



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC.APPLICTION NUMBER 77 OF 2015
IN THE MATTER OF ADVOCATES ACT CHAPETER 16 LAWS OF KENYA

AND

IN THE MATTER OF AN ADVOCATE –CLIENT BILL OF COSTS

BETWEEN

MUEMA KITULUT/A MUEMA

KITULU & CO. ADVOCATES.....APPLICANT

AND

COUNTY GOVERNEMTN OF KITUI.....RESPONDENT

RULING OF THE COURT

1. The Applicant herein has filed a Chamber Summons dated 21st January, 2016 pursuant to Section 3, 34 and 63E of the Civil Procedure Rule 11(2) of the Advocates Remuneration Order and seeks for the following reliefs namely:-

(a) That this Honourable Court be pleased to set aside, review or substitute the decision of the Taxing Master in the Misc. No. 77 of 2015 issued on 3rd November 2015.

(b) That the costs of this Application be in the cause.

2. The Application is supported by an affidavit of the Applicant on the following grounds:-

(a) The Applicant had filed an Advocate/Client Bill of Costs dated 24/3/2015 in which he had sought for the sum of Kshs.33,371,117/80 as costs arising from legal services rendered in HCCC NO. 362 of 2011 Rodah Mugikuyu Mutunga and four (4) others =Vs County Council of Kitui & Others.

(b) HCCC No/ 362 of 2011 was filed over dispute over prospecting rights issues to other Defendants by the Client/Respondent over land occupied by the Petitioners.

(c) The dispute therefore amounted to right to land and the intention of the Applicant was to retain the Client/Respondent issuing prospecting rights to the other Defendants to mine minerals on the vast suit area.

(d) On the 3/11/2015 the Taxing Master awarded the Applicant Kshs.514,160/= out of the sum of Kshs.33,371,117/80 claimed in the Advocate/client Bill of Costs.

(e) The Applicant being dissatisfied with the award of costs made on the 3/11/2015 wishes to object to the sum awarded as instruction fee and urges this Honourable Court to set aside and substitute the said award to that pleaded in the Applicant's Advocate/Client Bill of Costs.

(f) This Application for the setting aside, reviewing or substituting the award of the Taxing Master is brought in the interest of justice and fairness and hat this objection is merited.

(g) The Applicant had given the value of the land in dispute at Kshs.1.5 billion and had explained on how the figure was arrived at while calculating costs only for the Taxing Master to overlook the assessment of the value of the land and therefore arrived at an erroneous award of costs.

3. The Application was opposed strenuously by the Respondent whose learned counsel swore an affidavit dated 19th August, 2016 and raised the following grounds of opposition:-

(a) That the alleged valuation on the suit land was not pleaded and neither a formal valuation was done or filed before the Taxing Master.

(b) That the Taxing officer duly analyzed all the pertinent issues and correctly arrived at an award of Kshs.514,160/=.

(c) That the claim in Machakos HCCC. No. 362 of 2011 is not yet determined as such the Applicant has not conducted the case to conclusion.

(d) That the award by the Taxing Officer was not only sufficient but generous under the circumstances of the case.

(e) That the Applicant's Application should be dismissed and the Taxing Officer's award should be upheld.

4. Submissions:

Parties herein agreed to canvass the Application by way of written submissions. It was submitted for the Applicant that the Taxing Master in her ruling dated 3/11/2015 did not properly address her mind as regards item No.2 (instruction fees) in the Applicants Client/Advocate Bill of Costs and thereby arrived at an erroneous award in which a huge chunk of the Applicant's legitimate costs were disregarded. It was further submitted for the Applicant that the Taxing Master ought to have considered the fact that the suit was complex in nature as it involved a Petition whereby Petitioner had staked a claim of adverse possession on a huge chunk of land valued at Kshs. 1.5 Billion held in trust by the County Government of Kitui. Finally it was submitted for the Applicant that the Taxing Master had failed to appreciate and direct herself to the principles expounded in the cases of JORETH LTD =VS= KIGANO & ASSOCIATES - C.A. No. 66 of 1999 [2002] IEA 92 and NYANGITO & CO. ADVOCATES =VS= DOINYO LESSOS CREMERIES LTD - NBI HC MISC. NO. 843 OF 2013 [2014] EKLR and that had she done so, she would established that the Applicants claim of Kshs. 33,371,117.80 sought in the Bill of Costs was neither exorbitant nor far fetched and consequently the award by the Taxing Master should be set aside and or reviewed.

It was submitted for the Respondent that the Applicant herein is seeking to impose a value on land from the bar contrary to the precedent established JORETH LTD =VS= KIGANO & ASSOCIATES - C.A. No. 66 of 1999 [2002] IEA 92 since there was no value that could be ascertained from the pleadings, it was further submitted that there was no complexity in the matter which was a claim for adverse possession and that the Taxing Officer considered all the salient issues and arrived at the proper award in the circumstances of the case and which should not be interfered with.

5. **Determination:-**

I have considered the Applicant's Application together with the rival affidavits. I have also considered the submissions and authorities cited. The issue for determination is whether the Applicant has raised sufficient grounds to warrant the setting aside and or review of the Taxing Master's award made on the 3rd November, 2015.

To begin with, the Applicant's Application is basically a reference pursuant to Rule 11(2) of the Advocates Remuneration Order. The Applicant is dissatisfied with the award of Kshs.514,160/= given by the Taxing Master on the 3/11/2015 contrary to what he had sought in the Advocate/client bill of Costs (Instruction fees – item 2) in the sum of Kshs.33,371,117.80. Hence the Applicant desires this court to interfere with the said award more specifically the item on instruction fees as per his Advocate/client bill of costs dated 24/03/2015. The taxation of Bills by a Taxing Master entails an exercise of discretion. That being the position the High Court cannot interfere with a Taxing Officer's discretion 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.

(See the case of **FIRST AMERICAN BANK = VS= SHAH AND OTHERS [2002] I EA64**. Also in the case of **JORETH LTD =VS= KIGANO & ASSOCIATES - C.A. No. 66 of 1999 [2002] I EA 92** the Court of Appeal held that the value of the subject matter for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, judgement or settlement (if the same is not so 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 the 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 record reveals that the Taxing Officer indeed received the Applicant's Advocate/Client Bill of Costs dated 24/03/2015 and further received written submissions from both Advocates and rendered her ruling on the 3/11/2015 wherein she taxed the Applicant's Bill of Costs at the sum of Kshs.514,160/=. The Taxing Officer found the Applicant's instruction fees as billed to be unreasonable and proceeded to award the sum of Kshs.250,000/= after taking into account the volume of the work done and the length of time the matter was in court and in the end awarded an aggregate sum of Kshs.514,160/= as the legitimate fees due to the Applicant. The Taxing Officer did take into account the principles laid down in the case of **PREMCHAND RAICHAND & ANOTHER =VS – QUARRY SERVICES NO. 3 [1972] EA 162** which were that costs should not be allowed to rise to such a level as to the confine access to courts to the wealthy, that a successful litigant ought to be fairly reimbursed for the costs he has had to incur and lastly that there should be consistency in the awards made. The Taxing Officer further gave her reasons for her decision as follows:-

“Given that the value of the subject matter could not be determined from either the pleadings, proceedings or the judgement and no valuation was adduced before me to confirm that indeed the subject matter of the suit was indeed as stated by the Applicant as Kshs.1.5 Billion which could not be used as the basis of setting the instruction fees. Schedule VI (b) of the Advocates Remuneration Order is very clear that the value of the subject matter must be discernible from the Pleadings, Judgement or settlement. That is not the case in the instant matter and as such the applicable scale was that found in Schedule VII of the said Order which gives the minimum fee at Kshs.6,300/=. It is further noted that the suit was a petition whose costs should not be allowed to rise so high to deny litigants access to the courts.”

6. The replying affidavit of the counsel for the Respondent reveals that the Applicant raised the issue of valuation of the suit land without presenting a formal valuation report during the taxation of the Bill of costs. Even though the Applicant faulted the Taxing Officer for not going out of her way in calling for an expert opinion on the valuation, I find the Taxing Officer could not have done that in view of the fact that the value of the suit land was not revealed in the pleadings or judgment and further it could have been erroneous for her to go out fishing for evidence on the part of the Applicant yet it was the Applicant's responsibility to establish or justify his claim in costs. I am therefore unable to fault the Taxing Officer in

any way as she rightly exercised her discretion and which was not on an error of principle. Looking at the reasons advanced by the Taxing Officer pursuant to her ruling dated 3/11/2015, I find she duly considered all the salient issues and arrived at the proper award in the circumstances of the case. The award was not inordinately low as submitted by the Applicant. In fact from the replying affidavit of the Respondents counsel, the claim in **Machakos HCCC No. 362 of 2011**, is not yet determined and further that the Applicant has not averred that he conducted the case to its conclusion as no witness has testified yet. The Applicant upon being served with the said replying affidavit did not file a further affidavit as to whether he agrees or disputes those averments.

7. In the result it is the finding of this Court that the award by the Taxing Officer was not based on an error of principle or that the fee awarded was manifestly low to justify interference. Consequently, I find no merit in the Applicants' reference dated 21st January, 2016 and order the same dismissed with costs to the Respondent.

Dated, Signed and Delivered in MACHAKOS this 20th day of September,2017.

D. K. KEMEI

JUDGE

In the presence of:-

Musila for Mbindyo for Applicant

Munyua for F N. Mwalimu for Respondent

C/A: Kituva