



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 236 OF 2015 (OS)

JOSEPH MARIE OGETO T/A J.M OGETO & COMPANY

ADVOCATES.....1ST PLAINTIFF/RESPONDENT

LUFUA GARDENS LTD.....2ND PLAINTIFF/RESPONDENT

VERSUS

J.A ORIEMA OKOTH, KENNETH KIPLAGAT & GEORGE OGEMBO T/A

OKOTH & KIPLAGAT ADVOCATES1ST DEFENDANT /APPLICANT

SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD.....2ND DEFENDANT

RULING

1. The Applicant **J.A ORIEMA OKOTH, KENNETH KIPLAGAT & GEORGE OGEMBO T/A OKOTH & KIPLAGAT ADVOCATES**, took out the chamber summons application dated 21st April 2016 brought under the provisions of Rule 11 (2) of the Advocates (Remuneration) Order 2009, Section 3 & 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. It sought the following orders:

- i. THAT this application be certified urgent and service thereof be dispensed with in the first instance;*
- ii. THAT pending the hearing of this application interpartes the plaintiff be restrained by way of temporary injunction from executing the taxed party & party costs allowed via the Certificate of Taxation issued by the Honorable Deputy Registrar on 11th April 2016;*
- iii. THAT pending the determination of this application the plaintiffs be restrained by way of temporary injunction from executing the party & party costs allowed via the Certificate of Taxation issued by the Honorable Deputy Registrar on 11th April 2016;*
- iv. THAT the taxing master's decision in respect of item number 1 of the Plaintiffs Bill of Costs filed on 5th August 2015 be set aside and referred to a different taxing master for re-assessment abnition or else reviewed and/or assessed by the High Court.*
- v. THAT costs of this application be provided for.*

2. When the application came up for interpartes hearing, learned counsels appearing for the Applicant orally submitted that the 1st plaintiff Bill of costs be reassessed by another taxing officer. He averred that the proceedings arose out of proceedings to enforce professional undertaking. He claimed that following negotiations between the parties, the amount was reduced from kshs 125,000,000/= to kshs 55,000,000/=. He contended that the applicant taxed the bill at a sum of kshs 932,625/=:, which though the taxing officer took consideration of the amount she failed to consider other factors. He added that, the plaintiff did not have a beneficial interest and therefore the taxing master should have considered other factors like complexity of the matter. In general, he claimed that the Taxing Master failed to appreciate the nature of the dispute since the matter was filed and settled 3 weeks later. He concluded that the sum of money taxed was too excessive for advocates who have no interest.

3. I have considered the grounds set out on the face of the summons plus the facts deponed in the affidavits filed for and against the application and also the oral submissions of the applicant's counsel.

4. In a nutshell, the applicant is praying for injunctive orders to issue to restrain the plaintiff from executing to recover taxed party to party bill of costs vide the certificate of taxation issued on 11th April 2016 pending the hearing and determination of this application. The applicant has on the same note sought prayers on a reference in respect of item number 1 of the party and party bill of costs filed on 5th August 2015 which he prays that it be set aside and the that the bill of costs be referred to another taxing officer for reassessment *ab initio* or it be reassessed by the High Court.

5. I will in the first instance address the Reference. The applicants contention is that the taxing master erred in principle in arriving at her decision on item number 1 of the Plaintiffs Bill of costs which resulted to an excessive amount. The Applicant asserts that by taking the amount of kshs 55,000,000/= agreed on by the parties for the settlement of the case, then the taxing master erred as she failed to take into account the general conduct of the case, nature of the case and time taken for its dispatch, which factors ought to have been considered when assessing the instruction fees under the established principles of assessing costs.

6. According to the history of this case that has given rise to this reference, the applicants were the advocates for the 2nd Defendant where they were instructed to represent them in a sale of Land Reference Number 209/3205 Nairobi to the 2nd Plaintiff/ Respondents. Following the abandonment of the Sale, the 1st and 2nd Plaintiff instituted a suit against the applicant and the 2nd Defendant for refund of the purchase price. The 2nd Defendant reimbursed the Respondents with the purchase price on 19th June 2015 which left the suit compromised. Consequently, on 23rd July 2015, the counsels on record representing the purchaser and the vendor appeared before me and recorded terms of the consent that read thus:

i. " The agreement for sale dated 23rd March 2013 is terminated by the mutual consent between the vendor and the purchaser

ii. The notice under the clause 13.1 a of the sale agreement is deemed to have been issued and satisfied and the 21 days have now expired.

iii. In terms of clause 13.2 of the sale agreement, messrs Okoth & Kiplagat advocates shall release to the purchaser the balance of the purchase price i.e kshs 55,000,000/= within 14 days from today held as a stakeholder .

iv. The plaintiff will lodge a letter to Law Society of Kenya withdrawing the complaint against Okoth & Kiplagat advocates within 14 days from the date of confirmation of receipt of the balance of the amount stated in clause iii above.

v. The 1st Respondent to pay costs of this suit to be agreed on or taxed."

