REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

REFERENCE NO. 2 OF 2020

ALICE YANO t/a YANO & CO. ADVOCATES.....APPLICANT

-VERSUS-

REBECCA NADUPOI SUPEYO

ISAAC TIPANKO SUPEYO

(Sued as the Administrators of the Estate of

KEZIAH GATHONI SUPEYO).....RESPONDENT

RULING

1. Before court is a reference by way of Chamber Summons application dated 19th March 2020. The reference challenges the taxing officer's decision dated 17th February 2020. In that decision the taxing officer taxed the applicant's advocate-client bill of costs dated 24th September 2019 at Kshs. 3, 550,687/=.

2. The applicant was dissatisfied with the taxing officer's decision and filed this reference challenging that decision. The reference is supported by the affidavit of Alice Jepkoech Yano sworn on 19th March 2020 and the grounds on the face of the application. The grounds in support of the reference are that; the taxing officer misapprehended and misapplied the principles of taxation and failed to apply the correct principles in schedule 6 of the Advocates (Remuneration) Order 2014.

3. It was contended that the taxing officer failed to properly exercise his discretion thus made an improper determination; that he did not properly apply his mind to the suit, the bill of costs and submissions before him. The applicant also blamed the taxing officer for not properly applying the law and facts when determining the bill of costs and, therefore, arrived at an improper decision.

4. The applicant also faulted the taxing officer for not taking into account admissions earlier made by the respondent in **Misc. Case No. 20/2018** that there was an agreed fee of Kshs. 9,000,000/=.

5. According to the applicant, the bill of costs of Kshs. 65,996,550 had been drawn to scale and had not been objected to by the respondent. The applicant therefore faulted the taxing officer for stating that the valuation report was done without the respondents' participation. The applicant also argued that the taxing officer did not take this into account the complexity of the matter and the suit ELC at Machakos, now Kajiado ELC 615 of 2017. The applicant maintained that the taxing officer's decision was based on wrong principles of law and should be set aside.

6. The respondent filed a replying affidavit by Mellyne Akinyi Ogonjo Advocate sworn on 7th October 2020. It was deposed that the reference was irregular, had been filed out of time and was filed without leave of court. It was also contended that the applicant had not shown why there was delay in filing the reference and, thereafter, the court should not enlarge time.

7. Regarding the main reference, the deponent stated that the application appeared to overly challenge the instruction fee where the applicant sought Kshs. 40,000,000 in item 1 as instruction fee. The deponent contended that the argument that the taxing officer should have discerned the subject matter from the valuation report falls outside the principles in ***Joreth v Kigano & Associates*** [2002] EA 92.

8. According to the deponent, the taxing officer considered the bill of costs and the pleadings and ascertained the same from a sale agreement dated 9th June 2011 which was in the parties' documents in which the property was sold at Kshs. 50,000,000/=. The taxing officer applied schedule 6 of the Advocates (Remuneration) Order, 2014 and applied his discretion, thus awarded Kshs. 1,900,000/= as instruction fees.

9. Reacting to the valuation report the deponent stated that it was first attached to the bill of costs dated 24th February 2019 and it was

incomplete as attached to the reference. The deponent stated that **Nyakundi, J**. had earlier declined to consider the valuation report because it fell outside the purview of the law on taxation.

10. The applicant argued that the reference is competent. On whether the applicant had satisfied the criteria for setting aside the taxing officer's decision, the applicant argued in the affirmative. The applicant relied on rule 11(1) and (2) of the Advocates Remuneration Order 2009 on filing of references.

11. Regarding the principles on assessing of costs, the applicant relied on the decision in ***Premchad Raichand Ltd v Quarry Services of East Africa Ltd*** **(No. 3)** [1972] EA 162. The applicant also relied on ***Simpson Motor Sales (London) Ltd v Hendon Corporation*** [1964] 3 All ER cited in ***Auto Engineering Ltd v M Gonella & Co. Ltd*** [1978] eKLR **(***page 5 paragraph 7).* As well as ***Joreth Ltd v Kigano & Associates*** (supra)**.** The applicant again cited ***Ochieng, Onyango Kibet & Ohaga Advocates v Adopt a Light Limited*** [2007] eKLR among other decisions. The court was urged to allow the reference.

