



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 321 OF 2017

1. EDWARD MUTINDA NDETEI

2. JAMES MUTUA MUTHOKA

3. DANIEL MAKAU MWOLOLO.....PLAINTIFFS/RESPONDENTS

-VERSUS-

1. DIRECTOR OF LANDS AND URBAN PLANNING, GOVERNMENT OF MAKUENI

2. COUNTY GOVERNMENT OF MAKUENI.....DEFENDANTS/APPLICANTS

RULING

1. The reference herein dated 18th May, 2021 arises from the Ruling of the Taxing Officer, Hon. Otieno J. dated 3rd May, 2021. It is brought under the provisions of **Rules 2, 11(1) and (2)** of the **Advocates (Remuneration) Order** as well as **Section 3A** of the **Civil Procedure Act**. The Applicants are aggrieved with the taxed costs in respect of the party and party bill of costs dated 23rd February, 2021. The following orders have been sought: -

i) THAT the decision of the Taxing Master delivered on 3rd May, 2021 in so far as the same relates to the reasoning and determination pertaining to the taxation of the bill of costs dated 23rd February, 2021 be set aside.

ii) THAT the Honourable Court be pleased to refer the matter back for re-taxation of the bill of costs dated 23rd February, 2021 and with proper directions thereof.

iii) THAT in the alternative to prayer 2, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax the bill of costs dated 23rd February, 2021.

2. The application is supported by the affidavit of Njeru Runji sworn on 18th May, 2021. It is premised on the grounds that vide the Ruling of this Court dated 5th February, 2019 the suit herein was struck out and costs awarded to the Defendants for the main suit and the application for striking out. Hence, the Taxing Officer erred when she only awarded costs for the application for striking out dated 19th January, 2018.

3. The Plaintiffs/Respondents opposed the instant application vide the replying affidavit sworn by Edward Mutinda Ndeti on 7th June, 2021 on his own behalf and that of his co-plaintiffs. Therein, the Respondents deposed that **Rule 16** of the **Advocates (Remuneration) Order** granted the Taxing Officer discretion to disallow costs and the Applicants had therefore not laid out sufficient basis for this Court to interfere with the decision of the Taxing Officer. It was deposed further that the assessment of the Taxing Officer was not based on an error of principle which could warrant the setting aside of the decision. That the assessment of the Taxing Officer was reasonable and all relevant factors had been taken into account including the fact that the suit did not proceed to full hearing. It was averred that the application is misconceived and thus, the Respondents prayed for it to be dismissed with costs.

4. The Defendants/Applicants filed submissions in support of the application on 9th June, 2021. It was submitted that the Applicants had demonstrated that in fact, they had sought for prayers that the suit be struck out with costs in the Notice of Motion marked as Exhibit NR1 and the said prayers were allowed vide the Ruling delivered on 5th February, 2019 and the said Ruling was also annexed as the Exhibit marked NR2. It was their submission that the Taxing Officer clearly fell into error for failing to tax costs on the main suit.

5. The Respondents filed their submissions on 25th June, 2021. It was submitted that the Taxing Officer properly exercised her discretion in taxing the bill of costs at Kshs. 27,550/=. That in exercising the said discretion the Taxing Officer properly applied the general principles

governing taxation and therefore, this Court ought not to interfere with the decision. The Respondents annexed one authority in support of their submission: -

i) **Republic v Kenyatta University & another Ex parte Wellington Kihato Wamburu [2018] eKLR**; and

6. The only issue for determination is whether the Applicants have presented justified reasons to warrant an interference with the Taxing Officer's decision. It is common ground from the parties' submissions that this Court will interfere with the award of the Taxing Officer when it has been established that the same was arrived at on the basis of the wrong principles of taxation. In making this ruling, I have given consideration to the decision of Ringera J. (as he then was) in **First American Bank of Kenya v Shah and others [2002] 1 EA 64 (CCK)** wherein it was held as follows: -

“The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer’s decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle (Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory [1970] EA 141 followed). Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Though the High Court had the jurisdiction and the discretion to reassess the bill itself (Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (supra) and Arthur v Nyeri Electricity Underwriters [1961] EA 492 followed), the normal practice where the Taxing Officer’s decision disclosed errors was to remit it back to the Taxing Officer for reassessment unless the court was satisfied that the error did not materially affect the assessment (Nanyuki Ezzo Service v Touring and Sports Cabs Ltd [1972], Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar (supra) and Arthur v Nyeri Electricity (supra) followed). Though the issue of when an advocate became entitled to an instruction fee was the subject of apparently conflicting appellate decisions, the better position was that the instruction fee was an independent and static item, not affected by the stage a suit had reached (Joreth Ltd v Kigano and Associates [2002] 1 EA 88 (CAK) followed, Mayers v Hamilton [1975] EA 13 referred to). The full instruction fee to defend a suit was earned the moment a defence was filed and the subsequent progress of the matter was not relevant.” [emphasis added]

7. On the basis of the foregoing, I find that the Taxing Officer clearly erred on principle for failing to appreciate that the Ruling dated 5th February, 2019 disposed of both the main suit and the application she viewed was before her for assessment of costs. As a result, the Defendants were deprived of their entitlement to the costs of the suit considering they had filed a statement of Defence on 6th September, 2017. The submission by the Plaintiffs that the quantum assessed was reasonable because the matter did not proceed to full hearing is therefore baseless. In the result, I find that the Defendants are entitled to the costs of defending the entire suit as would be arrived at with reference to **Schedule 6A** of the **Advocates (Remuneration) Order**.

8. The upshot is that I find merit in the reference dated 18th May, 2021 and the same is allowed in terms of prayers i) and ii) thereof. Orders accordingly.

SIGNED, DATED AND DELIVERED VIA EMAIL THIS 9TH DAY OF MARCH, 2022.

MBOGO C.G.

JUDGE

9/3/2022

Court Assistant: Mr. T.Chuma