dispute is only on instructions fees. The fault is that the award was made on no reason and that the value of the land was irrelevant as the property is vested in the name of Kenya Forest service thus it is public land.

8. I have had the chance to look at the court file in ELC No. 44 of 2017 just to appreciate the dispute. In that file I have laid hands upon a ruling dated 30.07.2015 by which the proceedings in the matter was stayed pending the outcome of yet another matter over the same suit property being **Meru High Court Civil Case No 169 of 2008. A perusal of that file appraises me that the suit property is actually easily identifiable as 'The Show Ground' comprising some 100 acres or there about. On that appreciation alone and the fact that ASK show are to me public fairs for the education of farmers and exhibition by entrepreneurs, I do consider that the interest on the outcome of that litigation transcends beyond the parties in the court. I also consider that even if the value was not disclosed in the pleadings filed, a judicial officer is in law entitled to take notice of matters of local notoriety like the cost of land within the metropolis of Meru county. On my own as I write I consider that land to be prime with a value that cannot be termed insignificant.**

9. Having said that, I have read the taxing master's decision and I am unable to agree with the client that the decision proffered no reason at all. In the decision, the master adverted to the correspondence between the parties and the client's submissions which questioned why the sum demanded then had doubled. He then taxed off Kshs 15,000,000 after stating that he had considered the principle of taxation. In my opinion and view, I find no merit in the fault against the taxing master. In coming to that conclusion I have taken guidance from the decisions in ***First American Bank of Kenya v Shah & others (2002) 1 E.A.64, Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others (2006) eKLR*** and ***Shadrack Wang'ombe Mubea v County Government of Nyeri & another [2017] eKLR***, whose general thread of reasoning is that bills of costs should be taxed bearing in mind the nature of the matters in dispute and despite the novelty and complexity involved, the taxation should also take into account and promote access to justice as the proceedings generally developed jurisprudence and adequate reward for legal services.

10. Applying those principles to the facts of the matter at hand, I consider the litigation to have had an important impact on how court should or should not conduct their affairs. I have in mind the increasing media report that depict government agencies to prefer the application of brute state power as opposed to due process in having their way. It is the practice that portends badly for the rule of law and breeds anarchical tendencies which every well-intentioned citizen must resist for the communal good. To my mind the extensive importance of the matter to the parties and general public cannot be gainsaid. In that context therefore when the master awarded instruction fees with the circumstances of the matter in mind, he made no error of principle. In the absence of demonstrated error of principle to interfere with the decision would be unwarranted and usurpation of the jurisdiction of the master. I find no merit in the reference and I order it dismissed with costs.

11. There are three more matters I wish to comment on before I pen off. They concern the proper file to file the reference, when to apply for stay of execution and how to treat the costs of the parties incurred after taxation. I consider the matters important for my comment because I was forced to order consolidation in this file just like I did with the related files.

12. While counsel for the client had participated in the file in which the costs were taxed, when it came to filling the reference, he opted to file a new cause. That choice in my view is not contemplated by the Rules and the Act and I think for two reasons. The first reason is that in order not to truncate and proliferate litigation over one issue across multiple files and maybe before different courts, proceeding subsequent to a determination ought to be undertaken in the file in which the decision was rendered. I see that to be the rationale behind the dictates of Section 34 of the Civil Procedure Act. When faced with a similar situation, the court in ***Independent Electoral and Boundaries Commission v John Omollo Nyakongo t/a H.R Ganijee & Sons [2020] eKLR*** had this to say: -

**“My understanding of the jurisdiction of this court under rule 11 of the Advocates (Remuneration) Order is that the court exercises its jurisdiction on the platform of the suit in which the impugned decision of the Taxing Officer was made. It is not exercised in a separate or fresh suit. Exercise of that jurisdiction is invoked through the filing and service of an objection under rule 11 (1). The Notice of Objection sets out the contested items and findings, where necessary. Upon filing of the Notice of Objection within the suit, and upon service of the Notice, the Objector is required to file a reference to the Judge by way of Chamber Summons within the same suit. The Judge thereafter exercises jurisdiction under rule 11 on the platform of the suit in which the impugned decision of the Taxing Officer was made.**

**The miscellaneous application before me is a fresh suit. An application under rule 11(4) ought to be brought in the suit in which the impugned decision was made. I do not think I would be properly directing my mind if I were to purport to exercise jurisdiction under rule 11(4) on the platform of this fresh suit yet the impugned decision of the Taxing Officer was made in a different suit, to wit, Mombasa H.C.C.C Misc. Application No.332 of 2019”.**

13. The demand that all issues in a dispute be dealt with together serves the important purpose of avoiding conflicting decisions from different courts on the same matter. It also unnecessarily exaggerates the true state of workload in a court station and therefore distort the general operation and budgeting for judicial resources. Proliferation one dispute into a multiple of disputes is a practice that must be discouraged if not by the parties then by the court. I say it was improper for the client to file Meru HCC Misc. App Nos, E003, E004, E005

and E006 as fresh matters when there had been the files on which taxation had been undertaken.

14. When is a decision on taxation enforceable? Section 51 (2) of the Advocates Act provides.

**“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”** (emphasis added)

15. The provision tells me that a decision of the taxing master on taxation is not a final judgment cable of execution and the court, as defined by the Act, must be resorted to pronounce a judgment. I further read and understand the statute to say that a judgment would only be entered by the court where there is no contention as to retainer of the advocate. Where there is dispute as to retainer, the recourse is a suit in which retainer is to be proved

16. With such state of the law, can it be said in genuineness that one can seek to enforce the certificate of costs prior to entry of judgment! In my view, any fear of execution prior to entry of judgment and due extraction of the decree cannot be properly entertained. On that basis therefore I hold that the client’s prayer 1 in the chamber summons dated 30.09.2020 was not only premature but also untenable. And that is the risk to be taken with filling a different cause and which could have been avoided. It is my finding that seeking stay before judgment is entered does nothing beneficial to the administration of justice but instead impedes it and at time suffices takes the form of abuse of the court process.

17. The last issue regard what order I need to make on cost and how to effectuate such order it being appreciated that this is a matter on taxation on which it is not expected that a bill of costs may be filed and taxed. For that reasons and coming from the principle of law that costs follow the even, and that a court order shall not be in vain, I award the costs of the reference to the advocate and take it upon the court to assess the costs which I assess at **Kshs 30,000** to cater for disbursements, drawings, making copies and court attendances.

**DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19TH DAY OF MARCH, 2021**

**PATRICK J O OTIENO**

**JUDGE**