REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC PETITION NO. 2 OF 2018

FRANCIS KIMOLO KIMATU & 59 OTHERS.....PETITIONERS/APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE MBEERE DISTRICT LAND ADJUDICATION OFFICER.....2ND RESPONDENT

THE EMBU DISTRICT LAND REGISTRAR.....3RD RESPONDENT

MUTOKAA NTHAUTHO *(As Trustee for Mbandi Clan)*.....4TH RESPONDENT

RULING

1. What is before the court for determination is a notice of motion dated 19th March 2021 and filed on even date. The Application is expressed to be brought under **Rule 11(2) of the Advocates Remuneration Order, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law.**

APPLICATION

2. The Applicants are **FRANCIS KIMOLO KIMATU, DAVID NDULU KYAI & 57 OTHERS,** who are the petitioners in the petition while the Respondents are **THE HONORABLE ATTORNEY GENERAL, THE MBEERE DISTRICT LAND ADJUDICATION OFFICER AND MUTOKAA NTHAUTHO (As Trustee for Mbandi Clan),** who are the respondents in the petition.

The motion came with three (3) prayers, which are as follows:

> *Prayer 1: That the Ruling and/or decision delivered herein on 8th March 2021 by the Honourable learned Taxing Master, J. Ndeng'eri (DR) taxing the party and party bill of costs dated 11th January 2021 at Kshs. 251,590/= be set aside and/or vacated.*
>
> *Prayer 2: That the Bill of Costs aforesaid be remitted back for taxation by a different taxing officer.*
>
> *Prayer 3: That the costs of this application be provided for.*

3. The application is supported by grounds, interalia, that the honourable Deputy registrar erred in holding that the bill of costs was unopposed yet the petitioners had filed written submissions through the court email. It is argued that failure to consider the submissions resulted in granting of an award of Kshs. 200,000/= which is said to be excessive. The court has been urged to set aside the order in the interest of justice and have the taxation conducted afresh.

4. The application is accompanied by a supporting affidavit filed on 19.3.2021 and sworn by Peter Wangaki Wena, counsel on record for the applicant. He reiterated the grounds in the application and pleaded that the Hon. Deputy Registrar delivered a ruling on party and party costs in ELC Petition No. 2 of 2018, where she is said to have awarded to the 4th respondent and the interested party Kshs. 251,590/=. From the amount taxed, Kshs. 200,000/= was awarded as instruction fee as captured in the ruling.

5. The applicant contends that the ruling should be set aside and/or vacated in the interest of justice for determining that the matter was unopposed and for failure by the deputy registrar to consider the submissions which resulted in awarding an excessive amount as instruction fee.

6. The application was opposed by way of a replying affidavit dated 9.4.2021 and sworn by Dennis Kariuki, counsel on record for the 4th respondent. According to him, the application is bad in law, hopelessly defective, and one that ought to be dismissed. It is pleaded that the applicants never responded to the bill of costs by way of response/opposition to the bill and it is argued that such omission amounted to the bill being unopposed.

7. The 4th respondent is of the view that the findings of the taxing master that the bill was unopposed was well founded in law and the filing of the submissions in the absence of a response are said to have been of no legal weight. It is pleaded that taxation of costs is a discretionary matter and the taxing master has been said to have rightly exercised her discretion in arriving at the taxation figure.

8. The applicants have been blamed for sleeping on their duty to put in a response. The present application has been termed as an afterthought and one filed to delay attempts for recovery of the judgment award and costs. It is averred that the applicants are not deserving of the court's discretion and the application should therefore be dismissed with costs and the 4th respondent and interested party be allowed to realize the fruits of the judgment.

9. The application was canvassed by way of written submissions. The applicants relied on the contents in the application. They submitted to the court's jurisdiction to interfere with the decision of the taxing master. It was argued that the court will not interfere with the decision of a taxing officer unless there has been an error in principle. In support of this, reliance was made on the case of **Peter Muthoka & Another Vs Ochieng Onyango, Kibet & Ohaga Advocates, Civil Appeal No. 328 of 2017 [2019] eKLR** which cited the case of **Arthur Vs Nyeri Electricity [1961] EA92.**

10. Further reliance was also made on the case of **Joreth Ltd Vs Kigano & Associates [2002] eKLR (Civil Appeal No. 66 of 1999)** where it was held that interference with the findings of the taxing master can only be done if the taxing master misdirected himself on a matter of principle. The applicant also relied on the case of **First American Bank of Kenya Vs Shah and Others [2002]I E.A. 64** where the court stated that interference with the findings of a taxing master can only be made where it is shown that either the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle.