12. The respondents filed their written submissions dated 1st March 2021. They argued that the reference is not competent and that it has no merit. The respondent relied on ***Twiga Motors Ltd v Hon. Dalmas Otieno Onyago*** [2015] eKLR and ***Muri Mwaniki & Wamiti Advocates v African Banking Corporation*** [2020] eKLR.

13. The respondent also cited ***Ahmed Nassir v National Bank of Kenya Ltd*** [2006] E.A on the argument that Rule *11(1)* was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.

14. On whether the reference is merited the respondents submitted in the negative. They argued that the taxing officer judiciously acted after perusing and considering parties' pleadings and documents. They again cited ***Joreth Ltd v Kigano & Associates*** (supra) on what constitutes the subject matter for purposes of taxation.

15. According to them, the taxing officer properly exercised his discretion in accordance with the law. They also argued that there was no agreement for fees of Kshs. 9, 000,000/= as the applicant purported to argue. In that view, the taxing officer could not rely on the valuation report as it was not properly obtained. They cited ***S.G. Mbaabu & Co. Advocates v Joseph Muoki Kakenyi & 20 Others*** [2018] eKLR.

16. The respondents argued that a client need not be black mailed and charged exorbitant fees. They cited ***Muriu Mungai & Co. Advocates v New Kenya Co-operative*** [2010] eKLR as well as ***Mwangangi & Co. Advocates v Machakos County*** [2018] eKLR, that as a court of law is guided by facts and that the applicant had not shown the value of the property at the time of instructions.

17. I have considered the reference the response and submissions by parties. I have also considered the decisions relied on by parties. The issue that presents itself for resolution is whether the taxing officer was in error in taxing the applicant's Advocate-client bill of costs and in particular, whether the amount allowed on item 1 was inordinately low.

18. The applicant has called upon this court to set aside the decision of the taxing officer on the basis that the taxing officer erred in taxing the advocate-client bill of costs allowed Kshs. 1,900,000 on instruction fee despite the fact that the applicant had sought Kshs. 40,000,000. The applicant also argued that there was an earlier agreement on fees for Kshs. 9,000,000 which the taxing officer also failed to take into account.

19. The respondents on their part, argued that there was no agreement for fees between them and the applicant; that the taxing officer properly exercised his discretion and that the reference is not merited. The respondents also argued that the reference was filed out of time and therefore offended rule 11(1) of the Advocates Rules. According to the respondents the taxing officer was perfectly in order to tax their advocate- client bill of costs as he did.

20. From the depositions in the applicant's affidavit and submissions of both sides, the disagreement is on whether or not the amount allowed on instruction fee was inordinately low. Whereas the applicant argued that this was the case, the respondents maintained that the taxing officer was right in his decision.

21. I have perused the record placed before this court. No agreement for fees for Kshs. 9,000,000 signed by the parties to this application prior to instructions was exhibited by the applicant to support their argument that they had such an agreement for fees. Even if there had been such an agreement, then section 45(1) of the Advocates Act would have been invoked so that there would have been no need to go for taxation. The applicant having subjected their bill of costs for taxation was a clear manifestation that there was no agreement for fees between them. The taxing officer could not therefore be blamed for not taking into account what was not before him.

22. As was held in ***Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd*** (2) [2006] 1 EA5; [2007] eKLR, the proviso to section 45 (1) of the Advocates Act requires any agreement on fees to be in writing and signed by the client or his authorized agent. (See also ***Kakuta Maimai Hamisi, Peris Pesi Tobiko v Independent Election and Boundaries Commission and Returning officer Kajiado East Constituency*** [2017] eKLR).

23. Having determined that there was no agreement for fees between the parties, the only other issue for determination is whether the amount allowed in item 1 of the applicant's bill of costs was inordinately low. The applicant argued that the amount of **Kshs. 1,900,000** awarded by the taxing officer supposedly based on the subject matter of **Kshs. 50,000,000**, was inordinately low. The respondents on their part maintained that the taxing officer's decision was fair and this court should not disturb it.

