



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Miscellaneous Case 5 of 2008**

**MATHIU ELIJAH SOLO ..... APPLICANT**

**VERSUS**

**JOSEPH MURIRA ..... RESPONDENT**

**JUDGEMENT**

The respondent hereof sued the applicant in Maua PMCC No. 135 of 1998 seeking for orders of permanent injunction to restrain the applicant, his servants or agents from trespassing into plot No. 5065 KIANJAI MARKET; an order of eviction of the applicant from that plot and an order for *mesne* profits and damages for trespass. The respondent by the judgment of Maua Magistrate's Court was granted permanent injunction, an order of eviction against the applicant and costs of the suit. He filed a bill of costs which was assed before the Maua Magistrate's Court at Kshs. 122,370/=. The learned magistrate in his ruling when he awarded that amount failed to indicate how the amount of Kshs. 122,370/= was distributed amongst the various items in respondent's bill of costs. In other words, he did not show which items in the bill of costs were allowed and which were disallowed. The applicant was dissatisfied with that assessment and has made a reference before this court under paragraph 11 of the Advocate's (Remuneration) Order. Before I proceed to consider the challenge on the various items of the bill of costs, it is necessary to deal with the objection raised by the respondent. The respondent argued in his submissions that the applicant's reference was incompetent because no reasons had been given by the magistrate on the taxation as required under paragraph 11 of the Remuneration Order. Paragraph 2 of that Order provides:-

***“This order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in Subordinate Court (other***

***than Muslim courts), in Tribunal appointed under the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.”***  
(Underlining mine).

The respondent's bill of costs before the Maua Magistrate's Court was a party and party bill of costs and no doubt from the proceedings the matter was a contentious one. The paragraph therefore is applicable to that bill of costs. Was it then necessary for the magistrate to give his reasons for the taxation/assessment as required under paragraph 11? Paragraph 10 defines the taxing master, who is to give reasons for taxation as:-

***“The taxing officer for the taxation of bills under this Order shall be the Registrar or District or Deputy Registrar of the High Court, or in the absence of a Registrar such other qualified officer as the Chief Justice may in writing appoint; .....*”**

It is clear the reason for the purpose of paragraph 11 are to be given a taxing officer who is stated in paragraph 10 to be Registrar or Deputy Registrar of the High Court. The learned magistrate at Maua Magistrate's Court does not qualify to be a taxing master/officer as per that paragraph. Paragraph 11(2) requires the taxing officer to give reasons for his decision, and on receipt of those reasons a party who raised an objection to the taxation should within 14 days file a reference of that taxation before a judge. Therein lies the answer to the respondent's objection. The reference filed by the applicant, hereof, does not fall within the provisions of paragraph 11 of the Order. Then one might ask, is there a provision for challenging the assessment made by magistrate? In the Advocate's (Remuneration) Order, I could not find a specific provision for such a challenge. I am however of the view that the court can invoke, in view of that *Lacuna*, its inherent power to check such assessments of costs. Since paragraph 11 provides that references can be challenged by way of chamber summons, I find I cannot fault the applicant for approaching this court in the same way.

The respondent also argued that the learned magistrate exercised his discretion in assessing the costs and could increase or decrease the costs. The only discretion I could find in Schedule VII in paragraph 2 is limited which states:-

***“In any suit or appeal by the nature of which no specific sum is sued for, claimed or awarded in the judgment (other than proceedings falling under paragraph 3 below): Such costs as the court in its discretion award but not less than Kshs. 3,600/= if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or difficulty or the urgency of the matter) not exceed Kshs. 18,000/=.”***

The subordinate court has only that discretion, relating to instruction fees. It is because of that lack of discretion on other items of the bill of costs, that there is no provision in the Advocate's (Remuneration) Order for taxation of Subordinate Court's Costs. A practice is however arising, where parties in the

subordinate court file laborious and detailed bill of costs, and then engage the magistrate in the process of taxation. That in my view is uncalled for and should be discouraged. Subordinate court's party and party costs should be assessed, following the provisions of Schedule VII of the Order. Where a party desires to invoke the learned magistrate in exercise of his discretion on instruction fee, such should be addressed when the court makes an order for costs to be paid.

Faced with the objection by the applicant, I was faced with the option of ordering that the respondent's bill be re-assessed or for me to make determination of the same. I chose the latter option. I will therefore in this judgment proceed to assess the correct amounts that the respondent was entitled to by dealing with each item:-

- (a) Item No. 1, the respondent claimed for Kshs. 50,000/=. There is no basis for that amount. Paragraph 2 of the Schedule VII provides for a maximum of Kshs. 18,000/= and having perused the proceedings before the Maua Magistrate's Court that is the amount that the respondent will be awarded on this item.
- (b) Item No. 2. I perused the affidavit of service and since no distance is indicated there the respondent is only entitled to the minimum Kshs. 100/=.
- (c) Item No. 3, the amount allowed is as per paragraph 4 of the schedule, that is Kshs. 300/=.
- (d) Item No. 4 paragraph 8 provides Kshs. 100/=.
- (e) Item No. 5. Paragraph 9 provides Kshs. 45/=.
- (f) Item No. 7 under paragraph 5 amount allowed as Kshs. 225/=.
- (g) Item No. 9 there was no attendance for the 14<sup>th</sup> September 1998 in the proceedings.
- (h) Item No. 11 under paragraph 5 the amount allowed is Kshs. 225/=.
- (i) Item No. 13 under paragraph 5 the amount allowed is Kshs. 225/=.
- (j) Item No. 15 the amount should be as per paragraph 5, that is Kshs. 225/=.
- (k) Item No. 18 is provided under paragraph 5 Kshs. 225/=.

- (l) Item No. 20 is under paragraph 5, Kshs. 225/=.
  
- (m) Item No. 6, 8, 10, 12, 14, 16, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43 and 58 are not provided in schedule.
  
- (n) Item No. 22, respondents counsel did not attend court on 16<sup>th</sup> December 1998.
  
- (o) Item No. 24 is under paragraph No. 5 Kshs. 225/=.
  
- (p) Item No. 26 there is no proceedings of 7.4.99.
  
- (q) Item No. 28 is under paragraph 6 Kshs. 2,500/= being first day of full hearing.
  
- (r) Item No. 30, 32, 34 and 38 a further hearing days, Kshs. 1,000/= per item.
  
- (s) Items No. 40, 42 and 44 are under paragraph 5 Kshs. 225/=.
  
- Item No. 50 is not provided.

The respondent's costs are Kshs. 28,295/= having taxed off Kshs. 325,375/=. The costs assessed on 9<sup>th</sup> August 2007 before Maua Court in PMCC No. 135 of 1998 Maua is hereby set aside and is substituted with an order that the respondent's costs in that case are Kshs. 28,295/= The applicant is awarded the costs of this reference.

Dated and delivered at Meru this 26<sup>th</sup> day of November 2009.

**MARY KASANGO**

**JUDGE**