REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

IN THE MATTER OF THE TAX REFERENCE UNDER THE ADVOCATE'S (RENUMERATION) ORDER

TAXATION REFERENCE CIVIL CASE NO. 2 OF 2016

JOSEPH KIPLANGAT CHERUIYOT .....APPLICANT

- V E R S U S -

M/S WELDON NGETICH & CO. ADVOCATES.....RESPONDENT

R U L I N G

1. This is a reference filed by ***JOSEPH KIPLANGAT CHERUIYOT*** (hereafter referred to as the Applicant) against the firm of ***M/S WELDON NGETICH*** and Company Advocates (hereafter referred to as the Respondent).

2. The instant application was bought by way of originating summons dated 25/1/2016 to challenge taxation of the respondent's bill of costs dated 6/11/2013.

3. The parties filed written submissions in this reference which I have duly considered.

4. The applicant submitted that he contended the computation of item 1 on instruction fees, which was computed based on the value of property both at the lower court and the High Court, the applicant submitted that the provisions of the Advocates (Remuneration) Order provide that the value of the subject matter can be determined from the pleadings, judgment and settlement between the parties, the applicant submitted that in the instant case there was neither a settlement nor was the value stated in the judgment or pleadings and that there was no provision in the rules for arithmetically determining the amount which would have been the value of the subject matter at the time of judgment, the applicant alleged that the taxing master was drawn into speculation and inferences as to value of the subject matter.

5. The applicant submitted that the V.A.T computation was based on a flawed bill of costs and that there was no evidence that tax payable was paid to the Commissioner of V.A.T.

6. The applicant contended that the taxing master did not specify which of the items 2 to 62 are for the lower court schedule and for the High Court schedule.

7. The applicant submitted that the taxing master applied a wrong principle in arriving at the instruction fees and all other items that were objected to and sought to have the bill of costs and reasons given by the taxing master set aside and dismissed with costs.

8. The respondent submitted that the taxation that the applicant wanted to open was concluded on 12/5/2015, a certificate of costs issued on 25/5/2015 and a ruling on taxation by the taxation master was delivered on 26/6/2015. Further, that in delivering the ruling dated 26/6/2015 the tax master dealt with the value of the subject matter and took into account the nature and importance of the matter, the level and conduct of the evidence adduced, the complexity of the matter (which took 9 years) to be heard and concluded, legal research and time taken to peruse, draft documents and attend meetings.

9. The respondent submitted that the taxing master was correct when he taxed item 1 on the bill of costs based on the value of the property in dispute in BOMET SRM CC NO. 209 of 2008 and ***KERICHO HCCA NO. 26 OF 2011***, the respondents submit that the value of the property is in excess of Kshs. 10,000,000.

10. The respondent further submitted that the amount taxed correctly by the taxing master included instruction fees in the lower court, party and party bill of costs under schedule 7 (1) (b) of the Advocates (Remuneration) Order and further that items 2 to 62 which were taxed by the taxing master were allowable under various schedules of the Advocates (Remuneration) Order.

11. The respondent further submitted that the certificate of costs dated 27/5/2015 has not been set aside or altered, that the court should allow the respondent to execute for the amount already taxed and should not interfere with the ruling of the taxing master and/or officer.

12. The respondent further submitted that there were registered for V.A.T, they were V.A.T compliant and that they found it offensive for the applicant to challenge taxing 16% as provided under rule 7 of the Advocates (Remuneration) Order.

13. The issues for determination in this reference are as follows:-

i. Whether this Court should interfere with the discretion of the taxing Master.

ii. Whether item 1 should be re-assessed by this Court.

iii. Who pays the costs of this reference.

14. On the issue as to whether this court should interfere with the decision of taxing master, there is no evidence that the taxing master applied the wrong principles.

15. In the Court of Appeal case of ***PETER MUTHOKA & ANOR VS. OCHIENG & 3 ORS (2019) eKLR*** it was stated as follows; **"It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with"**

16. In **JORETH LIMITED VS. KIGANO & ASSOCIATES [2002] 1 EA 92 at 99** where the Court of Appeal held that the value of the subject matter 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.

17. In **REPUBLIC VS. MINISTER FOR AGRICULTURE & 2 ORS EX PARTE SAMUEL MUCHIRI W'NJUGUNA (2006) eKLR** Ojwang, J (as he then was) expressed himself *inter alia* as follows**: "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 a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other. The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle."**

18. I find that there is no basis for interfering with fee awarded herein.

19. On the issue as to whether item one should be re-assessed, I find that the same is taxed to scale and there is no reason to disturb the award of costs.

20. On the issue of costs, litigation must come to an end and for that reason, each party to bear its own costs of this reference.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF DECEMBER, 2021

A. N. ONGERI

JUDGE