24. It is a principle of law that a judge will not readily interfere with the decision of the taxing officer, and should only do so in very exceptional cases. The judge should only interfere where it is sufficiently demonstrated that the taxing officer erred in principle. an example is where the sum awarded is either inordinately high or low, taking into account the nature of the proceedings, to conclude that he acted on a wrong principle.

25. In ***Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another*** [1972] EA 162, ***Spray,*** Ag V stated:

> ***The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of the taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat so high or so low as to amount to an injustice to one party or the other.***

26. Similarly, in ***Rogan-Kemper v Lord Grosvenor*** (No.3) [1977] KLR 303, ***Law. JA,*** stated:

> ***A Judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.***

27. I have considered this reference and the arguments by parties. I have also perused the supporting affidavit and the ruling of the taxing officer, the subject of this reference. The applicant made general arguments that the taxing officer misapprehended and misapplied the principles on taxation thereby made an inordinately low.

28. In the supporting affidavit, the applicant deposed that the taxing officer did not take into account the fact of the ELC case previously in Machakos and now **Kajiado ELC No. 615 of 2017.**

29. I have perused the taxing officer's decision and reasons for it. The taxing officer considered the material placed before him and stated that since the bill related to matters that were still pending before the Environment and Land Court, and which were dated between 5th October 2017 and 10th September 2019, the bill of costs was to be taxed under Schedule 6 of the Advocates (Remuneration) Order, 2014. On this the taxing officer was right that he applicable Order was the 2014 Advocates Remuneration Order.

30. Regarding item 1, instruction fee, the taxing officer stated that the Applicant wanted to be paid instruction fee of Kshs. 40,100,000, a figure that was allegedly derived from from the subject matter, a parcel of land measuring 200 acres and valued at Kshs. 200,000,000. The taxing officer observed that the figure of Kshs. 200,000,000 was obtained from a valuation report unilaterally commissioned by the applicant and dated 19th June 2019.

31. After referring to binding decisions, the taxing officer reiterated the guiding principles, stating:

> ***Where the value of the subject matter cannot be established from the pleadings, it is the discretion of the taxing master to determine what would be reasonable instruction fee in the circumstanced. It was the learned judges' opinion that in determining instruction fee, the taxing master has to bear in mind the care and labour necessary, the number and length of papers perused, the nature and importance of the matter to the parties, the complexity of the matter and other circumstances that may be deemed fair and reasonable.***

32. The taxing officer made a finding of fact that the valuation report was not part of the primary proceedings (documents) and that he valuation exercise was carried out two months after parties had fallen out. It was also done without the respondents' participation raising its integrity. The taxing officer declined to use the valuation report as the basis for determining the value of the subject matter for purposes taxing instruction fee.

33. In determining instruction fee, the taxing officer relied on a sale agreement that was in the parent file and dated 9th June 2011 which showed that he property was to be sold for Kshs. 50,000,000. The agreement had been entered into between Millennium Dream Homes Ltd as vendor, (the 1st respondent in the primary suit) and Wonders Valley View Ltd. The taxing officer therefore awarded Kshs. 1,900,0000 on instruction fee.

34. I have carefully considered the reference and the amount the taxing officer allowed on item 1 and the reasons given to support his decision. I have also considered the applicant's grievances and supporting arguments. I do not find merit in the reference. The taxing officer considered the bill of costs before him and exercised his discretion in making the determination. It is not open for this court to interfere with that discretion unless it is shown that the taxing officer misapprehended the applicable principles and as a result reached an unlawful decision.

35. As was stated by the Supreme Court of Uganda (***Mulenga, JSC***) in ***Bank of Uganda v Banco Arabe Espaniol,*** Civil Application No. 29 of 2019;

> ***…[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount… Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.*** (Emphasis).

36. Flowing from what I have stated above, I am unable to uphold the applicant's argument that the taxing officer committed an error of principle or law in his decision. Consequently, the reference is declined and dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE 2021.

E. C. MWITA

JUDGE