REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL NO.77 OF 2018

PROF.TOM OJIENDA.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

(AS CONSOLIDATED WITH MISCELLANEOUS REFERENCE NO.E005 OF 2020)

COUNTY GOVERNMENT OF MERU.....APPLICANT

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PROF.TOM OJIENDA.....RESPONDENT

JUDGMENT

1. This 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 inter alia stay of execution of the certificate of taxation dated 23/07/2020 in **Meru H.C MISC APPL. NO.77 OF 2018**, the setting aside of the ruling on taxation delivered by the taxing master on 16/07/2020 and mounts a challenge limited to the taxation of **Items Nos. 1,2,7,13,14,15 & 23** of the bill of costs dated 19/03/2018. It further seeks that that the said 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 and in the alternative, that the said **items Nos. 1,2,7,13,14,15 & 23** in the bill of costs be remitted to another taxing officer for re-taxation.

2. The grounds upon which the application is founded are disclosed on the face of the summons as well in the Affidavit sworn and filed in support thereof. In the application, the client admits having instructed the advocate to represent it in Meru H.C Constitution Petition No.1 of 2016 whereafter the respondent, (hereinafter referred to as the advocate) filed an Advocate-Client Bill of Costs dated 19/03/2018 H.C Miscellaneous Application No.77 of 2018, the said bill was taxed, by a ruling delivered on 16/07/2020, at **Kshs 26,157,228.60**. The ruling aggrieved the client who wrote two letters dated 29/07/2020 and 16/09/2020 asking for the taxing master's reasons of taxation which reasons were given via email on 16/09/2020 at 4.16 P.M and the current application lodged challenging the award under items Nos.1,2,7,13,14,15 & 23. The client views the sum of Kshs 15,000,000 awarded under item No.1 for instruction fees, as colossal and excessive bearing in mind the matter before court was of a constitutional nature and that items 1,2,7,13,14,15 & 23 are unnecessary expenses which ought not to be passed on to the client. The taxing master is faulted for not factoring in the amounts already paid to the advocate despite having been furnished with proof of payment.

3. The application was opposed by the Replying Affidavit sworn by the advocate on the 29/10/2020. In that Affidavit the advocate contends that the bill was lodged in the sum of 67,503,424.66 but was taxed down to Kshs 16,000,000 for instructions fees which it is asserted was pursuant to discretion on the master to increase the item on instructions fees. It was asserted that interference could only be allowed where there is demonstrated error of principle and that the master had properly applied his mind to the matter and reached a fair and just decision. It was additionally contended that the client had not disputed the value of the proposed project in the sum of Kshs 2.3 billion.

4. On the directions of the court, this application like the related ones was canvassed by way of written submissions filed by the respective parties.

5. 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 the taxing master fell into error believing that the issue in contest involved property worth Ksh.2 Billion which was not the case. The taxing master is further faulted for considering extraneous issues, such as the value of intended development, instead of taxing the matter as a simple petition. The client relied on **Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W'njuguna (2006)eKLR, and *First American Bank of Kenya v Shah & others (2002) 1 E.A.64*** , like it did in all the four matter to support its position that public law litigation should not attract costs comparable to personal commercial disputes.

6. For the advocate, submissions were made to the effect that the petition was of importance not only to the client but also to the general public as it involved property rights in land and thus called for additional responsibility hence the justification for the sum awarded as instructions fees.

7. Items Nos.2, 7, 13, 14, 15 & 23 were asserted to have been drawn to scale and taxed in accordance with Schedule 6 of the Advocates Remuneration Order, 2014. 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 (sic) and the certificate of taxation dated 23/07/2020 be enforced 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, Simson 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 the court should be slow at disturbing findings by the taxing master on quantum of costs.

