



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU.

SUCCESSION CAUSE NO. 347 OF 2013

IN THE MATTER OF ESTATE OF ALICE KAHAKI NJOKA – DECEASED

JOHNSON KIBUNJA NJOKA.....1ST PETITIONER/APPLICANT

CHRISTINE NYAGITHA NJOKA.....2ND PETITIONER/APPLICANT

VERSUS

JOSEPH NJUGUNA.....1ST OBJECTOR/RESPONDENT

LUCY WANJIRU.....2ND OBJECTOR/RESPONDENT

MARGARET DAMAT.....1ST OBJECTOR/RESPONDENT

RULING

1. By way of Chamber Summons premised under **Rule 11(2)** of the **Advocates' (Regulations) Remuneration Order** (hereinafter the reference), the applicants seek orders:

1. That this court be pleased to vary or set aside the decision of the taxing officer contained in her typed ruling made on 17th December, 2015.
2. That the applicants be furnished with a ruling which gives the reasons for the award made on 17th December, 2015.
3. That the costs of this application/reference be provided for.

2. The following grounds are relied upon:

a. the ruling of the Taxing Officer offends Rule 11 of the Advocates Remuneration order in that it does not state the reasons for her Honour's decision thereby breaching the rules of natural justice which require that a party against which a ruling or judgment is given, knows the reasons so that it may appeal against it; consequently, the ruling contravenes the applicants' right to make a reference to this Honourable Court under the said Rule 11;

b. the taxation is illegal in that the learned taxing officer ignored wholly the law as stated by the Court of Appeal in **Joreth Limited V. Kigano & Associates** [2001] 1 E.A. 92 which held that the value of the subject matter is to be ascertained from the pleadings, judgment or settlement and where it is not ascertainable, the court is to use its discretion to assess the instruction fee but it is

not to undertake a valuation of the subject matter or receive from a party, the said value of the subject matter;

c. The pleadings and judgment do not disclose the value of the subject matter and there was no settlement made by the applicants and the respondents;

d. the award is so excessive as to manifest an error of principle;

e. the learned taxing officer did not apply the principle of taxation laid down by the Court of Appeal in **Premchand Raichard Limited & Another V. Quarry Services of East Africa Limited**, [1972] EA 162

f. the taxing officer erred in principle while taxing the 4th applicant's/respondent's party and party bill of costs dated 15th October, 2014 and 6th June, 2014 respectively';

g. on 18th December, 2015, the respondents/applicants objected to the taxation ruling delivered on 17th December, 2015 and sought for the reasons of taxation;

h. the reasons for taxation were not delivered until 2nd February, 2016, when the respondents/applicants perused the court file and discovered that the ruling had been typed;

i. the Taxing Officer erred in failing to hold that the value of the subject matter could not be determined from the pleadings for purposes of instruction fees;

j. the Taxing Officer failed to give sufficient reasons for or grounds to justify the award pertaining to items in the 4th applicant's/respondent's party and party bill of costs dated 15th October, 2014 and 6th June, 2014 respectively;

k. the taxing officer misdirected herself on the discretion and awarded a fee that is manifestly excessive as to justify interference from this Honourable Court;

l. it is in the interests of justice if this application/reference is allowed.

3. The application is further supported by the affidavit of Johnson Kibunja Njoka.

4. The gist of the grounds and the supporting affidavit is that the taxing officer of this court made a ruling on the 17th December, 2015 on the Respondent's (then 4th applicant) party and party Bill of costs dated 15th October, 2014 and 6th June, 2014 respectively.

5. That ruling is impugned for reasons summarised in paragraph 9 of the affidavit of Johnson Kibunja Njoka in the following manner:

a. both under **Order 21 Rule 4** of the **Civil Procedure Rules** and **Rule 11** of the **Advocates Remuneration Order**, a court is required by law to give reasons for its decision so that the loser may know how to exercise a right of appeal;

b. the Court of Appeal has held in **Ole Ganai V. Arabo** (1983) KLR 233, that a judgment is null and void for being one which is uncertain, nebulous and unascertain and that the ruling delivered herein on 17th December, 2015, falls in that category;

c. the ruling of the taxing officer offends Rule 11 of the Advocates Remuneration Order in that it does not state the reasons for her Honour's decision thereby breaching the rules of natural justice which require that a party against which a ruling or judgment is given, knows the reason so that it may appeal against it; consequently, the ruling contravenes the applicant's right to make a reference to this honourable court under the said Rule 11;

d. the taxation is illegal in that the learned taxing officer ignored wholly the law as stated by the court of Appeal in **Joreth Limited V. Kigano & Associate**, [2001] 1 E.A.92 which held that the value of the subject matter is to be ascertained from the pleadings, judgment or settlement and where it is not ascertainable, the court is to use its discretion to assess the instruction fee but it is not to undertake a valuation of the subject matter or receive from a party, the said value of the subject matter;

e. the pleadings and judgment do not disclose the value of the subject matter and there was no settlement made by the applicants and the respondents;

f. the award is so excessive as to manifest an error of principle;

g. the learned Taxing Officer did not apply the principles of taxation laid down by the Court of Appeal in **Premchand Raichard Limited & Another V. Quarry Services of East Africa Limited**, [1972] EA 162;

h. the Taxing Officer erred in principle while taxing the 4th applicant's/respondent's party and party bill of costs dated 15th October, 2014 and 6th June, 2014 respectively;

i. on 18th December, 2015, the respondents/applicants objected to the taxation ruling delivered on 17th December, 2015 and sought for the reasons of taxation;

j. the reasons for taxation were not delivered until 2nd February, 2016 when the respondents/applicants perused the court file and discovered that the ruling had been typed.

k. the Taxing Officer erred in failing to hold that the value of the subject matter could not be determined from the pleadings for the purposes of instruction fees;

l. the Taxing Officer failed to give sufficient reasons for or grounds to justify the award pertaining to items in the 4th applicant's/respondent's party and party bill of costs dated 15th October, 2014 and 6th June, 2014 respectively;

m. the Taxing Officer misdirected herself on the discretion and awarded a fee that is manifestly excessive as to justify interference from this honourable court;

n. it is in the interest of justice if this application/reference is allowed.

6. Despite request for reasons for taxation, the Taxing Officer failed to supply the same.

7. The reference is opposed and a replying affidavit by the 4th Respondent, Margaret Damat is on record. She also relies on grounds of opposition dated 31/10/2016 and filed in court on 8/11/16.

8. Key issues raised in the response are that taxation of bill of costs is a matter of judicial discretion by the taxing officer and the factors to consider are clearly set out.

9. It is urged that the application has flouted **Rule 11(2)** of the **Advocates Remuneration Order** for being filed without reasons given by the Taxing Master as envisaged under that rule. There is no evidence that the applicant pursued the reasons.

10. It is urged that, it is erroneous to hold that the estate of Alice Kahaki Njoka was valueless as the assets therein were known.

11. In a supplementary affidavit which was filed without leave but regularised by order of court, Johnson Kibunja Njoka has deponed that in their petition for letters of administration in respect of the estate of Alice Kahaki Njoka, no value was indicated.

12. He urges that the value of the estate ought to have been based on the value given in Nakuru High Court Succession Cause No.16 of 1984, In the estate of Alice Kahaki Njoika where Philip Njoka Kamau had stated the value as Kshs.30,000.

13. The petition filed by the applicants herein was not determined and as such the value of the subject matter was not established.

14. Both parties filed written submissions.

15. I have had occasion to consider the reference, the supporting and supplementary affidavits, the replying affidavit and submission by learned counsel and authorities cited.

16. The applicants case, in a nutshell is that the Taxing Master did not adhere to the principles of Law as stated by the Court of Appeal in **Joreth Limited V. Kigano and Associates** [2001] 1 EA 92. The Law as stated was that where the value of the subject matter is not ascertainable from the pleadings, judgment or settlement, the court is to use its discretion to assess the instruction fee but it is not to undertake a valuation of the subject matter or receive from a party the said value of the subject matter.

17. It is further urged that despite objecting to the taxation and seeking reasons from the Taxing Master, on 18th December, 2015 none were provided. The applicants only got to discover after perusal of the court record on 2nd February, 2016 that the ruling had been typed.

18. The Respondent's position as articulated by counsel is that the question of whether the applicant should be supplied with reasons is answered in the negative by the applicant's own submission at paragraph 30 (page 17) of their submissions. It is stated in that paragraph that the applicants followed the right procedure under **Rule 11(1)** of the **Advocates Remuneration Order**. The case of **Kenya Ports Authority V. Kobil (K) Limited**, HCCC No.83 of 1998 is referred to and it is quoted:

“That once the Taxing Officer has given reasons for a ruling, it is not necessary thereafter to apply for those reasons to be given subsequently.”

19. It is urged therefore that prayer two (2) is superfluous and should be dismissed.

20. It is urged for the respondent that prayer 1 of reference is incompetent as it is worded in a manner that seeks to set aside only the decision of the Taxing Officer *“in her typed Ruling made on 17th December, 2015”* leaving out the untyped ruling. The applicant's submission dated 13th December, 2016 is based on total disregard of the Taxing officers untyped ruling dated 17th December, 2015.

21. It is submitted that the Taxing Officer clearly stated in her untyped ruling that the value of the subject matter could not be ascertained as there was no judgment or settlement for that matter.

22. The fees were assessed based on sound factors as enumerated in the untyped ruling. No irrelevant factors were considered. No relevant factors were not considered neither was the decision based on an error of principle and the fees were not manifestly excessive.

23. The issues for determination in this reference based on the prayers and the material before court are:

a. whether the decision of the Taxing Master should be set aside.

b. whether the applicant should be furnished with the reasons for the award made on 17th December, 2015

24. I will dispose off the issue on whether the applicants should be given a ruling which gives the reasons for the award made on 17th December, 2015 first.

25. By their own admission, the applicants have conceded that they followed the right procedure under

rule 11(1) of the **Advocates Remuneration order** and a quote is taken from the **Kenya Ports Authority** case (supra).

26. Having acknowledged that there was a ruling of the Taxing Master and further acknowledging that it is an established legal principle that once reasons are given in a ruling, it is not necessary thereafter to apply for those reasons to be given subsequently, what other reasons did the applicants hope to be supplied with?

27. Unless the applicants would wish to concede that reference herein is irregularly filed by failure to comply with **rule 11(1)** of the **Advocates Remuneration Order**, the prayer that reasons be supplied at this stage cannot stand.

28. **Rule 11(2)** of the **Advocates Remuneration order** states:

“The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 days from 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.”

29. This court (Ochieng' J) in **Ahmed Nassir Adbdikadir & Co. Advocates V. National Bank of Kenya Limited**, (Nairobi H.C.Misc. Application No.750 of 2004 unreported) has held that it was mandatory for a party making a reference in respect of a taxation to annex a ruling outlining reasons of the taxing master's decision (see also **Shah & Parekh V. Apollo Insurance Co. Limited**, Nairobi H.C. Misc. Application No.263 of 2003 (unreported)).

30. More importantly as held in **Karandi Manduku & Co. V. Gatheca Holdings Ltd.**, Nbi H.C.Misc. Application No.202 of 2005 (unreported) a party who does not annex reasons of the taxing officer in support of his reference must establish that he undertook due diligence before reaching a determination the taxing officer was unable to supply reasons to enable him file reference to this court.

Such due diligence included such a party sending reminders to the taxing officer to supply the required reasons.

31. In essence, the prayer for reasons to be supplied and a prayer to set aside a decision of a taxing officer for failure to uphold correct principles cannot co-exist in the same application. The absence of reasons makes it impossible to comply with rule 11 in filing a reference but is a good ground for a reference in itself.

32. Failure by the taxing officer to give reasons is sufficient ground for an aggrieved party to seek redress by filing a reference to court. In dealing with a similar situation, the court of appeal in **Kipkorir Titoo & Kiara Advocates V. Deposit Protection Fund Board** [2005], 1KLR 528 held (page 535):

“Although there was no strict compliance with rule 11(2), of the Order, we are nevertheless satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed we are of the view that 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.....”

33. Where reasons are given (even in the form like the maligned 'typed ruling' herein), my view is that they remain reasons notwithstanding unintelligibility, inadequacy or even absurdity. Such would be grounds in support of a reference.

34. Even when the reasons are uncertain, indefinite and nebulous, that becomes a cornerstone ground in support of a reference.

35. In our instant suit, I am satisfied that reasons were given and I agree with counsel for the respondent

that the prayer thereon is superfluous, and I add, of no useful purpose as there is no value addition in once again giving the same reasons already contained in the acknowledged ruling.

36. I have had great difficulties in comprehending why the applicants while acknowledging there is an untyped ruling on record, crafted their prayer in the manner that what was to be set aside was the decision of the taxing officer contained in *her typed ruling made on 17th December, 2015*.

37. I have heard occasion to consider the record of proceedings before the taxing officer. The entire ruling by the taxing officer as gleaned from the proceedings is a full eight (8) handwritten pages. The ruling that was eventually typed is the conclusion of the entire ruling.

38. For the record, it is instructive to note that when the ruling was delivered, the applicant's herein were represented as the record readily shows, by Mr. Ndung'u Advocate. In attendance too, was Mr. Yanis holding brief for the then applicant in the Bill of Costs.

39. It follows therefore that the applicants were aware from the time of delivery of the said ruling of its existence and content (read reasons for taxation). It is therefore incorrect to state that the Ruling did not give reasons for the taxing officer's decision. As would be expected, counsel was taking notes during the delivery of the ruling and if on request, the Ruling supplied was not a reflection of what was read or reasons given at the reading, then counsel would raise the issue with the Deputy Registrar to be supplied with the correct ruling. There is no evidence at all that such a step was found necessary or taken by the applicants if at all the correct ruling was not supplied.

40. The applicants cannot therefore be heard to say that the taxing officer failed to give reasons for the decision. Contrary to the finding in the Court of Appeal decision in **Ole Nganai V. Arap Bor** (1983) KLR 233, the taxing officer's decision was not uncertain, indefinite and nebulous that it is not capable of enforcement.

41. In considering whether, I should set aside or interfere with the decision of the taxing officer, I have had regard to the ruling on record which was delivered on 17th December, 2015. It is my duty to consider whether the taxing officer followed the correct Principles of law, whether she entertained irrelevant matters or failed to consider relevant matters and ultimately whether the sums awarded were manifestly excessive.

42. In her opening remarks in her learned ruling, the taxing officer states as follows:

“While taxing the 2 bills, I am guided by the general principles under the Advocates remuneration order that costs allowed should be reasonable and that they should not be allowed to rise to a level that will make justice a preserve for the rich only.”

43. The above statement is clear testimony that the Taxing Officer started off from the blocks alive to the general principles applicable. Did she tread on the right path? We shall see that shortly.

44. Quoting and correctly so from the celebrated case of **Joreth Limited V. Kigano and Associates**, (2002) E.A. 92 – 99, she referred to the passage relating to instruction fees in that decision where the Court of Appeal stated:

“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 ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters, the nature and importance of the cause or matter, the interests of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

45. It is contended in submission by the applicants that the taxing officer proceeded in error of principle as she relied on the value of the subject matter as forwarded to her by the Respondent (4th objector). It is

the position of the applicants that the value of the estate of Alice Kahaki was valueless.

46. That submission above cannot be entirely correct. It is true that the taxing officer did ask parties to submit on the value of the subject matter (the worth of the estate). But she never relied on any such value submitted on. She states (page 22 of the proceedings):

“In the current case, the value of the estate was not ascertainable from pleadings neither from judgment or settlement. I hence directed parties to submit on the worth of the estate and after perusing the submissions, value is not ascertainable and I will exercise my discretion in regard to the same.”

47. It is therefore erroneous to assert that the taxing officer based assessment on any value forwarded to her or otherwise accessed.

48. Instruction fees on both bills herein was assessed taking into account the factors below (as seen from the ruling):

a) The disclosure of properties enlisted in the estate though the value was not ascertainable.

b) The importance of the matter to the parties

c) The proceedings brought into focus four (4) other suits:

- Nakuru HC Succ Case No.16 of 1984

- Nakuru HC Succ Case No.347 of 2013

- Nakuru H.C. Succ.Case No.487 of 2013

d) The complexity of the matter.

e) Serious preparation involved.

49. These considerations by the taxing officer were on all fours with the principles in the **Joreth Limited** case (supra).

50. Indeed, in her opening remarks in the ruling, the taxing officer appears quite alive to the decision is **Premchand Raichard Limited & Another V. Quarry Services of East Africa Limited and Another** (No.3) (1972) E.A. 162 at 165 where the court *inter alia* stated that costs should not be allowed to rise to such level as to confine access to courts to the wealthy and that a successful litigant ought to be fairly reimbursed for the costs he has had to incur.

51. From the foregoing, I am satisfied that the taxing officer applied the correct principles, did not entertain irrelevant matter or fail to consider relevant matters neither was the fee manifestly excessive taking into account the circumstances of this case.

52. The tests to be applied by a taxing officer and by a Judge on a reference in making a deduction or addition if he is of the opinion that a bill of costs is manifestly excessive or manifestly inadequate is the reasonableness attaching thereto. It is not for this court to substitute what I consider to be proper figure for that allowed by the taxing officer unless in my view the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate (see **Rongan Kamper V. Grosvenor**, 1989 KLR 362).

53. Looking at both the bill of costs herein (dated 17th June, 2014 and 6th June, 2014), the amounts claimed and the amounts awarded, I find no reasons to interfere. In doing so I am guided by the decision in **Republic V. Minister for Agriculture & 2 others** (2006) KLR where the court stated:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will therefore not 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 somewhat too high or too low as to amount to an injustice to one party or the other.....the court can only interfere with the Taxing Master when either the decision was based on an error of principle, or the fees awarded was manifestly excessive as to justify an inference.....”

54. This position is also well expounded by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates V. Deposit Protection Fund Board** (supra) where at page 533, the court held:

“On a reference to a judge from 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. In Arthur V. Nyeri Electricity Undertaking, [1961 E.A.497 the predecessor of this court at page 492 paragraph 1:

“where there has been an error in principle the court will interfere. But questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.”

55. I am not persuaded that there has been established any basis upon which I may interfere with the decision on quantum of the fees by the taxing officer. There is no error of principle and neither is the amount manifestly excessive.

56. For the above stated reasons, I find no merit in the reference dated 9th February, 2016.

The same is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nakuru this 12th April, 2017.

A. K. NDUNG'U

JUDGE