



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION NO.27 OF 2015
IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA
AND IN THE MATTER OF AN ADVOCATE – CLIENT BILL OF COSTS

BETWEEN

MUEMA KITULU

T/A MUEMA KITULU & CO. ADVOCATESAPPLICANT

AND

COUNTY GOVERNMENT OF KITUIRESPONDENT

RULING OF THE COURT

1. The Applicant has filed an Application dated 20/1/2016 seeking to set aside, review or substitute the Taxing Master's decision in **HC Misc. No.27of 2015** issued on 9th December, 2015.
2. The Application is supported by an affidavit of the Applicant sworn on even date and further on the following grounds:-
 - a. The Applicant herein filed an Advocate/Client Bill of costs before this court on 26/02/2015 in which he sought a sum of Kshs.2,568,470/= as costs arising from legal services provided in High court Petition No. 72 of 2009 Machakos – Musyoka Ngela =Vs George Wambua & County Council of Kitui.*
 - b. The High Court Petition No.72 of 2009 was a suit representative suit involving a large group of persons as stated in the Plaintiff's pleadings.*
 - c. The dispute before court was a Constitutional reference which sought preservatory orders over a vast land mass located within Kitui County which the Client/Respondent herein held in trust.*
 - d. On the 9/12/2015 the Taxing Master awarded the Applicant Kshs.198,642/= out of the sum of Kshs.2,568,470/= claimed in the Advocate/Client bill of Costs.*
 - e. The Applicant being dissatisfied with the award of the costs and wishes to object to the sum awarded as instruction fees and urges this court to set aside and substitute the said award to that pleaded in the Applicant's Advocate/Client Bill of Costs.*

f. The Application is being brought in the interest of justice and fairness.

3. The Application is opposed by the Client/Respondent who filed grounds of opposition namely:

1. There is no legal basis for interfering with the Taxing Officer decision as regards Advocate's instruction fees.

2. The Taxing Officer considered all the salient issues of the case in arriving at the decision being challenged.

3. The level of engagement of services were on interlocutory basis as the instructions were terminated by a change in the law welfare the case was even set down for hearing.

4. The amount awarded by Taxing Officer as instruction fees was not only generous but sufficient under the circumstances of the case.

5. The Application should be dismissed with costs.

6. That the Taxing Officer fully analyzed all the pertinent issues in the case and correctly arrived at an award of Kshs.198,000/= as instruction fees.

7. That it is the Respondent's respectful views that the award by the Taxing Officer was not only sufficient but generous under the circumstances of the case.

8. That in view of the foregoing reasons the Taxing Officer's award in this matter should be upheld and confirmed.

9. That the Applicant seeking the review of the Taxing Officer's award should therefore be dismissed with costs.

4. With the leave of the court parties filed submissions. It was submitted that the Taxing Master should have allowed the instruction fee as billed since the matter was a complex one in which the client intended to construct a public market on the disputed plot at a cost of Kshs.50 million and therefore the sum of Kshs.2,568,470/= sought in the Bill was neither exorbitant or farfetched and the Taxing Master had misdirected herself and arrived at an erroneous figure. Counsel relied on the following cases:-

1. JORETH LIMITED =VS= KIGANO & ASSOCIATES C.A NO.66 OF 1999 [2002] EA 92

2. NYANGITO & CO, ADVOCATES =VS= DONYO LESSOS CREMERIES LTD HC MISC. CAUSE NO.843 OF 2013 [2014] eKLR.

It was submitted for the Respondent that the Taxing Master had exercised her discretion judiciously and considered the fact that the matter involved a Judicial Review Application or Petition seeking preservative orders for which the Advocates Remuneration order attracts fees in the sum of Kshs.45,000/= . It was further submitted that the Taxing Master considered all the relevant issues before arriving at the award which in the opinion of the Respondent was sufficient and generous under the circumstances. It was finally submitted for the Respondent that the Taxing Officer's award should be upheld and confirmed.

5. I have considered the Applicant's Application as well as the reply thereto by the Respondent. I have considered the submissions of learned counsels for the parties. It is not in dispute that the Applicant had filed its Advocate/Client Bill of Costs dated 16/02/2015 in which it had billed a sum of Kshs.2,568,470/= and during the taxation before the Taxing Master, the same was whittled down to a sum of Kshs.198,642/=. The bulk of the Applicant's fees was on instruction fees (item No.1) where he had billed the sum of Kshs.1,577,000/= but which was taxed by the Taxing Master to the sum of Kshs.100,000/= . Apparently the item in contention is item No.1 on instruction fees. The learned Taxing Master gave her

reasons for the taxation vide her ruling dated 9/12/2015. She clearly stated that the instruction fees was taxed in line with Schedule VI 1(c) of the Advocates Remuneration order and proceeded to state that the value of the subject matter could not be determined from the pleadings but that the same should not be less than Kshs.6,300/=. The Taxing Master finally awarded the sum of kshs.100,000/= on that item and further pointed out that the nature of the matter involved a Petition for conservatory order and that the value of the subject matter had not been pleaded and thus found the aforesaid sum to be reasonable in the circumstances.

6. Applicant has urged this court to interfere with the taxing master's award on the item (instruction fees). It is indeed trite law that the high court is not entitled to upset a taxation merely because in its opinion the amount awarded is high or low and it would not interfere with a taxing officer's decision unless the same was based on an error of the principle or the fee awarded was manifestly excessive to justify an inference that it was based on an error of principle (see the case of **CONSTRUCTION PETROLEUM ENGINEERING (EA) LIMITED =VS= UGANDA SUGAR FACTORY [1970] EA 141.**

7. It is noted that the value of the subject matter in the **Constitutional Petition No.92 of 2009** wherein the Applicants had represented the Respondent whereby they managed to secure a conservatory order was not disclosed. It has since transpired from the Bill of Costs that the value of the subject matter was Kshs.50 million although the Respondent disputes. The value was not at all captured in the pleadings and the Applicant only raised it at the time of filing for its fees. The Taxing Master indeed exercised her discretion and arrived at the sum of Kshs.100,000/= as instruction fees. In the cited authority **JORETH LIMITED =VS= KIGANO & ASSOCIATES C.A. NO.66 OF 1999 [2002] EA 92** it was held as follows:-

“The value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. However, where the same is not so ascertainable, the taxing master is entitled to use his discretion to assess such instruction fees as he considered just taking into account, amongst other matters, the nature and importance of the cause, the general conduct of the proceedings, any directions by the trial judge and all other relevant circumstances.”

8. Looking at the above authority, I find the taxing master did exercise her discretion and indicated that the subject matter had been a Constitutional Petition that only sought for a conservatory order. Indeed such a Petition was similar to an Application unlike a main suit that requires parties to take pre-trial directions and then proceeding with the trial that entails calling of witnesses. Again the value of subject matter had not been pleaded in the Petition so as to enable the Taxing Master work out the amounts due as instruction fees.

9. Counsel for the Applicant has also relied on the case of **NYANGITO & CO. ADVOCATES =VS= DONYO LESSO CREAMERIES LIMITED – HC MISC. CAUSE NO.843 FO 2013 [2014] eKLR** where it was held:-

“In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.”

10. I must point out that the instruction fee could not have been gleaned upfront in view of the fact that the value of the subject matter had not been revealed or indicated in the pleadings and it was now open to the Taxing Master's discretion to establish what was reasonable in the circumstances as instruction fees and to have regard to the subject matter as a whole and also consider the complexity of the case. As noted earlier, this matter was not a complex one but merely an Application where conservatory orders were sought. I find the Taxing Master properly exercised her mind and arrived at a reasonable award and therefore there is no reason at all to interfere with the award which is reasonable in the circumstances.

11. In the result, it is the finding of this court that the Applicant's Applications dated 20/1/2016 lacks merit. The same is ordered dismissed with costs.

Dated and delivered at Machakos this 17th day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the Presence of:

Mrs. Nyaata for Respondent.....

.C/A: Kituva