



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.204 OF 2009

MICHAEL OCHIENG MBUYA.....PLAINTIFF

VERSUS

JACOB OJWANG OJWANG.....DEFENDANT

R U L I N G

This ruling follows hearing of the application dated 30/4/2012 on 13/3/2013. The application is a chamber Summons filed under Rule 11(1) and 2 of the Advocates (Remuneration) order and Section 3A of Civil Procedure (Cap 21, Laws of Kenya)

It is essentially a reference to this Court challenging the taxation and award of costs by the taxing officer made on 13/4/2012 and consequential orders arising therefrom.

It seeks, inter alia, to have such taxation set aside or varied. The Court is asked to re- tax the bill or refer it to a different taxing officer for taxation denovo. Provision for costs of the application is also asked for.

The taxing officer is faulted for taxing item one in the bill, which related to different matter in which the defendant was not involved. He is also said to have awarded item 3 at 120,000/= on the erroneous basis that the value of the property was 2000,000/= while the records didn't reflect such value.

It was also pointed out, inter alia, that the taxing master failed to consider that no defence had been filed in the matter; and that he had considered irrelevant issues and failed to consider relevant facts and law.

The counsel for plaintiff/respondent filed grounds of opposition on 20/6/2012 faulting the application for incompetence and for being brought inordinately and in bad faith. It was said to be intended to deny the plaintiff the fruit of his judgment.

When the application came for hearing on 13/3/2012, issues were taken with the following items: 1,2 and 3.

Item 1 was said to be related to succession cause which is a different matter altogether. **DITTO** items 2, 2a and 2b. Item 3 is said to have proceeded on the basis that the value of the subject matter was 2 million shillings while that was not the case.

Item 4 is another one. It is stated to be for preparation for trial. No defence was filed and there was no trial the plaintiff's side could talk about, or so it was alleged.

Item 5 talks of the plaint as containing 10 folios. The plaint was stated to be a two page document and the applicant wondered where 10 folios came from.

Item 7 concerns going to Omariba advocate. Applicant's counsel wondered how Omariba was coming in and opined the item should have been taxed off. Item 9 concerned service. Counsel stated service is charged at 1000/= for the first 3km. For a distance further than that, actual expenses incurred have to be availed. Here, the award was Kshs.7500 but no proof seems to have been availed.

Attendances should also have been awarded at lower scale, it was said. It should therefore have been 630/= instead of 840/= as awarded.

Item 9 as taxed is repeated in items 18,22, 26 and 31. These items, it was argued, also need a fresh look.

Other items disputed are 19,24,30,39,45 and 49. These items are charged at 735/= as if they are pleadings, which they are not. The Court was also told that items 15,16,20,25,40, 46,50 and 54 are disputed.

V.A.T item was also disputed on the ground that having been indicated as a disbursement, a receipt should have been shown and that was not done.

Counsel for the plaintiff responded by saying that what is provided for in the remuneration order is the minimum, not the maximum. Charging higher, he said, is not prohibited and the decision of the taxing master is final.

Counsel continued that it was not shown the taxing master erred in law and differences of 20/= or 100/= can't be said to be errors in law.

Counsel also contended that it was wrong to say the matter was not defended. The defendant was said to have been in Court and was asked questions by the Court, to which he replied that he had no problem if judgment was entered against him.

Otieno for defendant/applicant replied by saying, inter alia, that the taxation flew in the case of remuneration order. He also reiterated a few other things he had stated at the start of hearing.

The court has looked at the application, the grounds of opposition and arguments presented by both learned counsel.

Overall, the arguments of the applicants counsel have weight and seem to have merit. The response given is jumbled and too general.

What is challenged is a 62-item bill taxed on 13/4/2012.

The law is clear. The taxing master has a discretion to award what is reasonable. The discretion should be exercised judiciously and valid reasons should be proffered for what is awarded in a given item.

In order to appear fair and judicious, the taxing master should properly appreciate complicated issue of fact and law. And while the position in law is that the awards made should not be interfered with, the superior court will nevertheless interfere where the amount awarded is inordinate or is lacking in legal or factual basis.

Where the superior court finds it necessary to intervene, it is necessary, for the appearance of fairness and impartiality, to have taxation done by a different taxing master.

The court has pointed out that the application seems to have merit. It is necessary to explain.

Items 1,2,2A and 2B relate to a succession cause – HCC No.722/09 – brought to enable the plaintiff to file this suit.

The question that arise is whether costs arising in a different case can be visited on a person who was not party to it. The court thinks that the applicant makes a good point by asserting that he was not party to the succession cause.

Looking at it differently, the plaintiff filed the succession cause in order to get capacity to bring the suit. It is necessary to consider whether the defendant/applicant had contributed to plaintiffs lack of capacity. The answer obviously is that he had not. That being the case, why then should he be condemned to pay cost? And why couldn't costs be done in the succession cause itself?

Then there is item 3. the award made is 120,000/= on the basis that the value of the subject matter was 2000,000/=. It is true that the value of the subject matter, where known, is a major consideration. But the truth is that that value should be discernible from pleadings or judgment. That is not the case here. Such value does not appear anywhere.

The Court can go on and on. Counsel for the applicant raised many pertinent points. But to drive the point of merit home completely, one more example will suffice: item 5 concerns the drawing of plaint. The bill indicates the plaint has 10 folios. What is in the Court file is a two-page document, or 3 if you include verifying affidavit. Counsel for the respondent said a folio means a paragraph according to Blackstone Law Dictionary. That sounds mischievous.

The word folio, as ordinarily used in our courts, means page. As appearing in Blackstone Law Dictionary, t is easy to connect “leaf” and page. Counsel for the applicant is therefore correct to dispute this item. Other issues raised by applicant counsel concerns wrong approach to the law applicable resulting therefore in inappropriate awards.

The plaintiff/respondents counsel responded in general terms. In some instances, he didn't respond to crucial points. For instance, there was no mention of succession issue in the response given. And such as was responded to couldn't successfully counter the concrete arguments of the applicant's counsel.

This being the case, it is clear that the application herein has merit. It is one in which the court should intervene. The application is therefore allowed with the directive that it goes to a different taxing master for a fresh taxation.

Such taxation should be done in presence of both sides unless circumstances render this impossible. The plaintiff will pay the costs of this application.

A.K. KANIARU – JUDGE

25/6/201

A.K. Kaniaru – Judge

Dianga G. - Court Clerk

No party present

Interpretation – English/Kiswahili

Yogo for defendant/Applicant

Mwamu for Respondent/Plaintiff

COURT: The application/reference dated 30/4/2012 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

25/6/2013