



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO 531 OF 1994

MBUKI KASAVI.....APPLICANT

VERSES

MAINGI MUTISYA NZIOKA.....RESPONDENT

RULING

The Application

This ruling is on an application by way of Chamber Summons dated 19th February 2015 brought by the Advocates for the Plaintiff, seeking orders pursuant to paragraph 11 of the Advocates (Remuneration) Order that the time allowed for giving notice under Rule 11(1) of the Advocates (Remuneration Order) be excused, and that their objection to the decision of the taxing officer on items 1, 33, 61 and 80 of the Plaintiff's Bill of Costs dated 25th March 2014 be heard and decided.

The grounds for the application are set out in the chamber summons and in the supporting affidavit sworn by George Gitonga Murugara on 23rd February 2015. These are that the ruling on taxation of the Plaintiff's Bill of Costs as against the Defendant dated 25th March 2014 was delivered by the taxing officer on 31st July 2014, and the Plaintiff's Advocates requested for a copy of the ruling in a letter dated 1st August 2014 and filed in Court on 7th August 2014, a copy of which was annexed. After a further request in a letter dated 5th January 2015 and visits to the court registry, the ruling was availed to them on 10th February 2015.

Further, that the taxing officer erred in holding that the value of the subject matter was Kshs 3,400/= when the trial judge dismissed this allegation, and erred in applying Schedule VI (b) of the Advocates Remuneration Order instead of Schedule (VI) (1). It was also stated that the taxing officer in disallowing items 33 and 80 of the Bill of Costs failed to appreciate that a fee for instructions to prepare an affidavit was chargeable under Schedule VI (1) (o) as a separate item from instruction fees.

The learned counsel for the Plaintiff, Mr. Gitonga Murugara, in addition made submissions in Court and urged that the wrong principles of law were applied by the taxing officer, and particularly on the value of the subject matter which was not known, as the Court dismissed the claim on the ground that there was no sale agreement and the purchase price was therefore not known. It was the learned counsel's view that the amount awarded of Kshs 50,000/= as instruction fees was manifestly inadequate. He noted that the Court of Appeal in an appeal from the judgment of this Court awarded Kshs 400,000/= on the item of instruction fees.

The Response

The Defendant filed a replying affidavit sworn on 19th June 2015 by Daniel Mutyotwii Maingi ,who stated that he holds the Defendant's power of attorney. The deponent stated that no plausible explanation had been given as to why an objection to the decision of the taxing officer was not given within the stipulated time. Further, that the taxing officer is allowed discretion to ascertain the subject matter in a dispute from the pleadings if no specific amount is provided for, and that this discretion was erroneously applied in this case as the Court dismissed the defence that the value of the land was Kshs 3,400/=. However, that the taxing officer did not err in applying Schedule VI(b) of the Advocates Remuneration Order.

The learned counsel for the Defendant, Mr. Muthama, submitted during the hearing that the Plaintiff never adduced any evidence of the subject matter of the suit, and should have undertaken an assessment of the same and valuation report provided to dispute the taxing officer's findings.

The Issues and Determination

I have considered the arguments made by the parties, and find that there are three issues for determination. The first is whether the reference by the Plaintiff to this Court can be allowed out of time. Secondly, if so, what are the applicable Advocates (Remuneration) Orders and Schedules in the taxation of the Applicant's Bill of Costs, and lastly, whether the Taxing Officer erred in the taxation of the disputed items in the said Bill of Costs.

On the first issue, the provisions as to the time for filing of references are found in rule 11 of the Advocates Remuneration Order, which provides as follows:

“ (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

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

The material time for filing an application to this court as set out in rule 11(2) is within 14 days of receipt from the taxing officer of the reasons for his or her decision. The Applicant herein attached as Annexure “GGM 1” a letter dated 1st August 2014 indicating their objection to the taxing officer's ruling and requesting for a copy of the same. However, there is no record that the same was forwarded to the Applicants by the Taxing Officer as required under the mandatory provisions of Rule 11(2) of the Advocates (Remuneration) Order, and it is therefore not evident when time started to run as against the Applicant.

Under rule 11 (4) of the Advocates (Remuneration) Order, this Court has discretion to enlarge the time fixed for filing and objection or for the taking of any step upon application, notwithstanding that the time for taking that step may have expired. While the Court cannot excuse the Applicants from compliance the provisions of Rules 1 and 2 of the Advocates (Remuneration) Order as sought, I hereby gives them leave to file their objection out of time for the reasons noted in the foregoing, and the application dated 19th February 2015 and filed in Court on dated 23rd February 2015 is therefore accordingly deemed to be properly on record.