11. It is submitted that the taxing master's consideration that the application was not opposed yet the applicants had filed written submissions amounted to error in principle which led to awarding of instruction fees that were excessive and this would justify the court's interference.

12. On whether the instruction fee was excessive, it was submitted that the instruction fee is derived from the value of the subject matter which is discerned from the pleadings, judgment and/or settlement and it was contended that there was no monetary value claimed in the petition. The applicants relied on the case of Premchand Raichand Ltd & Another Vs Quarry Services of East Africa Limited & Another [1972] E.A 162 which set out the principles to be considered when taxing instruction fees. It is argued that the taxing officer failed to appreciate that the instruction fees should not be excessive as to deter persons from accessing justice.

13. According to the applicants, they had sought relief under the bill of rights of the constitution and an award of Kshs. 200,000/= is excessive. Further reliance was made on the case of **Republic Vs Minister For Agriculture & 2 Others Ex-Parte Samuel Muchiri W. Njuguna & 6 Others [2006] eKLR.** It was submitted that the matter was not complex nor did the advocates spend much time on preparation of the documents or research.

14. Finally, on whether the filing of the reference was an afterthought, the applicants relied on the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order and submitted that they had adhered to the said provisions and had filed reference without undue delay. The court was urged to allow the application as prayed for.

15. The 4th respondent on his part filed submissions on 27.1.2022. He argued that a party cannot oppose a pleading by way of submissions. It is his case that the applicants, though being afforded an opportunity to file a response to the bill of costs, failed to comply with the court's directions and the deputy registrar was right in deeming the bill of costs as unopposed. It was pointed out that the bill was drawn for a sum of Kshs. 3,863,500/= but was taxed at Kshs. 251,590/=.

16. Reliance was made on the case of **Riziki Fresh Limited Vs Jkm [2019]eKLR** where the court cited with approval the cases of **Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another [2014]eKLR and Ngangá & Another Vs Owiti & Another [2008] 1 KLR (EP) 749** where the court stated that submissions do not take the place of evidence and that many cases are decided without hearing submissions but based on evidence presented. With that the court was urged to dismiss the application with costs to the 4th respondent.

Analysis and determination

17. I have considered the application, the response made, rival submissions by the parties together with the material on the court record. The application before the court seeks to set aside the ruling on the taxation of party and party costs of Kshs. 251,600/= awarded to the 4th respondent and the interested party. From the material before the court, though the entire taxation of costs is challenged, the applicant is particularly opposed to the amount awarded as instruction fee. It is argued that the amount is excessive compared to the nature of the matter handled by the learned counsel on record and the court has been urged to set it aside.

18. It is trite law that an award for taxation of costs by the taxing master should not lightly be interfered with. Circumstances under which courts can interfere with such decision would arise if the decision by the taxing master is 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. This was as held in the case of **Republic –Vs-Ministry Of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006]Eklr**, where Hon. Justice J. B. Ojwang (as he then was) stated as follows:-

> "*The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it*

thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…The court cannot interfere with the taxing officer's decision 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."

19. Further in the case of **Peter Muthoka & another v Ochieng & 3 others (Supra)** *it was held that:*

> *"It has long been the law as was stated in ARTHUR -vs-NYERI ELECTRICITY (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases."*

20. There are therefore two issues for determination; the first is whether there was an error of principle to warrant interference with the decision by the taxing master. In the application before me, it is argued that the decision by the taxing master was based on an error of principle in her ruling on the taxation for costs. The said error is said to have been occasioned by the taxing master's determination that the bill of costs was unopposed, yet the applicants had filed written submissions. It is argued that failure by the taxing master to consider the submissions resulted in the granting of an award of Kshs. 200,000/ as instruction fee and the same is said to be excessive.

