



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL APPN. NO. 4 OF 2016

IN THE MATTER OF ADVOCATES/CLIENT BILL OF COSTS

BETWEEN

OTIENO RAGOT & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED....CLIENT/RESPONDENT

Arising From

KERICHO HIGH COURT CIVIL SUIT NO. 47 OF 2001

KIMAYUE ARAP TAITOPLAINTIFF

VERSUS

JOSEPH KIPKOECH CHEPKWONY1ST DEFENDANT

NATIONAL BANK OF KENYA LTD2ND DEFENDANT

RULING

1. This ruling relates to the applicant's reference dated 7th June 2016 with respect to the taxation of an Advocate/client bill of costs. The application was expressed to be brought under Rule 11 of the Advocates Remuneration Order and arises from the ruling of the Deputy Registrar delivered on 24th May 2016.

2. In his application, the applicant sought orders that:

1. The learned Deputy Registrar's decision dated and delivered on 24th May 2016 by which:

a) He held that the value of the subject matter of the suit for purposes of the taxation of the applicant's bill of costs was kshs.405,000.00 and that the items 1 and 2 being instructions fees and the getting up fees in that order would therefore be taxed at kshs.45,000.00 and kshs.15,000.00 respectively rather than the sums claimed under those items in the applicant's bill of costs dated 15th February 2016 be set aside.

b) He taxed off the sum of kshs.577.673.04 from the applicant's bill of costs dated 15th February 2016 and allowed only kshs.412.703.68 be set aside.

2. This Honourable Court be pleased to allow the items the subject matter of this reference as claimed and tax the applicant's bill of costs dated 15th February 2016 as drawn.

3. Costs of this reference be provided for.

3. The application is based on the following grounds:

a) The Learned Deputy Registrar made an error of law and fact which he held that the respondent's interest in the property which was the subject of the litigation in the parent suit was the charge which was at kshs.405,000.00 only.

b) The learned Deputy Registrar made an error of law and fact in failing to find that the charge both the principal sum as well as the interest.

c) The Learned Deputy Registrar erred in law in failing to follow decisions that were binding on him in breach of the rule of stare decisis.

4. The respondent opposes the reference and has filed grounds of opposition dated 19th July 2016 as follows:

1. The application is premature the decision of the taxing officer having been communicated to the parties on 8/6/2016 when the application had already been filed.

2. The application misapprehends the applicable principles on taxation of costs.

3. The application seeks to have the court consider extraneous matters in taxation of bills of costs.

4. The Registrar was right in his ruling taxing the bill and allowing the sum of kshs.412,703.68.

Background

5. There appears to be some confusion in the heading to the documentation filed by the applicant before the court. While the application makes reference to **Kericho Misc. Civil Application No. 4 of 2016**, the applicant's list of authorities makes reference to **Misc. Civil Cause No. 65 of 2015**, arising out of **Kisumu HCCC No. 19 of 1999** in which the respondent was the plaintiff and the defendant was one Leo Pius Odera (sued as the Administrator of the Estate of Susan Akinyi Odera). I believe the correct parties are as set out in the application and the documents which had been filed before the Deputy Registrar of this Court.

6. The applicant represented the respondent in **Kericho High Court Civil Suit No. 47 of 2001- Kimayu Arap Taito vs Joseph K. Chepkwony and National Bank of Kenya Limited**. The suit involved a claim by the plaintiff that the 1st defendant had charged his property to the 2nd defendant to secure a sum of Kshs 405,000. The plaintiff sought in the said suit a permanent injunction to restrain the 2nd defendant from advertising his property for sale, selling or in any adverse way dealing with his property, general damages, costs and interest. The plaintiff in that suit was successful to the extent that the court granted his prayer for a permanent injunction restraining the 2nd defendant from advertising or selling his property.

7. The applicant then filed an advocate/client bill of costs which was taxed by Hon. J. R. Ndururi, Deputy Registrar. In his ruling dated 24th May, 2016, the Deputy Registrar taxed the Advocate client bill of costs at Kshs 412, 703. 68.

8. At paragraph 8 of his ruling, the taxing master observed as follows:

“8. From the summary of the primary suit above, it is clear to me that the subject matter of the suit was Title N. Kericho/Ndarawet/1311. The Respondent’s interest in that property was the charge over the property to secure the sum of Kshs 405,000. That is the value contained both in the plaint and in the Respondent’s statement of defence. That should therefore be the correct value of the subject matter when it comes to taxation of the Applicant’s bill of costs.”

9. It is the taxing master’s determination of the value of the subject matter that has precipitated the present reference. The applicant’s contention is that the value of the subject matter as set out in the bill of costs was Kshs 15,433,141. He bases this on what he states is the amount outstanding on the charge as being ***“Kshs 3,560,174. 60 as at 18. 02.2003 with interest at the rate of 29% per annum the aggregate value of the charge as at 29.8. 2014 being the date of judgment being Kshs 15,433,141. 00”***. The respondent opposes this, its contention being that the applicant has misunderstood the principles of taxation, and that the taxing officer was right in taxing the applicant’s bill as he did.

The submissions

10. Learned Counsel for the applicant, Mr. Otieno, submitted that the applicant’s grievance is with respect to taxation of item 1 and 2 of the bill of costs. His submissions are that the Deputy Registrar made an error of law and fact in holding that the value of the subject matter of the suit was Kshs 405,000 and not Kshs 15, 433, 141. 00 as claimed in item 1.

11. According to Mr. Otieno, on 19th of April 2016, a consent was recorded before the Deputy Registrar pursuant to paragraph 13 of the Advocates Remuneration Order for the filing of documents. The suit out of which the present application arose was heard in full, and according to the applicant, the dispute was an instrument of charge that the respondent sought to enforce against a property that was in the name of the plaintiff. The charge had been registered to secure a borrowing of kshs.405,000/- plus interest. The amount outstanding at the time the respondent sought to realize the security was kshs.3,560,174.60 with interest at 29% per annum. In the applicant’s view, the Deputy Registrar ignored the element of interest in computing the subject matter

12. Counsel referred the court to the decision in **Kenya Commercial Bank Limited vs Muthoga Gaturu & Co. Advocates Meru High Court Misc. Civil Appn. No. 109 of 2004** on how to determine the value of the subject matter. Counsel faulted the Deputy Registrar for stating in his decision that he had not seen the authorities that the applicant had relied on. According to the applicant, had the taxing master followed the authorities, he would have found that item 1 and 2 of the bill of costs were properly charged.

13. His second contention was that the applicant had sought interest on the costs. That Rule 7 of the Advocates Remuneration Orders allows an Advocate to charge interest at 14% per annum from the date of delivery of the bill to the client. The applicant submitted that the bill of costs was served on 22nd January 2016; that the taxing master had the discretion to award interest as this was a matter connected with his jurisdiction to tax the bill. He relied in this regard on the decision in **Evans Thiga Gaturu vs Kenya Commercial Bank Limited Misc. Appn. No. 343 of 2011**.

14. Finally, Counsel referred to **Winding Up Cause No.28 of 1996 – In the Matter of Winding Up of Leisure Lodges (Unreported)** for the proposition that the taxing master has power to deal with all matters arising on a taxation.

15. In submissions in response on behalf of the respondent, Learned Counsel, Mr. Ojuro, pointed out first that the amount of Kshs 412,703.68 that was taxed by the Deputy Registrar had already been paid by the respondent.

16. His second contention was that the reference had been filed prematurely: according to the respondent, the ruling was delivered on 24th May 2016, and the applicant wrote to the Deputy Registrar for reasons on

30th May 2016. Reasons were availed by letter dated 8th June 2016, by which time the reference had been filed. According to the respondent, this was in breach of Rule 11 which requires that the reference be filed within 14 days after the giving of reasons.

17. The respondent's second contention was that the Deputy Registrar was correct with respect to the value of the subject matter. The matter relates to proceedings in court in which there is a plaint and a defence, and paragraph 6 of the defence indicates the amount of Kshs.405,000/- for which the property was charged. According to the respondent, the defence does not talk of interest and other charges, and there was no counter claim by the respondent. Further, that the issue of the charge was not in contestation in that suit.

18. The respondent's submission was that what was in contention in that suit was another person suing both the borrower and the lender, and the issue of the interest and other charges was not before the court. Accordingly, the value of the subject matter could only be discerned from the pleadings, and the value was Kshs.405,000/-.

19. It was also the respondent's submission that in the case out of which the present taxation arose, the only relief that the plaintiff was granted was injunctive relief, and the dispute was not between the lender and borrower, which would require that the court looks at the charge. Rather, that the dispute was between the charger, the chargee and a third party, and the issue of enforcement between the two was not before the court.

20. Additionally, according to the respondent, the documents which the applicant had introduced at the taxation stage to show the value of the subject matter are documents that came to the knowledge of the Advocate by virtue of his having represented the bank in the parent suit. They related to the bank and its customer, the 1st defendant, and not to the suit which is the subject of the taxation.

21. With respect to the claim for interest, the respondent's submission was that there is no computation or claim for interest on the bill. It would therefore not have formed part of the decision on the taxation. Further, the items that both parties had submitted on before the taxing master were items 1, 2, 53 and 67, while the present reference relates only to item 1, items 53 and 67 not being contested in the application. The respondent therefore prayed that the reference be dismissed with costs.

22. In response, Mr. Otieno submitted, with regard to the allegation that the reference had been filed prematurely, that there was nothing that stopped the applicant from filing the reference as the taxing master's ruling already contained reasons. He relied in this regard on the decision of Odunga J in **Evans Thiga Gaturu vs. Kenya Commercial Bank Limited (supra)** for the proposition that where reasons are contained in the ruling, a party need not wait for reasons.

23. To the submission that the charge was not in contestation, the applicant's response was that the charge was part of the dispute, and even though there was no contract between the respondent and the plaintiff in the parent action, the instructions of the respondent was to protect its interest under the charge.

24. The applicant denied that the documents had been introduced at the taxation, stating that the documents had been part of the suit.

Determination

25. I believe three issues arise for determination in this reference:

i. Whether the reference was filed prematurely, and the effect thereof;

ii. Whether the Deputy Registrar erred in his determination of the value of the subject matter in the taxation;

iii. Whether the Deputy Registrar erred in not awarding interest to the applicant.

Whether the reference was filed prematurely, and the effect thereof

26. I will deal first with this first issue, which is fairly straightforward. As observed by the applicant, the ruling or decision of the taxing master already has the reasons for his decision. That being the case, as Odunga J observed in **Evans Thiga Gaturu vs Kenya Commercial Bank Limited**:

“In most cases, the court is aware that taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another “ruling” containing the reasons.”

27. In this case, the taxing officer’s ruling already contained reasons for his decision. I agree with the view expressed by Odunga J that it would be foolhardy to wait for reasons which have already been given in the ruling before filing a reference. I therefore find on this issue in favour of the applicant.

Whether the Deputy Registrar erred in his determination of the value of the subject matter in the taxation

28. The second issue for consideration is whether the taxing master erred in his determination of the subject matter of the suit. In determining this issue, it is I believe important to consider first the principles applicable, this being a reference on a taxation under rule 11 of the Advocates Remuneration Order. The principles that should guide the court in determining such a reference are fairly well settled, though I note that neither Counsel made reference to them in their submissions.

29. In **Premchand Raichand Ltd & Anor vs Quarry Services of East Africa Ltd & Ors. EALR (1972) EA 162**, it was held that the court should only interfere with the decision of a taxing officer ***“when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”***

30. In **Republic vs Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others** (supra), **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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...”

31. With regard to the value of the subject matter for purposes of taxation, the Court of Appeal stated in its decision in **Joreth Ltd vs Kigano & Assoc. Civil Appeal No. 66 of 1999 (unreported)** 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, judgement 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.” (Emphasis added)

32. In this case, the Taxing Officer took the view that the respondent’s interest in the matter was the charge to secure a loan of Kshs 405,000. He took the view that this was the value contained in both the plaint and the respondent’s statement of defence. In his view, that was the correct value of the subject matter for purposes of taxation of the advocate/client bill of costs.

33. As I understand the principles of taxation to be as set out in the cases that I have cited above, the values of the subject matter is such as can be ascertained from the proceedings. If it cannot be ascertained from the proceedings, then the taxing officer may use his discretion to assess such fee as he considers just.

34. I am satisfied that the taxing officer in this case properly applied the correct principles in arriving at the value of the subject matter. It was clear from the proceedings what the subject matter of the dispute was: the plaintiff, whose land had been charged to the respondent by his son, sought to stop the bank from exercising its statutory power of sale. The charge between the 1st and 2nd respondent, and the amount due thereunder were not, as contended by the applicant, in contention. The value of the subject matter was clear from the pleadings, the plaint and the defence. To arrive at a different value, as urged by the applicant, would have required that the court inquires into documents that were not in contention before the trial court.

35. In the circumstances, I am satisfied that the taxing master properly exercised his discretion in taxing the bill of costs in the matter.

Whether the Deputy Registrar erred in not awarding interest to the applicant

36. In his submissions before the court, Counsel for the applicant raised the issue of interest, which he argued that the taxing officer should have awarded the applicant. I note, however, that this item was neither the subject of this reference nor was it raised before the taxing officer. Consequently, I will not address myself to it.

37. The upshot of my findings is that this reference fails. It is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Kericho this 22nd day of March 2017.

MUMBI NGUGI

JUDGE