



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC NO. 48 OF 2019**

**NURU JEPLETING CHOGE.....APPLICANT**

**-VERSUS-**

**RAJAB KIPKOSGEI MAGUT & OTHERS.....RESPONDENTS**

**RULING**

1. This is a ruling in respect of a reference dated 16<sup>th</sup> September, 2021. The Applicant had filed a reference to this Court against the taxing officer's ruling on the Respondent's bill which was delivered on 2<sup>nd</sup> December, 2020. The reference was fully heard and in a ruling delivered on 20<sup>th</sup> April 2021, the taxing officer's ruling was set aside and the bill was remitted back for re-taxation by a different taxing officer.
2. The bill of costs was re-taxed by another taxing officer who delivered a ruling on 20<sup>th</sup> August, 2021. This reference is against the re-taxed bill in which the Applicant contends that the taxing officer erred in basing instruction fees on the value of the suit property whose value was Kshs 240,000,000/= as per a valuation report which the Appellant contends was not before the Court.
3. The Applicant contends that instruction fees which was taxed at Kshs 1,420,000/= was erroneous in that the valuation report which the taxing officer relied on had neither been tabled before Court nor served upon the Applicant and that in any case the same had been questioned before as it was filed long after the case had been withdrawn.
4. The Applicant argues that since there are only two taxing officer both of whom have been involved in the taxation, the taxation by the latter taxing officer ought to be set aside and the bill taxed afresh by this Court.
5. The Applicant's reference was opposed by the Respondent based on a replying affidavit sworn on 27<sup>th</sup> September, 2021. The Respondent contends that this reference is an abuse of the process of Court in that the same bill had been taxed by another taxing officer before and that the present reference is res judicata.
6. The Respondent further argues that the reference ought to be dismissed as it was filed outside the 14 days required and that there was no extension of time sought to file the same.
7. The parties were directed to file written submissions. The Applicant filed his submissions on 29<sup>th</sup> November, 2021. The Respondent filed his submissions on 19<sup>th</sup> November, 2021.
8. I have carefully considered the submissions by the parties and the only major issue for determination is whether the taxing officer erred in basing instruction fees on the value of the suit property. However, before I address this issue, I have to determine whether this reference was filed out of time as alleged by the Respondent and whether the same is res judicata.
9. The Respondent argued that this reference was filed out of time. I have looked at the Court file and notice that the counsel for the Applicant requested for reasons from the taxing officer vide letter dated 26<sup>th</sup> August, 2021. The taxing officer responded to this letter vide letter dated 31<sup>st</sup> August, 2021 in which she said that the reasons for taxation were contained in the ruling delivered on 20<sup>th</sup> August, 2021. The letter was picked from the registry by advocate Isiji on 3<sup>rd</sup> September, 2021 at 3.10p.m. This therefore means that the Respondent was expected to file a reference to this Court within 14 days. This reference was filed on 16<sup>th</sup> September, 2021 which was within the 14 days required. The reference was therefore not filed out of time.
10. On the issue of whether this reference is res judicata, it is important to note that this is a re-taxation which was ordered by the Court. This being a re-taxation there is no way the same can be res-judicata in view of the earlier taxation by the first taxing officer. The Applicant was at liberty to file a reference to this Court if he was dissatisfied with the re-taxation. This reference is therefore not res judicata.

11. The Applicant's contention is that the taxing officer relied on a valuation report which had neither been tabled before Court or served upon the Applicant. I have perused through the file and notice that the Respondent had filed his bundle of documents on 12<sup>th</sup> November 2019. Annexed to this bundle was a valuation report. In considering instruction fees, the taxing officer is expected to ascertain the value of the subject matter from the pleadings. In the instant case, the bundle of Documents which had been placed before Court had a valuation report which set the value of the suit property at Kshs 240,000,000/=

12. It is therefore wrong for the Applicant to argue that there was no valuation report which had been tabled or served upon the Respondent. I notice that the suit was withdrawn on 12<sup>th</sup> November, 2019. It was therefore not possible to serve the bundle when the suit had been withdrawn.

13. The Applicant argued that the valuation report was filed after the suit had been withdrawn. There is no evidence to confirm this. This is because it is not possible to ascertain whether the filing of the Respondent's bundle came after the withdrawal notice or not. This would have been possible if the Court stamp had indication of time when a document is filed. Unfortunately, the Court stamp does not contain the time when a documents is filed.

14. The bundle of documents being part of the pleadings, the taxing officer was perfectly in order to use the amount in the valuation report to ascertain the value of the subject matter.

15. The Applicant was only dissatisfied with item 1 being instruction fees. The taxing officer having ascertained the value of the subject matter from the pleadings, she had no discretion to use any other method to arrive at a figure other than the one she arrived at on instruction fees.

16. The Applicant's contention that the taxing officer should have taken into account the fact that the Applicant had been messed by his erstwhile advocate is neither here nor there. The Advocate's Remuneration order is clear on how instruction fee should be taxed. Once the Applicant decided to sue his brother, he should have been ready to meet costs in case he lost as in this case where he had put his brother to trouble of engaging a lawyer who filed defence and documents only for the case against him to be withdrawn.

17. This Court can only interfere with the taxing officer's finding if it is found to have been erroneous. The taxing officer did not err in arriving at the amount given as instruction fees. I therefore find no merit in this reference which is dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF FEBRUARY, 2022.**

**E.OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Mathai for 1<sup>st</sup> Respondent

Mr. Isiji for Applicant

Court Assistant –Albert

**E.OBAGA**

**JUDGE**

**24<sup>TH</sup> FEBRUARY, 2022**