Analysis and determination

8. I see the application to challenge the Taxing Master's decision on two fronts; that the award of instructions fees was exorbitant and that the six contested items were unnecessary costs not chargeable upon the client. To my mind, an unnecessary charge should be the kind that an advocate engages in with no benefit to the client or costs that are extravagantly incurred. The six contested items relate and concern; attending court when directions were given that an interlocutory application be abandoned to enable the petition be fast tracked; making copies of written submissions; drawing submissions respecting the petition and making copies thereof; drawing of replying affidavit and drawing the bill of costs. To my mind those were necessary papers to be filed and availed to court to enable it progress the matter towards conclusion. I consider the costs incurred thereby to be necessary and proper in the kind of dispute in which the advocate was retained. In any event the Remuneration order specifically provide for such work and the rate of remuneration. I hold that it is not genuine for the client to term work done on its behalf and at its behest to be unnecessary and not chargeable. Such a position cannot be distanced from an assertion that the remuneration order is bad for allowing charges for unnecessary and uncalled for work. I do view the clients position and challenge on items Nos. 2, 7, 13, 14, 15 & 23 as untenable and hold that the said items as taxed were diligently done, in accordance with Schedule 6 of the Advocates Remuneration Order and incapable of challenge on the grounds advanced. In any event, before the taxing master no challenge was raised on the propriety of those items just like in this reference no submissions were offered on the same. Instead, the client proposed Kshs 3,000, for item 2, which proposal the master acceded to. I

consider the challenge on those items to have been improperly taken with no faith in pursuing same.

9. On the instructions fees taxed at 15,000,000 which the client consider too high, the taxing master had the following to say. In coming I have considered the rival submissions by the parties as well as the general principles of taxation.

> **"I have also considered the court record. Among the documents filed by the applicant there is a letter dated 7th February, 2017 in which the applicant was demanding for payment of kshs. 20,000,000/=. There is also a letter dated 15th December, 2016 in which the applicant was demanding payment of Kshs. 12,100,000/=. I have not seen any response by the respondent to those two letters contesting the amounts of legal fees demanded therein. I have further seen the voluminous documents filed by the applicant on behalf of the respondent and more so the authorities filed in support of the Respondent's position as regards the petition giving rise to this bill. All these point out to the input in terms of research and time expended by the applicant in trying to safeguard the interests of the respondent in the case".**
>
> **Having considered the above factors and the principles of taxation which both parties are alive to and as correctly captured in their respective submissions it is my finding that whereas the applicant's proposal is too high and somehow exaggerated, the respondent's proposal is on the other hand too low in the circumstances of this case. Consequently, doing the best I can and putting in mind the nature of the matter at hand, I tax item 1 on instruction fees at Kshs. 15,000,000/=. 22,700,000 is taxed off."**

10. In ***Donholm Rahisi Stores (Firm) v EA Portland Cement Ltd 2005 eKLR*** the court observed that "*taxation of costs whether those costs be between party and party or between Advocate-client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order and that the court will not be drawn into arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates Remuneration Order'.*

11. In ***First American Bank of Kenya v Shah & others (2002) 1 E.A.64,*** the court set out circumstances in which a judge of the high court may interfere with the taxation of a taxing master to include where the taxation is based on an error of principle and the failure to consider relevant factors was held to be an error of principle.

12. Although the pleadings in this case did not disclose the value of the subject matter, the taxing master would still be enjoined to consider all the relevant factors like the nature and importance of the petition, the complexity of the matter, the novelty of the questions raised, the value of the subject matter and the time expended by the advocate. It is not the law that all those factors must present themselves in a matter before the taxing master decides to increase instructions fees from the provided minimum. Some or just one would just suffice.

13. Having considered the pleadings by the client together with its submissions, I am not convinced that the client has proved the substantial loss that it stands to suffer if the application for stay is denied. In my view, the failure by the client to prove the substantial loss it stands to suffer, if stay of execution of the bill of costs is not granted renders this application untenable.

14. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in ***Visser vs Gubb 1981 (3) 753 (C)*** as follows

> **"the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the**

point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

15. While considering whether or not the taxing officer arrived at reasonable instruction fees, the court must always bear in mind that there is no mathematical formula by which to calculate the instruction fees and that the exercise involves weighing the diverse general principles, maintaining consistency in the level of costs and that, bearing in mind all these intricate balancing acts, the reviewing court ought not lightly interfere with what in the taxing officer's opinion is reasonable fee. There has to be a compelling reason to justify such interference. **(See *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others (2006) eKLR)***

16. The general principles with regard to such applications or references in taxation were explained by the court ***in the Estate of Ogilvie:*** **Ogilvie –vs Massey *(1910) P 243*** where the court held: -

"on questions of quantum the decision of the taxing mater is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered".

17. In **Green Hills Investment Ltd – Versus- China National Complete Plant Export Corporation T/A Covec [2004] eKLR** it was held that: -

"As a matter of principle, discretion ought to be exercised within reason, fairly and judiciously and the taxing master ought to take time to look at issues of complexity of facts and the law and the industry and time put in the matter. Further, the amount awarded should not be outside reasonable limits so as to be manifestly inadequate to such extent that it could be deemed to be a mockery of legal representation."

18. Applying those crystalised principles to the fact here, I take the view that every reference on taxed costs, the overriding consideration remains an analysis of whether the taxing master in arriving at the decision he did, committed an error of principle by ignoring the established principles or by considering irrelevant matters or failing to consider the relevant ones[1]. It is also trite that the court must be slow to disturb the decision and only do that I deserving cases but without seeking to substitute the discretion of the taxing master with its own[2]

19. The client in its submissions filed in court conceded that there were demands for fees by the advocate which were never responded to then turns back to deny having acquiesced on the demand bases on the value of the suit land. In deed there was no value disclosed in the petition a fact that is in fact irrelevant for this determination because the taxing master did not use any value in taxing the instructions fees. It is however of note that demands were made for not insignificant sum which the client, with due diligent, ought to have protested. It chose to keep quiet. That indeed is not the expectation from a public body like the client here. Such demand ought to attract a response in good faith followed by negotiations in order to not only speed up the matter and avoid additional costs occasion by the taxation proceedings but also mitigate on the costs payable. I repeat, the client behaved badly in just ignoring correspondence to it and thereby exposing the public to what I consider unnecessary expenses.

20. That aside, the onus is upon the applicant in a reference to prove, to the satisfaction of the court that the master committed an error that deserves intervention by the court. That error must be evident from the master's decision. I am not satisfied that the onus has been discharged. Granted, the sum of Kshs 15,000,000 is not insignificant by any chance, I also find it not to be exorbitant or excessive when regard is given to the matter at hand and the interest of the parties. I have noted from the decision in the petition

that a raft of prayers was sought among them a declaration that the governor and his County Executive committee member in charge of land were not fit to hold public offices. I consider such prayers if granted would have visited upon those respondents the epitome of ignominy couple with the attendant doom never to hold a public office on account of having violated the law. It was not thus a light matter on that front alone. It was a matter that had a huge interest for the respondents and equally the petitioners who asserted being residents of Meru and thus voters with an input on the election of a governor. I take notice that the 1st respondent, in that petition, continues to hold a high public office and I shudder to imagine what would be his fate today had the petition succeeded. On the second front, the intended project must have been a vision of the executive arm of the County Government to create a landmark in the town of course at heavy capital investment.

21. In conclusion based on the above analysis, I find and hold that the client has not demonstrated any error principles committed by the taxing master in awarding the sum of Kshs. 15,000,000 as instruction fees. I have also found that the other limb of the challenge was equally out of misapprehension of the law and the same cannot be the basis of interfering with the decision of the taxing master. I uphold the taxing master and in effect dismiss the reference as lacking in merits.

22. I award the costs of the reference to the advocate and, being aware that this is a matter on taxation on which no further bill of costs can be lodged for another taxation, assess such costs at Kshs 30,000 to cover disbursements and attendances.

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

PATRICK J O OTIENO

JUDGE

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[1] **First American Bank of Kenya -vs- Shah and Others (2002)** EA 64

[2] Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC).