



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO. 318 OF 2016

MWANGANGI & COMPANY ADVOCATES.....APPLICANT

VERSUS

MACHAKOS COUNTY.....RESPONDENT

RULING

The Application

The Applicant herein was the Advocate for the Respondent in **Machakos High Court Civil Suit No. 255 of 2009**, and filed an Advocate/Client Bill of Costs dated 15th December 2014 with respect to the said suit. A ruling was delivered on 14th November 2016 with regard to taxation of the said Bill of Costs by the Taxing Master, Hon. L. Kaitany.

The Applicant subsequently filed an application by way of an Amended Chamber Summons dated 7th February 2017, seeking orders that the decision of the Taxing Officer and any consequential Order(s)/certificate(s) arising thereon be set aside/vacated; the said Bill of costs be taxed afresh by a differently constituted Taxing Court, or in the alternative in the interest of justice this Court be pleased to assess/tax the costs lawfully payable to the Applicant on the said Bill of Costs; and that this Court do issue such other orders/directions as it may deem fit and just to issue to serve the ends of justice in the circumstances herein .

The grounds for the application were set out on the face of the said Amended Chamber Summons and in a supporting and supplementary affidavit sworn by the Advocate.

The grounds for the application are reproduced verbatim as follows:

1. The learned Taxing Officer erred in principle as she arrived at a decision which is contrary the law applicable .
2. The learned Taxing Officer misapprehended and misapplied the law and principles of taxation in the nature of the suit giving rise to the taxation and failed to apply correctly the principles and formula provided for in Schedule VI of the Advocates (Remuneration) Order , 1997, for assessing the instruction fees .
3. The learned Taxing Officer erred in law and fact by failing to exercise the powers and discretion given to her under the Advocates (Remuneration) Order properly , with reason ,

fairly and judiciously .

4. The learned Taxing Officer erred both in law and fact by making an improper determination on the paragraph of Schedule VI of the Advocates (Remuneration) Order, 1997, applicable in the assessment of the instruction fees in the taxation .

5. The learned Taxing Officer did not apply her mind properly on the Suit, the Bill of Costs and the written and oral submissions on the taxation by the Applicant on the quantum of costs and thereby arrived at an erroneous decision .

6. The learned Taxing Officer erred in law and fact by arriving at an improper determination on the value of the subject matter of the Suit and when she failed to assess the instruction fees on the basis of a valuation which she herself had lawfully ordered.

7. The Taxing officer erred in principle by arriving at an erroneous decision on the taxation for reason of her failure to give due and/or proper consideration to the relevant factors of the case including but not limited to the :

- a) nature and importance of the Suit giving rise to the taxation ;
- b) interest of the parties ;
- c) value of the subject matter ;
- d) public interest in the subject matter ;
- e) importance and complexity of the matter ;
- f) conduct of the proceedings ;
- g) labour expended and the responsibility undertaken by the Applicant in the matter ;
- h) and all other relevant circumstances.

8. The learned Taxing Officer misapprehended and grossly misdirected herself on the principles of law enunciated in the authorities cited by the parties and/or misapplied them in the taxation herein thereby arriving at an erroneous decision .

9. The learned Taxing Officer erred both in law and fact in awarding the Applicant costs which in all the circumstances of the Suit were manifestly disproportionate to the Suit, unreasonable and so inordinately low as to amount to substantial oppression and injustice to the Applicant and a mockery of legal practice.

10. The Learned Taxing Officer erred in law and in fact in failing to award V.A.T or at all as against the Respondent.

11. In all the circumstances of this matter the said decision of the learned Taxing Officer is premised on the wrong principles of law and/or is without basis in law, unreasonable and unjust.

12. It is in the interest of justice that the Orders sought herein do issue.

The Applicant further stated that the reference application herein is traceable to **Machakos HCCC No. 255 of 2009- Danson Mutuku Muema & 119 Others vs County Council of Masaku & 3 Others**, wherein the Respondent herein instructed the Applicant to be substituted with the defunct Municipal Council of Machakos, the 2nd Defendant in the said suit. Further, that the substitution was done with consent of the Respondent among other parties, and that the Respondent never objected to the name/

description given to it in the said substitution proceedings and the orders arising therefrom, and that the description is lawful and proper.