On the issue of the applicable Advocates (Remuneration) Orders and Schedules, it is not disputed that the transaction giving rise to the Applicant's Bill of Costs is the Plaintiff filed by the Plaintiff herein dated 9th November 1994, seeking a declaration that the Defendant holds title number KITETA/NDITUNI/42 in trust for the Plaintiff, and for rectification of the register substituting the name of the Defendant with that of the Plaintiff. The Defendant filed a Defence dated and filed on 25th November 1994, and judgment was entered in favour of the Plaintiff on 17th January 2003 after the holding of a trial. The items in the

Plaintiff's Bill of costs therefore bear various dates from 9th November 1994 until 5th February 2004, and various Remuneration Orders therefore apply to the disputed items of the Bill of Costs as follows.

As at the date of filing suit, the applicable law as regards taxation of Bill of Costs was the Advocates (Remuneration) Order of 1993 which came into effect on 1st September 1993. As regards the applicable schedule of the Advocates (Remuneration) Order of 1993, the fees to be charged in Party and Party Costs with respect to contentious matters such as the present suit was provided in Schedule VI of the order. Specifically as regards item 1 of the Bill of Costs on instruction fees, Schedule VI (A) (1) (b) of the said Order provides for the instruction fees in cases where a party sues in proceedings where a defence or other denial of liability is filed, which fees are calculated depending on the value of the subject matter of the suit.

The parties are in this regard in agreement that figure of Kshs 3,400/= in the Plaintiff herein was not indicative as to the value of the subject matter of the dispute, but an allegation by the Defendant as to purchase price he paid for the land, which was dismissed by the Court in its judgment. The taxing officer appears to have found the value of the subject matter in this case to be not more than Kshs 100,000/= and allowed for a fee of Kshs 15,000/= under the said Schedule, and awarded Kshs 50,000/= as instruction fees taking into account the volume of work involved.

There is no basis for the value given to the subject matter by the taxing officer of Kshs 100,000/=: and the award of instruction fees made was therefore in error. I however agree with the Defendant that the Plaintiff ought to provide a valuation report on the subject matter of the suit as at the date of filing suit, to aid the taxing officer in this respect.

As regards items 33 and 80 of the Plaintiff's Bill of Costs, the taxing officer's finding was that the said items are not provided for separately under the 1993 and 1997 Schedules, and were therefore disallowed. Item 33 is dated 27th May 1997, while item 80 was dated 18th July 2003. The applicable law for item 33 was therefore the Advocates (Remuneration) Order of 1993, while for item 80 the Advocates (Remuneration) Order of 1997, which came into effect on 2nd December 1997 applied.

Instruction fees for certain matters arising during proceedings including preparation of affidavits are allowed under Schedule VI (A) (1) (o)(i), of both Orders, in addition to the instruction fees charged to bring the suit under Schedule VI (A) (1) (b), and for drawing affidavits under Schedule VI (A) (4) (f) also provided for under both Orders. The finding by the Taxing Officer disallowing instruction fees for the preparation of affidavits was therefore in error.

Lastly, as regards items 61 of the Plaintiff's Bill of Costs, which was getting up for trial and was dated 22nd May 2002, the Advocates (Remuneration) Order of 1997 was the applicable law. Under Schedule VI (A) (2) of the said Order, fees for getting up for trial of not less than one third of the instruction fees are allowed in addition to the instruction fees, in cases where liability is denied or there is a joinder of issues for trial. The figure awarded by the taxing officer for this item of Kshs 16,666/= was based on the instruction fee awarded of Kshs 50,000/=: which this Court has found was awarded in error, and which consequently also makes the getting up fee for trial that was awarded to be in error. Various decisions have elucidated the principles governing the assessment of costs in the application of the Schedules in the Advocates (Remuneration) Order. In the case of ***Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162*** the Court outlined these principles as follows;

- (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
- (b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and

(d) so far as practicable there should be consistency in the award made and

(e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

In the case of ***Joreth Limited v Kigano & Another* [2002] E.A. 92** the court also set out various factors that are to be considered in determining the instruction fee namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.

The cases cited also emphasise the principle that the taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the ***Advocates (Remuneration) Orders*** including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. (see also ***First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 E.A. 61** and ***Republic v Minister for Agriculture & 2 Others ex Parte Samuel Muchiri W’Njuguna & 6 Others* (2006) e KLR**).

I therefore accordingly order that the decision of the Taxing officer in the ruling delivered on 31st July 2014 as regards to items No. 1, 33, 61 and 80 of the Applicant’s Party and Party Bill of Costs dated 25th March 2014, be and is hereby set aside. The learned counsel for the Plaintiff in his submissions requested this Court to proceed and tax the said items, however, given that the Plaintiff may need to provide additional information to the taxing officer as noted in the foregoing, I direct that the said items in the Bill of Costs be referred back to another taxing officer for fresh taxation according to the principles enunciated herein. Each party shall bear their own costs of the application.

Dated, signed and delivered in open court at Machakos this 21st day of November 2016.

P. NYAMWEYA

JUDGE