7. This consent was then adopted as judgment of the court. It is clear that in the consent number 5, the

parties agreed that the Applicant should pay the costs of the suit to be agreed on and/ or taxed.

8. The Respondent then proceeded to file the party to party bill of costs which was taxed by **Hon R. Makungu** and a certificate of taxation was issued by **Hon. F. Wangila**. According to the Ruling by the taxing officer, the bill was taxed in the sum of kshs 933,625/=. The applicant was aggrieved by the Ruling and proceeded to file this reference challenging the decision of the taxing office. Before doing so, he requested for reasons vide an objection to taxation of items in the plaintiffs party and party bill of costs and vide a letter dated 15th April 2016, the taxing master informed him the reasons were as per the Ruling dated 31st March 2016.

9. I have perused the party to party bill of costs and the Ruling by the taxing master. Specifically, I have evaluated the amount under item 1 of the party to party bill of costs which has given rise to this reference. Item 1, which is the instruction fee was pegged on the balance of the purchase price that was owed and due to the plaintiff which amounted to kshs 55,000,000/=. Upon taxing the instruction fee using the Kshs 55,000,000/= as the value of the subject matter, the taxing master taxed the instruction fee at kshs 875,500/=. It is the contention of the Applicant that that the taxing master erred by taking the amount of kshs 55,000,000/= as the value of the subject matter and failed to take other matters in consideration including the general conduct of the case, nature of the case and time taken to dispatch.

10. In the case of **Joreth Ltd v Kigano & Assoc. Civil Appeal No. 66 of 1999 (unreported)**. The Court of Appeal observed therein 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 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.”

11. In this case, I understand why the Taxing Officer used the Kshs 55,000,000/= as the subject matter value to ascertain the legal fees, which was proper in the circumstances. I also have no quarrel with the instruction fees taxation amounting to Kshs 875,500/= which was correctly arrived at by the taxing master as per Schedule VI (1)(b) of the Advocates Remuneration Order. Be as it may, it **would be an error of principle to omit to consider relevant factors. According to the Advocates (Remuneration) Order, 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 and the general conduct of the proceedings.**

12. It was the Applicant/Advocates’ contention that the Taxing officer failed to take into consideration the general conduct of the case, the nature of the case and time taken to resolve the matter, which contention I agree with. I am of the view that, in assessing the instruction fees, whether upwards or downwards, various factors must be considered. Above all is the complexity of the matter and the time within which the matter was concluded. In the case of **Ramesh Naran Patel vs. Attorney General & another (2012) e KLR**, Emukule J. in drawing inference from the guidelines set out in the **Joreth vs. Kigano & another** (supra) stated that:

“the taxing officer’s discretion in exercise of his discretion to increase the instruction fee are clear. He must demonstrate in his ruling the reasons for increase of fees-

i. Care and labour required by the advocate;

ii. Specify the number and length of the papers to be perused;

iii. The nature and importance of the matter;

iv. The value (where ascertainable) of the subject matter.

v. Interest of the parties;

vi. Complexity of the matter, and

vii. Novelty of the matter.

13. I share the sentiments of Emukule J. expressed in the above case. It would appear the taxing officer in this matter did not take into account any of the above considerations.

14. I note that the Applicant sought for reasons for the taxed amount from the Taxing Officer and in her response the taxing officer claimed that the same were explained in her Ruling. I have perused the Ruling and no reasons were included in the ruling. There is therefore no justification for the award.

15. In the end, I hereby allow the application. The ruling of the Taxing Master dated 31st March, 2016 is hereby set aside and the respondent's party and party bill of costs is ordered to be taxed afresh by another taxing officer other than **Hon R. Makungu**. The Respondents shall bear the costs of this application.

Dated, Signed and Delivered in open court this 16th day of August 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondents