



REPUBLIC OF KENYA



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Mwangangi & Company Advocates v Kakenyi (Environment and Land Miscellaneous Application E005 of 2021) [2022] KEELC 3694 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3694 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2021
CA OCHIENG, J
JULY 25, 2022

BETWEEN

MWANGANGI & COMPANY ADVOCATES APPLICANT

AND

CLEMENT MUNYAO KAKENYI RESPONDENT

(Being an application to set aside the decision of the taxing officer dated the June 2, 2021 in Machakos Environment and Land Court Misc Application No E005 of 2021: Mwangangi & Company Advocates v Clement Munyao Kakenyi.)

RULING

1. What is before court for determination is the applicant's chamber summons application dated the July 29, 2021 brought pursuant to rule 11(1) and (2) of the *Advocates Remuneration Order*; sections 1A, 1B and 3A of the *Civil Procedure Act*. The applicant seeks the following orders:
 1. Spent
 2. That the decision of the learned taxing officer dated the June 2, 2021 in Machakos Environment and Land Court Misc Application No E005 of 2021: Mwangangi & Company Advocates v Clement Munyao Kakenyi, as relates only to the taxation of item No 1 of the applicant's advocate/client bill of costs therein dated January 20, 2021 and filed on January 22, 2021 and any consequential order(s) and/or certificate(s) arising thereon be set aside/vacated.
 3. That the taxing court do expeditiously re-calculate/re- tax the fees payable to the Applicant on the said item No 1 of the said bill of costs as per the Advocates Remuneration Order and the applicable principles of taxation at the value found by the taxing court of Kshs 19 million per acre, the land parcel herein measuring approximately 2.380 hectares or 5.88098 acres.



4. That the taxing court do re-assess the VAT consequential upon the re assessed/re taxed fees on the said item No 1 of the bill of costs as per the relevant provisions of the VAT Act No 35 of 2013.
5. That in the interest of justice in the alternative to prayers 3 & 4 above, this honourable court be pleased to assess/tax the fees payable to the applicant on item No 1 of the bill of costs and the VAT payable thereon, as:
 - i. The application herein seeks to correct only an error of miscalculation of the fees payable to the applicant only on item 1 of bill of costs since while the taxing court made proper findings that the value of the land herein is Kshs 19 million per acre on the evidence placed before the court, the court erroneously calculated the fees under item No 1 at Kshs 653,860/= instead of Kshs 1,761,079/30 as the land measures approximately 2,380 hectares or 5,88098 acres as pleaded in the bill of costs and proved by production of the certificate of title and deed plan on pages 39 & 41 of the applicant's list of documents filed on March 9, 2021.
 - ii. The costs in the said bill of costs arose out of the legal services rendered to the respondent by the applicant in 2018 on the respondent's instructions on the registration of a title for the land herein in the name of the respondent which costs comprise out of pocket payments made by the applicant on the respondent's request and which remain unpaid to-date.
 - iii. By reason of the respondent's failure to pay the applicant the costs due, the applicant has suffered great prejudice, loss and hardship which continues for as long as the matter remains pending in court.
 - iv. Further, delay in the determination of the matter will defeat the ends of justice as the Applicant will suffer gross miscarriage of justice and possible irreparable damage.
6. That the respondent do pay interest at 14% on the fees that will be finally determined as being due and payable to the applicant on the said item No 1 of the bill of costs herein as provided under paragraph 7 of the Advocates (Remuneration) Order.
7. That this honourable court do issue such other/further orders as it may deem fit to issue to serve the ends of justice in the circumstances herein.
8. That the costs hereof be borne by the respondent.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Florence Mwangangi Advocate.
3. The respondent opposed the application by filing a replying affidavit where he disputes the applicant's averments and contends that the applicant is making a calculated attempt to sneak an amendment guised as a revision trying to alter and amend instructions fees. He insists the advocates ought to have sought an amendment to the bill of costs before the same was taxed. He deposes that the entire purchase price subject to the sale agreement dated the June 27, 2016 was Kshs 57,000,000 but seeking to lump together and compute all acres in the entire mother title and then multiply all this acreage by consideration of Kshs 653,860 per acre would amount to unjust enrichment. Further, presentation of already completed deed plans at the Lands Office cannot surpass the legal fees subject to the sale agreement dated the June 27, 2016. He avers that the advocates/applicant was fully remunerated and paid in full, legal fees under sale including purchase of property based on the sale agreement dated the June 27, 2016. He states that he personally undertook the subdivision process works until obtaining,



