



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC. APPLICATION NO. 2 OF 2020

KENYA FOREST SERVICEAPPLICANT/CLIENT

VERSUS

WANYAMA C.S. COMPANY ADVOCATE....RESPONDENT/ADVOCATE

RULING

On 26th February 2020, Wanyama C.S. & Company Advocates filed their Advocate-Client Bill of costs seeking the same to be assessed by the Deputy Registrar of the court. The parties presented written submission in support of their respective opposing positions. After considering the said submission, the Deputy Registrar assessed the Advocate-Client bill of costs at Kshs 20,693,659/=. The client was aggrieved by this assessment. It filed a reference to this court seeking the following orders:

- i. That the entire taxation be set aside
- ii. That upon setting aside the taxation, the court itself taxes the Advocate-Client bill of costs.

The grounds in support of the reference were, inter alia, that; the advocate had relied on a valuation report prepared by Adomag Valuers which not part of the proceedings before the court at the time the petition was heard; that the petition sought prerogative orders against the client which petition ultimately was unsuccessful; that the Deputy registrar did not give reasons on how she arrived at the decision awarding the instruction fees of Kshs 10,000,000/= to the advocate; that in event, there was no justification for the Deputy Registrar to award such sum as instruction fees; that the Deputy Registrar failed to apply the Advocate Remuneration Order in determining the instruction fees to be paid to the advocate; that the Deputy Registrar did not take into consideration the nature of the proceedings that took place i.e that the case was disposed off by written submissions and not by the court hearing witnesses in the usual rigours of trial.

In the premises therefore, the client contends that the Deputy Registrar committed an error of principle and an error of fact and the law which should be rectified by this court in this reference. The client was of the view that the assessed amount was manifestly excessive, unreasonable, unjustified and without any legal basis. The reference was supported by the annexed affidavit of Prof. Nixon Sifuna, the advocate for the client.

The reference was opposed. The Advocate swore a reply affidavit in opposition to the application. She gave a history of the suit that she acted on behalf of the client. She stated that the subject matter of the suit was a parcel of land measuring 1800 acres known as LR Nos 6657 and 10832. The petitioners in the case sought to have the suit parcel of land transferred to them by the court after questioning the manner in which the client had acquired the land. The advocate deponed that upon receiving instructions from the client, she prepared the requisite pleadings on submissions. The client was ultimately successful in defending the petition. The Advocate deponed that the issues in dispute in the case were complex and required due diligence and the collation of information from other professionals.

The advocate was of the view that she went above her normal call of duties as an advocate in putting into effect the clients' instruction. She averred that the petition in which she was instructed by the client was not a mere constitutional petition but one that sought various reliefs including declaratory orders in respect of ownership of land and orders of compensation. She deponed that in defending the petition, she did extensive research and consulted various experts including environmental experts.

The Advocate urged the court to take into consideration that she defended the suit upto the highest court in the land; the Supreme Court. She was therefore justified in presenting the bill of costs that she did before the court. She posited that the Deputy Registrar of this court had neither committed an error in law or in fact. She urged the court not set aside the assessment of Advocates costs by the Deputy Registrar, for to do so will not be in the interest of justice and fairness. She averred that the client had not placed any cogent grounds for this court to interfere with the exercise of discretion by the Deputy Registrar. In the premises therefore, she urged the court to dismiss the reference.

This court has carefully considered the rival written submissions made by the parties to this reference. The court has also considered the decided cases relied on by the parties to this reference. The Court of Appeal in **Otieno, Ragot & Company Advocates V Kenya Airports Authority [2021] eKLR** held thus in regard to the principles which this court should take into consideration when determining this reference:

“ ... it must be emphasized that matters of quantum of taxation are purely within the province, competence, and judicial discretion of the taxing officer. The High Court or even this court will not lightly interfere with an award of quantum by the taxing officer; unless an error of principle or the discretion was improperly exercised, resulting in injustice, to borrow the phrase used in the famous Mbogo – V- Shah [1968] EA 93. Specific to taxation, the court in Kipkorir Tito & Kiara Advocates Vs Deposit Protection Fund Board [2005] eKLR was categorical that:

“On reference to a Judge from the Taxation by the taxing Officer, the judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs”.

The proper exercise of discretion by the taxing officers was restated in **Kamunyori & Company Advocates Vs. Development Bank of Kenya Ltd [2015] Civil Appeal No. 206 of 2006** which reminded us that;

“ ... 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 in 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 instruction fee is arrive at on the wrong Principles, it will be set aside.”

In **Vipul Prechand Haria Vs Kilonzo & Co Advocates [2020] eKLR**, the Court of Appeal held thus:

“Once the client was dissatisfied with the bill, it fell upon the taxing master to tax it. Such taxations much as it lies in the taxing officer’s discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the taxing officer takes into consideration should be apparent from the reasons that she gives in her decision. It is those reasons that give an indication whether or not the discretion reposed in the taxing officer was properly exercised.”

In the present reference, the client’s complaint was that, the Taxing Officer relied on a valuation report that was not part of the proceedings to assess the value of the subject matter of this suit. It was conceded by the advocate that indeed the valuation on report was not part of the pleadings filed in court during the hearing of the subject suit. The report was commissioned by the advocate as a basis for lodging her claim for the settlement of her fees as evidenced in the Advocate-Client bill of costs. It is trite that the value of the subject matter of the suit must be discerned from the pleadings before court and not by extraneous procurement of a Valuation report not part of the court proceedings.

If the taxing master was inclined to go on that direction, then, on the basis of the Principle of fairness and equality of arms, the Taxing officer should have allowed the client to also to prepare a Valuation report which could then form a basis for reaching an objective determination as regards the value of the subject matter of the suit. By relying on the Valuation report prepared by the advocate, the taxing officer committed an error of principle which must be remedied by this court.

The second issue that came to the fore is that no reasons were ascribed by the Taxing Officer for the decision that she arrived at. Other than the figures which the advocate presented to the court for taxation, the Taxing Officer did not give reasons why she agreed with the bill that was presented to the court by the Advocate. This court would have proceeded to tax the said bill of cost, unfortunately the information availed by the advocate is such that if this court were to embark on such exercise, it would be an exercise in speculation. The bill of cost lacked particulars as to dates when certain events took place such as court appearances, etc. It is not clear from the said bill of costs the nature or importance of the matter that the Advocate handled.

No information was placed before the court in regard to what was taxed as party to party bill of costs after the conclusion of the case. This would have formed the basis for the ascertainment of the Client-Advocates bill of Costs. It was also not clear from the bill presented to court whether the advocate was presenting her bill of costs for taxation for the work she did in the High Court, the Court of Appeal or the Supreme Court. This is crucial information that would have assisted the Taxing Officer to reach a just determination. The absence of such information inevitably led to the state of affairs that the parties herein find themselves.

For the above reasons, it is clear that the reference filed by the client is for allowing. It is hereby allowed. The Advocate – Client bill of cost is remitted back to the Taxing Officer for re-taxation. The said taxation shall be undertaken by another taxing officer other than Hon. C. Kesse. The client shall have the costs of this reference.

It is so ordered.

DATED AT KITALE THIS 16TH DAY OF DECEMBER, 2021

L. KIMARU

JUDGE