21. From my reading of the ruling and the pleadings by both parties it is evident that the taxing master, while determining the bill of costs, indicated that the same was not opposed. I have looked at the annexures to the application before me and I note that in annexure marked 'PWW 4' the applicants have attached submissions which are dated 10th February 2021. They were filed in opposition to the bill of costs. I agree with the applicants that there were submissions before the court at the time of taxation and the same were not factored in or considered by the taxing master in her ruling.

22. However, does failure to consider the said submissions amount to error in principle warranting the court's intervention? I have already stated earlier in the ruling that the only contested figure is the instruction fee. I am therefore of the view that an error of such nature would only be occasioned if the taxing master failed to consider the principles set out in determination of an award for instruction fee and whether any prejudice was occasioned to the applicants by failure to consider their submissions.

23. The court of appeal, in the case **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99,** while determining what is to be considered when awarding costs for instruction fee, stated as follows *"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 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 matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances".*

24. I have looked at the ruling by the taxing master. At paragraph 8 of her ruling she outlined the matters to be considered in arriving at a figure for instruction fees, which are the same considerations as outlined by the court of appeal. The taxing master, in her determination stated that the orders sought were ordinary relief sought in petitions and she went ahead to justify her decline of the amount sought of Kshs. 3,240,000/= on grounds that the same was devoid of legal justification and that no proof of the industry and research had been furnished before the court to justify the figure sought. She therefore she gave an award of Kshs. 200,000/= . Overall, the amount awarded was only about 6.5% of the entire amount claimed.

25. In my view, having considered the reasoning and considerations made in reaching the award, I am convinced that there was no error in principle by the taxing master in arriving at the figure of Kshs. 200,000/= as the instruction fee. This I say also having looked at the submissions by the applicants. In the said submissions, the applicants called upon the taxing master to consider mainly the issue that counsel on record for the interested party though representing 53 interested parties ought to charge instruction fee jointly and not separately.

26. I have looked at the ruling and the taxing master in her determination extensively considered this issue and ultimately determined that by virtue of counsel having taken instructions from one of the interested parties, then the claims and interests of the other 52 interested parties were well represented by the individual for purposes of litigation and further that the application to join the interested party having been one, then it extinguished the necessity to multiply instruction fees. It is therefore evident that the taxing master duly factored and logically determined this issue and gave sound reasons for such determination. I find that failure to consider the submissions did not amount to such error in principle and no prejudice whatsoever was occasioned by the taxing master's failure to consider their submissions.

27. The second issue I seek to consider is whether the fee was too high or too low as to make an inference that it was based on an error of principle. The applicants have argued that the amount of Kshs. 200,000/= was too excessive considering that the matter before the court was a constitutional petition and the subject matter could not be ascertained from the pleadings.

28. The principle, that guide a taxing officer in assessing instruction fees for a constitutional petition are set out in Schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014 which provides as follows:-*'Constitutional petitions and prerogative orders.*

> *To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate-*
>
> *(ii) Where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000'.*

29. I have looked at the ruling. The taxing master in her determination had stated that in the suit, the parties had sought ordinary relief and the petition did not present anything novel that would impact the charting of new jurisprudence in land or constitutional law in the matter.

The court had gone ahead to award Kshs. 200,000/= as instruction fee and in my view that amount is not excessive in the circumstance. As stated earlier in the ruling the taxing master had given explanation for the said award and what she considered in arriving at the figure. It is important to appreciate further that what was awarded was a paltry 6.5% of what had been claimed as fee.

30. In the Court of Appeal case of **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR,** in emphasizing that discretion must be exercised judiciously the court held that:

> *"It is not lost to us … that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court, upon a reference, will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in* ***MBOGO -vs- SHAH (Supra),*** *then the decision though discretionary, may properly be interfered with. See also* ***ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG' NYONG'O & 10 OTHERS, EACJ App. No. 1 OF 2009."***

31. My findings are that the taxing master exercised her discretion judiciously and I shall not therefore interfere with such exercise of discretion as it was based on principles and guidelines as required of the law under taxation. The upshot of the foregoing is that the reference now before me lacks merit and the same is dismissed with costs.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **15TH DAY** of **MARCH, 2022.**

In the presence of Ms. Muriuki for Wena for petitioner/applicant, Kiongo (A.G.'s office) for 1st to 3rd respondent and Ndolo for Andade for 4th respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

15.03.2022