the three deed plans which he took to the advocates/applicant to conclude by lodging them at the land's office for processing of titles. Further, the sale transaction was handled by the advocates/applicant while the survey works and subdivision was undertaken by an independent surveyor appointed by him and paid in full. He reaffirms that the advocates should therefore charge instructions fees only, based on the consideration of Kshs 57 million as per the sale agreement dated the June 27, 2016 and thereafter the actual costs in respect to presentation including lodging of the deed plans.

4. The advocates/applicant filed a supplementary affidavit sworn by Florence Mwangangi where she deposes that the taxing officer made an error in taxing item 1 of the bill of costs. She contends that the respondent's replying affidavit is without any merits.
5. The instant application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant chamber summons application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the decision of the taxing officer in respect to item No 1 of the advocates/applicant's bill of costs dated the January 20, 2021 should be set aside.
7. The advocates/applicant in its submissions reiterated its averments and stated that there was an error of calculation of item (1) in the bill of costs which is contrary to the provisions of paragraph 11 of the *Advocates (Remuneration) Order*. To support its averments, it relied on the following decisions: *Kamunyori & Co Advocates v Development Bank of Kenya Limited* [2015] eKLR and *Kagwimi Kangethe & Co Advocates v Nairobi Mamba Village Limited* [2017] eKLR.
8. The respondent in his submissions insists the decision of the taxing officer in relation to item No 1 of the applicant's bill of costs dated the January 20, 2021 should not be set aside. He contends that the advocates/applicant has not provided sufficient facts requiring interference with the decision of the taxing officer. To buttress his averments, he relied on the following decisions: *National Oil Corporation Limited v Real Energy Limited & another* [2016] eKLR; *Republic v Capital Markets Authority Ex parte Solomon Muyeka Alubala, National Bank of Kenya (Interested Party)* [2021] eKLR and *Samuel Varghese v Ameli Inyangi & Partners Advocates* [2018] eKLR.
9. The fulcrum of the dispute herein revolves around the advocates/ applicant's claim that the taxing officer made an erroneous decision in reducing the amount as stated in item (1) of the bill of costs. I note the instant application has been brought under rule 11(1) and (2) of the *Advocates Remuneration Order* which stipulates thus:
 - 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."

While paragraph 7 of the *Advocates Remuneration Order* provides as follows:-

“ An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery



of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

10. In the case of *Republic v Ministry of Agriculture and 2 others: Ex parte Muchiri W’Njuguna & others* [2006] eKLR the court held that:

“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. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts.”

See also the decision of *Joreth Limited v Kigano & Associates* [2002] eKLR

11. From a perusal of the impugned bill of costs as well as the ruling of the taxing officer, I opine that the figure awarded as item 1 being instruction fees was justified as it was in accordance with paragraph 1(a) and (b) of the *Advocates Remuneration Order 2014*. I note that the transaction herein was in respect to procuring three titles and the taxing officer proceeded to award the same instruction fees vide Machakos ELC Miscellaneous Application No E003 of 2021 and Machakos ELC Miscellaneous Application No E004 of 2021 respectively which dealt with transaction in respect to procuring the two other titles in respect to land being land reference numbers 7885/25 and 7885/26 respectively. It is my considered view that the taxing officer did not make any erroneous decision as claimed. I however find that the advocates/applicant is entitled to charge 14% interest on the taxed amount in accordance with the provisions of paragraph 7 of *Advocates Remuneration Order* from the date of the June 2, 2021.
12. In the circumstances, while relying on the legal provisions cited above and associating myself with the quoted authorities, I do not see the need of interfering with the taxing officer’s decision and will proceed to uphold it.
13. It is against the foregoing that I find the chamber summons application dated the July 29, 2021 unmerited except for prayer No 6 and will proceed to dismiss the rest of the prayers with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2022

CHRISTINE OCHIENG

JUDGE

