



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 25 OF 2015

IN THE MATTER OF: THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA

AND

IN THE MATTER OF: THE ADVOCATE-CLIENT BILL OF COSTS DATED 3RD SEPTEMBER 2019,

ARISING FROM THE LEGAL SERVICES RENDERED IN MOMBASA HIGH COURT,

PETITION NO.25 OF 2015

BETWEEN

MWANGI NJENGA T/A MWANGI NJENGA & COMPANY ADVOCATES.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

The Application

1. By **Chamber Summons** herein dated **6th August, 2020**, the Applicant, **Mwangi Njenga & Co. Advocates** prays for the following orders:-

1. That this Honourable Court be pleased to set aside and/or vary the decision of the Taxing Master, Hon. Muchoki, delivered on his behalf by Hon. E. I. Michieka, PM on 4th June 2020 in Mombasa High court Petition No.25 of 2017.
2. That this Honourable Court be pleased to tax afresh the Bill of Costs dated 3rd September, 2019.
3. In the alternative to prayer No.2 that this Honourable Court be pleased to remit the Bill of Costs dated 3rd September 2019 for fresh taxation before another Taxing Master.
4. That the costs of the application be provided for.

2. The application is premised on the grounds set out therein and is supported by **Affidavit** of **Mwangi Njenga** sworn on **6th August, 2020**.

3. The Applicant's case is that he was the Advocate on record representing the Respondent in Mombasa High Court **Petition No.25 of 2017**, and that the said matter was an important one involving complex issues and raising novel questions of law as well as involving a great deal of time and industry in defending the same. The Applicant stated that the subject matter of the said suit, as could be discerned from the pleadings, was at least **Kshs.5,000,000,000/=** according to a copy of the Petition attached marked as "NM-1" and **Supporting Affidavit** thereof at **paragraphs 2.2 and 9** respectively. The Applicant avers that despite the fact that the value of the subject matter as disclosed in the Petition was **Kshs.5,000,000,000/=**, the Taxing Master erred by assessing instruction fees at **Kshs.900,000/=**. The Applicant annexed marked as "MN-2" a copy of the **Ruling**.

4. The Applicant further avers that the Taxing Master erred when he failed to consider the nature and importance of the matter in **Mombasa High Court Petition No.25 of 2017**, the complexity thereof, the novelty of the questions raised therein, and the time expended in defending the matter, and that the Taxing Master failed to give any reason or basis at all for assessing the instruction fees at **Kshs.900,000/=**.

5. Being aggrieved with the Taxing Master's decision, The Applicant issued a **Letter** dated **15th June, 2020** giving **Notice of Objection** to the said decision and requesting for reasons on the same, which **Letter** was filed at the registry on **15th June 2020**. To date, the Learned Registrar has not responded to the said **Notice of Objection**.

The Response

6. The application is opposed by the Respondent vide **Notice of Preliminary Objection** filed herein on **8th October, 2020**. In its Preliminary Objection, the Respondent states that there was no proper Reference filed before this Court as contemplated under **Rule 11(1)** of the **Advocates Remuneration Order** and that the failure to file the **Notice of Objection** within the stipulated period rendered the **Reference** fatally defective. The Respondent referred to **Rule 11(1)** of the **Advocates Remuneration Order** which stipulates as follows:

“Should any party object to the decision of the Taxing Officer, he may within 14 days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.”

7. The Respondent states that the application herein is fatally defective as there is no valid Notice issued setting out the items of taxation objected to as required under **Rule 11(1)** of the **Advocates Remuneration Order**, and therefore the cause of action herein has abated due to the Defendant's failure to issue a valid Notice under **Rule 11(1)** of the **Advocates Remuneration Order**. This means that in the absence of the said Notice referred to above, the court lacks the jurisdiction to grant the orders sought.

8. Further, the Respondent states that the Applicant never sought **Leave of Court** to extend time to file a **Reference** before the High Court as stipulated in **Order 49 rule (7)(3)** of the **Civil Procedure Rules**, as follows:-

i. The Memorandum of Appeal, setting out the grounds of the Appeal shall be filed within seven days of the decision of the Registrar.”

9. The Respondent asked the Court to dismiss the application with costs to the Respondent.

Submissions

10. The application was canvassed through written submissions. The Applicant filed submissions on **30th October 2020**, while the Respondent's submissions were filed on **10th November 2020**.

Determination

11. I have considered the issues raised on the Chamber Summons and submissions of parties. I have also carefully considered parties submissions. In my view, the issues which arise for my determination are as follows:-

i. Whether the Objection by the Respondent to the validity of the Reference is valid.

ii. Whether the Taxation Ruling delivered on 4th June 2020 should be set aside or varied.

i. Whether the objection by the Respondent to the validity of the Reference is valid.

12. The Applicant submitted that there is no proper basis for the Notice of Objection. The Applicant submitted that the Ruling on Taxation was delivered on 4th June 2010 after which the Applicant by a Notice of Objection received in court on 15th June 2020 objected to the Taxation and sought reasons for the Taxation. That Notice was made within 14 days as required under paragraph 11(1) of the Advocates Remuneration Order. As correctly submitted by the Applicant, the Taxing Master was required under paragraph 11(2) of the Advocates Remuneration Order to give reasons for his decision after which the Applicant would have 14 days to file his Reference. There being no reasons from the Taxing Master, the Applicant procedurally filed this Reference, which is validly before the Court. Incidentally, although the Respondent raised the issue of validity of the Reference in its Notice of Preliminary Objection, the Respondent did not address the issue in its submissions.

ii. Whether the Taxation Ruling delivered on 4th June, 2020 should be set aside or varied.

13. It is trite that in taxation matters the starting point of an Advocate's Bill of Costs is the value of the subject matter as disclosed in the pleadings. This issue must be ascertained *a priori*, so that where it is not disclosed in the pleadings and Judgment, the Taxing Officer is duty bound to use his or her discretion to assess such instruction fees as he considers just, taking into account the nature and importance of the cause or matter, the general conduct of proceedings, any directions of the trial Judge and other relevant circumstances.

See **Joreth Limited...vs...Kigano & Associates (2002)eKLR**.

14. The Court of Appeal in **Joreth Limited (supra)** stated that:-

“the value of the subject matter of a suit 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).”

In the present case, the value of the subject matter was stated in the pleadings to be Kshs.2,000,000,000/=, being the value to the land at the time of filing, with the value projected to increase to Kshs.5,000,000,000/= upon completion of the development.

15. The Petition involved the property registered as **Mombasa/Block XXV/122**. The object of the Petition was to vindicate the Petitioner’s claimed proprietary interest in the suit property and to allow the continuation of the development plans thereon, for which the Petitioner was in the process of getting approvals before the ownership of the suit property was brought into question. However, the Taxing Master, in assessing instruction fees, acknowledged that the value of the subject property was **Kshs.2,000,000,000/=**, but then, without giving any reason or basis for his decision, proceeded to tax **Kshs.900,000/=** as instruction fees. The failure to give reasons in a taxation was censured by the High Court in **Khushbir Harjeet Singh Chadha –vs- Wesley Maranga Robinson Gichaba[2020] eKLR**, where the court stated the following:-

“The rationale for giving reasons in a Judgment or Ruling or decision was espoused in the persuasive authority in the case of Soulmezis..Vs...Dudley (Holdings) PTY Limited, 1987 10 NS WLR 247,279, where MC Hugh JA held as follows:-

“The giving of reasons for a judicial decision served three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge’s decision. As Lord Macmillan has pointed, the main purpose of a reasoned Judgment is not only to do but seem to do justice. Secondly, the giving of reasons furthers judicial accountability. A requirement that Judges give reasons for the decisions, grounds of decision that can be debated, attacked and defended – serves a vital function in construing the Judiciary’s exercise of power. Thirdly, under the common law system of adjudication, courts not only resolve disputes, they formulate rules for application in future cases”.

16. The provisions of paragraph 11(1)(2) of the **Advocates Remuneration Order** imposes a duty to give reasons on the Taxing Master taxing a Bill of Costs. The Taxing Master’s **Ruling** dated **10th August, 2018** merely stated that the bill was drawn to scale, was not opposed and was therefore allowed as drawn. That Ruling did not give any reasons for taxation of the Bill of costs as taxed at an aggregate sum of **Kshs.3,889.249.50**.

17. Without providing any reasons for his action, the Taxing Officer erred in principle thereby giving what appears to be manifestly low award. In **First American Bank (supra)** the Court set out circumstances in which a Judge of the High Court may interfere with the taxation of a Taxing Officer. The consideration includes where the taxation is based on an error of principle. Failure to consider relevant factors was held to be an error of principle.

18. Even if the pleadings and Judgment in the present case did not disclose the value of the subject matter, the Taxing Officer would still be enjoined to consider all the relevant factors. The relevant factors, which the Applicant listed in his Bill of Costs, include 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. None of these factors were considered by the Taxing Master in the Ruling.

19. The Respondent submitted that the Applicant’s Bill of Cost ought to have been taxed under **Schedule 6 paragraph 1(j)** of the **Advocates Remuneration Order 2014**. The Respondent submitted that the subject matter of the case was not the value of the land but the violation of alleged rights of the Petitioners for which they sought declarations.

20. On that basis, the Respondent submitted that the Taxing Officer’s award was not only sufficient but generous under the circumstances. The Respondent submitted that it was not the property that was in dispute and the Taxing Officer properly exercised his discretion in assessing the instruction fees which was applicable.

21. The Respondent referred to **Machakos High Court Civil Application No.27 of 2015–Muema Kitulu...Vs..County Government of Kitui**, where it was stated thus:

“However what comes out clearly is that the matter involved a Constitutional Petition where the Petitioners sought for Conservatory Orders as well some declaration which must have been canvassed by way of written submissions as is often the practice and therefore there was nothing like calling witnesses to testify. The Taxing Officer considered the submissions of the parties during the taxation of the bill and came up with the sum of Kshs.250,000/= as reasonable for item on instruction fees. I find the Taxing Officer properly exercised her mind and arrived at a reasonable award and therefore I see no reason to interfere with the same. As the matter did not involve a dispute over property such as land, the Applicant’s submissions that if a proper valuation was to be undertaken the value would be higher to be way off the mark because the property had not been valued and pleaded and no Valuation Report was availed which could then have enabled the Taxing Master to rely on. The Taxing Master could not, of her own volition undertake a valuation enquiry when no such issue had been pleaded. I am satisfied that the award made by the Taxing Officer was reasonable in the circumstances of the case”.

22. The Respondent further submitted that awarding of costs is a matter of discretion. Such discretion ought to be exercised judiciously and within reason. The Respondent cited Ibrahim J. in **Green Hill Investments Ltd...Vs...China National Complete Plant Export corporation (Complaint) T/A Covac (2004) 1 KLR 74:-**

“The Taxing Master is given the discretion to award what is reasonable. That discretion must be exercised within reason, fairly and judiciously” (emphasis provided).

23. The Respondent submitted that taking cognizance of the above cited authorities no more than **Kshs.150,000/=** should be awarded as instruction fees and the rest be taxed off. The Respondent prayed that the decision of the Taxing Officer with respect to the instructions fees be set aside and the figure of **Kshs.900,000/=** is substituted with the sum of **Kshs.150,000/=**. As the other items were not contested, the same remain as taxed.

24. From the foregoing, it is clear that neither the Applicant nor the Respondent is satisfied with the verdict reached by the Taxing Master. In my view the Taxing Master should clearly ascertain the value of the subject matter from the proceedings and if he or she is to deviate from it, to justify why, by providing reasons.

25. From the foregoing reasons the **Chamber Summons** before the court succeeds with the following orders:-

1. That the decision of the Taxing Master, Hon. Muchoki, delivered on his behalf by Hon. E. I. Michieka, PM on 4th June 2020 in Mombasa High court Petition No.25 of 2017, be and is hereby set aside.

2. That the Bill of Costs dated 3rd September 2019 be and is hereby remitted for fresh taxation before another Taxing Master, other than Hon. Muchoki.

3. Costs herein to abide taxation aforesaid.

That is the Ruling of the court.

DATED, SIGNED and DELIVERED at MOMBASA on this 17th day of December, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Omino for Petitioner

No appearance for Respondent

NOTE:

In view of the declaration of measures restricting court operations due to

the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.