It was further contended by the Applicant that the Respondent never raised issue with the way it had been named in the taxation proceedings arising out of **Machakos HCCC No. 255 of 2009**, that were undertaken in **Machakos HCC Misc. Application No. 197 of 2014**, and all pleadings filed by the Applicant therein uniformly referred to the Respondent as "Machakos County"

The Applicant attached copies of the substitution application, the pleadings filed in **Machakos High Court Civil Suit No. 255 of 2009**, the valuation report, and the Consent Order.

The Respondent filed a Preliminary Objection and Replying affidavit in response to the said application. The objection was raised on the ground that the application is not compliant with the Advocates (Remuneration) Order or any known legislation. According to the Respondent, the process of objecting to a taxation is by way of reference whose procedure is clearly laid out in the Advocates (Remuneration) Order 2009, and that the Applicant has ignored the steps laid down in law and the statutory mode of filing a reference leading to an abuse of the Court process.

In addition, that, the Applicant has not enunciated the purported principles that the Taxing Officer erred in, to warrant the setting aside of the Taxation, and the Applicant is only aggrieved that the Taxing Officer's discretion although exercised in its favour, is not as much as the Applicant wanted.

The Respondent further averred that the application has been made against the Government of Machakos County which was a party to the taxation in **Machakos HCC Misc. Application No.197 of 2014**, and that further the said application was served upon the Legal Department of the Government of Machakos County, but that the named Respondent hereto is not the said Government. Therefore, that the Government of Machakos County is not a party to this Application and thus no orders should and indeed none can be obtained against it.

Lastly, that the allegation that the Taxing Officer failed to consider the Applicant's submissions, the valuation done, and the report by the Central Bank of Kenya is an unfair attack on the Taxing officer as the said Officer's Ruling considered all the evidence and submissions filed, and also considered relevant factors in exercising her discretion in taxing the Bill.

The Determination

The instant application was canvassed by way of written submissions by the parties. On the preliminary issue raised about the Government of Machakos County not being a party to this reference, the Applicant submitted that the Respondent was rightfully and lawfully sued in the taxation in the names of "Machakos County", and that the Respondent never objected to the said description of "Machakos County" in the main suit or the taxation, and no Orders were ever issued to amend the description. Further, that in any event the terms "Machakos County" and "Government of Machakos County" can lawfully be used interchangeably to refer to one and the same entity.

I note in this respect that Article 6(1) of the Constitution provides that the territory of Kenya is divided into the counties specified in the First Schedule. Machakos County is county number 16 in the said Schedule. It is thus a constitutional recognized territorial unit. As to whether it is a legal or juristic person capable of being sued, Article 176(1) of the Constitution further provides that there shall be a county government for each county, consisting of a county assembly and a county executive. In essence, a county government cannot exist without a county, and in addition it is the governance structure provided by law for a county.

The primary unit recognized by the Constitution is thus the County which can be sued as such, or through any of its organs including the county government. The Respondent in this respect is also estopped from denying that Machakos County is one and the same party as the Government of Machakos County, as it never objected to its substitution in the main suit and in the taxation proceedings as Machakos County,

and participated in the said suit and proceedings as such.

The Respondent also urged that the procedure in filing a reference was not followed on account of the reference being preferred before the reasons were furnished, which rendered the reference incompetent. Reliance was placed on the decision in **Muriu Mungai & Co. Advocates vs New Kenya Co-Operative Creameries Ltd Nairobi, (Milimani) HCMC No. 692 of 2007** and in **Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua (K) Construction Co. Ltd, Eldoret HCMCA No. 124 of 2007** for the position that it is mandatory for an applicant who objects to a taxation to annex the ruling giving reasons by the taxing master.

According to the Respondent, the applicable procedure is that notice of objection to the decision must be given to the taxing officer within the specified period, and of the items objected to, and that the taxing officer then gives reasons for the decision to the items to which the objector objects, whereupon the objector then applies to the judge within 14 days of the said reasons. The Respondent prays that this Court finds that it thus lacks jurisdiction and strikes out the application.

The learned Taxing Officer in this respect delivered her ruling on the taxation on 14th November 2016. The Applicant being aggrieved with decision wrote to the Taxing Officer on 15th November 2016 objecting to the whole of the Taxing Officer's decision and requesting for the Officer's reason for her decision. On 30th November 2016, the Applicant filed an application dated 29th November 2016 in this Court challenging the said Taxation. There is no record of the reasons having been sent by the taxing officer before the filing of the reference.

The Advocates (Remuneration) Order provides for the procedure for filing a reference in Rule 11 as follows:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired. "

The mandatory obligation set by the provisions is on the taxing officer to forward the reasons, however no timeframe is given within which this should be done. The timelines that apply are with respect to when the Objector should seek the said reasons and file the reference after receiving the reasons. The Applicant in the present reference did annex the letter dated 15th November 2016 by which she requested for the reasons from the Taxing Officer, which appear not been provided by the time the reference was filed on 29th November 2016.

The Courts' power under paragraph 11 of the Advocates (Remuneration) Order is meant to be exercised to meet the ends of justice so that the objector is not barred from filing a reference in circumstances such as the one at hand. The Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v. Deposit Protection**

Fund Board [2005] 1 KLR 528 considered the implication of a Taxing Officer's failure to record and/or furnish reason for his/ her decision as follows:-

“If a taxing officer totally fails to record any reasons and to forward them to the objector as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

In addition, it is my view that in the event that the taxing officer does not forward the reasons, it is sufficient for an objector to annex the ruling which includes the reasons for the decision, as did the Applicant in this case, and in such an event, the filing of a reference after lodging objection to taxation but before obtaining reasons for the decision is not fatal. It is also my view that this is a procedural technicality which the court can dispense with under Article 159 of the Constitution for the sake of substantive justice.

While still on the procedure used, the Respondent urged that the Applicant brought the application by way of a Notice of Motion instead of a summons in Chambers as stipulated by the Advocates Remuneration Order at Rule 11 (2). Further, that the amendment by the Applicant of the title of the application to read "Chamber Summons" in place of "Notice of Motion" does not cure the defect in the Application. However, I find that this argument has been overtaken by events, as the Applicant did apply for, and was granted leave by the Court without any opposition from the Respondent to amend its application, and subsequently on 7th February 2017 filed an Amended Chamber Summons.

Coming to the substantive issues for determination in this reference, the Court notes that the item in contention is item 1 in Advocate/Client Bill of Costs dated 15th December 2014 on instruction fees, where an amount of Kshs 127,263,750/= was taxed off to Kshs 2,00,000/= by the Taxing Master. In doing so, the Taxing Master declined to rely on Schedule VI 1(b) of the Advocates Remuneration Order of 1997 and on a valuation report that had been filed by a consent order, and instead applied the basic fees in Schedule VI (1) of the Order as the starting point, on the ground that the value of the subject matter could not be determined from the pleadings, judgment or settlement.

The main issue for consideration therefore, is whether the Taxing Master applied the correct principles in determining the value of the subject matter and in taxing the instruction fee. The Applicant in their submissions dated 20th February 2017 urged that the value of the subject matter of the suit in **Machakos HCCC No. 255 of 2009** had not been stated in the Complaint, but it was stated to be land in Machakos town measuring 3,769 acres which the Plaintiffs claimed and sought to be registered as owners thereof. Further, that on 11th June 2015 by consent of both parties, the taxing Court ordered the Respondent's Valuer to value the suit property for purposes of the taxation. That subsequent thereto the suit property was valued by the Respondent's Valuer and a Report and Valuation dated 1/3/2016 was filed in Court on 29/4/2016.

However, that in her ruling on the taxation, the Taxing Officer declined to use the valuation as a basis to tax the Bill of Costs, citing **Joreth Ltd versus Kigano & Associates, (2002) eKLR, (The Joreth Case)** where the taxing officer had declined to rely on a valuation letter proffered by the Advocate/Applicant. It was submitted that the Taxing thereby misapprehended the law and failed to exercise the powers and discretion given under Rule 13A of the Advocates (Remuneration) Order properly, with reason, fairly and judiciously, as the valuation of the suit property had been ordered and lawfully so by the same Court for purposes of the taxation.

The **Joreth Case** was also distinguished by the Applicant from the case before the Taxing Officer herein, on the ground that the valuation report that the Court declined to rely on therein was an initiative solely of the Advocate/Applicant and was being objected to by the other party, whereas the valuation in the matter before the Taxing Officer herein had been ordered by the Court on consent of both parties.

Reliance was also placed on the decisions in **Muriu Mungai & Co. Advocates vs New Kenya Co-operative Creameries Ltd, Nairobi Misc. Civil Application No.373 of 2007** and **Ufundi Co-operative Savings and Credit Society vs Njeri Onyango & Company Advocates, [2015] eKLR**, where the

Court held that it was in order for the Taxing Officer to rely on a valuation report made after instructions were taken, and that the Taxing Officer had the right to call for further information to assist him to assess the value of the subject matter for the purposes of calculating instructions fees .

The Applicant submitted that the Taxing Officer therefore erred both in law and fact by making an improper determination the paragraph of Schedule VI of the Advocates (Remuneration) Order, 1997 that was applicable in the assessment of the instruction fees in the taxation; and took into consideration irrelevant factors and failed to consider relevant factors such as the nature or importance and complexity of the suit, interest of the parties, value of the subject matter, labour expended and the responsibility undertaken by the Applicant, general conduct of the proceedings, public interest in the suit and all other relevant circumstances, and thereby arrived at an erroneous decision on the taxation.

Reliance was placed in this regard on the case of **Mutuli & Apolo Advocates vs Hon. Cyrus Jirongo, (2010) eKLR**, where the Court held that the Taxing Officer had erred for not taking into account the factor of the complexity of the matter which was discernible from of the bill of costs; and the case of **Green Hills Investments versus China National Complete Plant Export Corporation, eKLR 2004** where the Court faulted the decision of the Taxing Officer for failing to take into account both the public interest in the case and the value of the subject matter.

Lastly, that the value of the subject matter having been given at Kshs 10 Billion by the Respondent's Valuer upon a valuation ordered by the Court with consent of the parties, the Taxing Officer was bound to assess the instruction fees under Schedule VI I (b) of the Advocates (Remuneration) Order, 1997 on the basis of the said valuation, and taking into account the depreciation of the shilling and the inflationary rate from 1998 when the Applicant was given instructions in the suit to-date. The formula for calculating the instruction fees applied in **Kamunyori & Company Advocates vs James Mathenge , Nairobi Misc. Civil Application No. 241 of 2008** was proposed, where the Court held that in the event that the value of the subject matter of the suit shall exceed Kshs. 1, 000,000/=, the instruction fees payable shall be the sum of Kshs. 55, 000/= plus 1.5% of the amount that is over the sum of Kshs. 1,000, 000/=.

The Respondent on their part filed submissions dated 5th April 2017, wherein it was contended that Rule 13A of the Advocates (Remuneration) Order grants the taxing officer powers to call for any evidence which might seem necessary to her mind in the determination of the cause before the Officer. Further, that the said Rule does not spell out what the said Taxing Officer should do with the evidence. That the Taxing Officer in this matter diligently allowed any documents that she opined necessary for the determination of the matter, and even those proposed to her by the parties including the valuation report and a report from the Central Bank of Kenya, which she considered with approval or disapproval in her ruling in exercise of her powers , including those under Rule 13A.

On the valuation report, the Respondent submitted that the said report was erroneous on the acreage of the property, and the Respondent argued against its reliance based on the fact that the Applicant argues that if the property's value as per the time of valuation was Kshs 10 Billion then a valuation of nearly half the current value 18 years ago is justifiable. However, that this Court is a Court of Law and is as such guided by facts, and the Applicant has not shown the value of the property at the said time of instructions, and it is merely conjecture to state that the value must have been Kshs 1.5 million an acre 18 years ago. Further, that land will almost always appreciate and there are due diligence actions that could have been taken by the Applicant to determine the approximate value of the property at the time of filing suit.

The Respondent contended that the Taxing Officer begun with determining the admissibility of the said report for purposes of taxing the Bill, and while determining the said Report was not worthless, she stood guided by authority that a Valuation done after the Bill was made could not be relied on and thus chose not to rely on the same. Reliance was placed on **The Joreth Case** for this position.

Lastly, it was urged relying on the decisions in **Desai, Sarvia & Pallan Advocates vs Jambo Biscuits (Kenya) Limited [2014] eKLR**, **First American Bank of Kenya vs Shah and others [2002] E.A.L.R 64** and **Premchand Raichand Limited & Another Vs Quarry Services of East Africa Limited and another [1972] E.A 162**, that this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.

Further, that no plausible grounds have been laid to warrant the interference of the said decision of the Taxing master. As to the schedule by which the Bill should be taxed, the Respondent relied on Schedule VI (I) which states that the fees chargeable may be reasonable but not less than Kshs 6,300/=.

The principles that guide the court when dealing with a reference are well settled. A judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See **The Joreth Case** and **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board, (supra)**. What I need to determine in the reference before me is whether the taxing officer made an error of principle to warrant interference with her exercise of discretion.

On the applicable schedule of the Advocates (Remuneration) Order, the suit giving rise to the taxation before the Taxing Officer namely **Machakos High Court Civil Suit No. 255 of 2009** (originally **Nairobi High Court Civil Case No. 2765 of 1998**) was filed on 11th December 1998, and the applicable Order is thus the Advocates (Remuneration) Order of 1997. The taxation of instruction fees of an Advocates/Clients Bill of Costs is governed by Schedule VI(B) of the said Order, which provides *inter alia* that as between an advocate and client, the minimum fee shall be the fees prescribed in Schedule VIA, increased by one half, or fees ordered by the Court increased by one half, or fees agreed on by the parties.

Schedule VIA in paragraphs 1 (a) and (b) stipulate that the instruction fees are to be calculated on the basis of the value of the subject matter, which is to be determined from the pleadings, judgment or settlement between the parties. The Taxing Officer found this particular Schedule inapplicable on the ground that the value could not be determined in any of the ways provided, and that the valuation report could not be used as a basis to tax the Bill of Costs under this provision. She therefore applied paragraph 1 (I) of the Schedule VIA which provides for a minimum fee of 6,000/= for any other cases not provided for under the schedule.

I am of the view that the Taxing Officer to this extent erred as parties had consented to a way of determining the value of the subject matter of the suit by way of a valuation report. The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in **The Joreth Case** as follows:-

“We would at this stage point out 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) 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 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”.

The Taxing Officer is thus not only limited to the pleadings, judgment and settlement in determining the value of the subject matter of a suit, and is granted such discretion by paragraph 13A of the Advocates (Remuneration) Order which provides as follows;

“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.

The taxing officer having directed the Applicant to furnish the court with a valuation report with the consent of the Respondent, therefore made such a report part of the Court record which ought to have been considered, and by failing to do so there was injudicious exercise of her discretion. To this extent

this case differed from **The Joreth Case**, as the valuation report herein was filed with the consent of the parties and upon a Court order.

Having found that the taxing officer erred in principle, I have the discretion to either remit the bill to the taxing officer with appropriate direction on how it should be taxed or to proceed and tax the same. In the case of **Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board (supra)** the Court of Appeal stated as follows:-

“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see– D’Sonza v Ferrao [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243).”

See also **Moronge & Company Advocates vs. Kenya Airports Authority (2014) e KLR**.

The learned counsel for the Plaintiff in his submissions requested this Court to proceed and tax the item on the instruction fees. This Court for the avoidance of doubt has the jurisdiction to do so as confirmed by the Court of Appeal in the cited judicial decisions hereinabove, and for the reasons given by Ringera J. (as he then was) in the case of **First American Bank of Kenya Ltd vs Gulab P Shah & Others (2002)1 E.A.64** where the learned Judge stated as follows:-

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

However, and notwithstanding that the present case has been pending in Court for over 15 years, I have had occasion to peruse the documents relied upon by the Applicant to determine the value of the subject matter of the suit property, and note that the valuation report dated 16th March 2016 that was filed in Court on 29th April 2016, provided that the current open market value of the said property as at the date of valuation was Kshs 10 Billion. This Court is thus not able to determine what the value of the property was at the time of filing suit, and the Applicant may need to provide additional information in this regard. In addition the documents filed in Court on the depreciation of the Kenya shilling and inflation rates may not be adequate in a determination of the value of the property at the time of filing suit, as other externalities need to be considered in such a valuation. This is thus a proper case for remitting back to the taxing officer for the cited reasons.

The upshot of the foregoing is that I set aside the decision of the Taxing Officer dated 14th November 2016 only as regards Item 1 on the instruction fees. I further direct that the Advocate /Client Bill of Costs dated 15th December 2014 be put before another Taxing Officer for the re-taxation of that item 1 only. The Applicant shall file a new valuation report on the value of the subject matter of the suit in **Machakos HCCC No. 255 of 2009** as at the date of filing suit, which the new Taxing Officer shall take into account, in addition to the applicable principles what I have detailed in my ruling hereinabove, in determining the value of the subject matter of the suit for purposes of the re-taxation.

Each party shall bear their own costs of the application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of March 2018.

P. NYAMWEYA

JUDGE