Manyanyi t/a Balusi & Smart v Alwala & 2 others (Environment and Land Miscellaneous Application E008 of 2021) [2022] KEELC 14798 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14798 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2021

DO OHUNGO, J

NOVEMBER 15, 2022

BETWEEN

ABRAHAM BALUSI MANYANYI T/A BALUSI & SMART ..... APPLICANT

AND

MERIDINA ALWALA ..... 1ST RESPONDENT

LIVINGSTONE ALWALA ..... 2ND RESPONDENT

BELLA ALOSA ALWALA ..... 3RD RESPONDENT

RULING

1. Proceedings in this matter commenced on April 13, 2021 whenAbraham Balusi Manyanyi practicing as Balusi & Smart Advocates (hereinafter "the advocate") filed advocate/client bill of costs dated April 12, 2021 against the respondents (hereinafter "the clients"), claiming a total of KShs 1,618,207 as advocate/client costs. The taxing officer taxed the bill on February 3, 2022 at KShs 1,028,900. A certificate of costs dated February 8, 2022 was then issued.

2. Aggrieved with the taxing officer's decision, the clients wrote to the Deputy Registrar, through their advocate on record, a letter dated February 18, 2022, indicating an intention to file a reference. Ultimately, the clients filed Chamber Summons dated March 3, 2022, which is the subject of this ruling. The following orders are sought in the application:

    1. The decision/Ruling of the Deputy registrar made on the February 8, 2022 be set aside.

    2. The matter be remitted to another registrar for assessment of Advocate - Client bill of costs.

    3. The Advocate - Client bill of costs dated April 12, 2021 applicable scale for purposes of the assessment be lower court scale.

4. The Advocate - Client bill of costs dated April 12, 2021 be subjected to a percentage less the total amount since the matter never took off.

5. Costs be in the cause.

3. The application is supported by an affidavit sworn by Meridina Alwala and is based on the following grounds:

a. That the Learned Deputy Registrar erred in law and fact in applying the High Court scale in the assessing of the Advocate – Client bill of costs where the amount in issue had not been determined by the Court.

b. That the learned Deputy Registrar erred in law and fact in applying the High Court scale in the assessing of the Advocate-Client bill of costs where the amount in issue fell within the Subordinate Court's Jurisdiction.

c. That the Learned Deputy Registrar erred in law and fact in allowing item 2 on fees for preparing for trial without regard to the law on the Advocate - Client bills and fees for preparing for trial as to certification by the trial judge.

d. That the Learned Deputy Registrar erred in law and fact in failing to apply and consider the Provisions of Schedule 7 of the *Advocates Remuneration (Amendment) Order* hence an erroneous decision.

e. That the Learned Deputy Registrar erred in law and fact in allowing duplicated items in the bill contrary to the law.

f. That the Learned Deputy Registrar erred in law and fact in arriving at a decision that is not supported by the law and erroneous in the circumstances.

g. That the Learned Deputy Registrar erred in law and fact in failing to discount the sums that had been paid by the Respondent/Applicant prior to the filing of the bill and the mutual Advocate-Client understanding.

h. That the Learned Deputy Registrar erred in law and fact in failing to consider that the matter never took off for even a single hearing of the case.

4. The advocate opposed the application through a replying affidavit, which he swore on March 23, 2022. He deposed that on instruction fees, the Deputy Registrar was guided by various pleadings and documents filed in Kakamega ELC Case No 120 of 2017 and that while estimating the value of the subject matter which is land title number Kakamega/Municipality Block 1/220, the Deputy Registrar considered the parties' pleadings and accordingly settled on KShs 30,000,000 which was expressly pleaded. Further, that the Deputy Registrar used the Sale Agreement dated February 20, 2016 to arrive at the value of the subject matter.

5. In response to the clients' contention that the assessment should have been on the subordinate court scale, he deponed that the clients voluntarily ousted the jurisdiction of the subordinate court and further that if the purchase price and value of the suit land was KShs 20,000,000 as of the date of the agreement then obviously it was much higher on the date of filing Kakamega ELC Case No 120 of 2017.

6. Regarding fees for getting up and preparing for trial, the advocate deposed that his firm made all necessary preparations needed for trial of Kakamega ELC Case No 120 of 2017 including preparing and filing witness statements and over 18 crucial exhibits to be relied upon. That the clients' case

was fully ready for trial as far back as September 2020 and the Deputy Registrar properly exercised discretion by allowing the item on fees for getting up and preparing for trial. That the Deputy registrar made a slight error of principle when he held that the attendance fee for half an hour should be KShs 1900, which figure constitutes party and party costs and not advocate/client costs. The advocate therefore urged the court to adjust the amounts under the affected items 16-19 of the bill to KShs 2, 850 per attendance. That upon re-tallying the amounts and considering the adjustments to be made to instruction fees, fees for getting up or preparing for trial and the proposed attendance fees, the total due as advocate client costs is KShs 1,177, 207 from which the court can discount the sum of KShs 134,100 which the clients paid prior to the filing of the bill.

7. An order was made that the application be canvassed through written submissions. Ultimately, the advocate opted not to file any submissions and instead relied fully on his aforesaid replying affidavit.

8. The clients their submissions on June 10, 2022 and submitted that they retained the advocate to render legal services on their behalf by instituting a suit in the Environment and Land Court Kakamega, being Kakamega ELC No 120 of 2017, and that the advocate prosecuted the suit until April 8, 2021 when he ceased acting. Regarding the general principles governing interference with the exercise of discretion by the taxing officer, the clients relied on the South African case of *Visser vs Gubb* 1981 (3) SA 753 (C) 754H -755 C and further argued that the value of the subject matter was KShs 19,000,000 which clearly falls under the jurisdiction of the subordinate court. That the taxing officer ought not therefore to have used the High Court scale.

9. The clients went on to argue that the taxing officer was required among others to take in to account the time taken in handling the matter, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute and any other factors he considered relevant. Relying on the case of *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18 F CG, the clients argued that the taxing officer failed to consider the above guidelines.

10. They argued that the taxing officer assessed instruction fees at KShs 720,000 which is manifestly excessive after considering the value of the suit property at KShs 19,000,000. That the taxing officer arrived at the instruction fees by applying Schedule 6 Part A Paragraph 1 (b) of the *Advocates Remuneration Order* which applies to proceedings in the High Court, yet the value of the suit property fell below the jurisdiction of the High Court. They argued that instruction fees should be assessed using Schedule 7 as opposed to Schedule 6. On the item of fees for getting up or preparing for trial, the clients argued that it should be taxed off completely since it is not provided for under schedule 7 and because the suit never proceeded for hearing. They also argued that items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 be disallowed as they are not provided for under Schedule 7.

11. On attendances under items 16 to 29, the clients argued that hearing of the main suit never proceeded and that consequently, all mentions should be assessed at KShs 1,400 and hearing of interlocutory applications be assessed at KShs 2,100 each as per Schedule 7 of the *Remuneration Order, 2014*. They also submitted that perusals under items 30 and 31 be disallowed since they are not provided for under Schedule 7. Regarding disbursements under items 32 and 40, they argued that they be taxed as drawn.

12. I have considered the application, the affidavits filed and the submissions. The issues that arise for determination are whether the taxing officer applied the correct scale, whether the taxing officer properly determined value of the subject matter and lastly whether the taxing officer exercised his discretion in accordance with the law.

13. The guiding principles applicable in a reference were stated by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR as follows:

> "On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

14. Applying those guidelines to the present case, there is no dispute that the advocate acted for the clients in Kakamega ELC No 120 of 2017. I have perused the said file in the course of preparing this ruling. The said matter was filed in this court, which is equivalent to the High Court, on April 7, 2017. The scale applicable when taxing a party and party bill or advocate client bill arising out of representation in court is guided by the court where the case was filed. Kakamega ELC No 120 of 2017 having been filed in this court, the scale applicable in taxing the advocate/client bill of costs dated April 12, 2021 is Schedule 6 Part A as read with Schedule 6 Part B of the *Advocates Remuneration Order*. I have read the subject ruling of the taxing officer and I am satisfied that the taxing officer applied the correct scale. Having filed their suit in this court, the clients cannot turn around and seek to have costs taxed on a scale that applies to matters filed in the subordinate court.

15. On the question of whether the taxing officer properly determined value of the subject matter, I am guided by the holding of the Court of Appeal in *Joreth Limited v Kigano & Associates* [2002] eKLR as follows:

> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment 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 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."

16. There is no dispute that the subject matter of the suit was the parcel of land known as Kakamega/ Municipality Block 1/220. The clients pleaded at paragraph 16 of their plaint dated April 7, 2017 the value of the suit property "may be approximately ... KShs 30,000,000". The taxing officer observed in his ruling that the clients did not annex any evidence to demonstrate that value. In my view however, for purposes of determining the value of the subject matter as between the clients and their advocate for purposes of taxation of costs, it is perfectly in order to use the value which the clients have themselves pleaded in the plaint and verified by way of a verifying affidavit. In this case, the taxing officer was gracious and used the value was of KShs 19,000,000 which is found in a sale agreement which was among the materials placed before the court. The clients have not denied the existence of the sale agreement or even the value of KShs 19,000,000. In fact, they want that value used, only that they prefer instruction fees and fees for getting up or preparing for trial assessed under Schedule 7 of the *Advocates Remuneration Order* which is applicable to subordinate courts. I find no basis in the clients' contention that the taxing officer did not properly determine value of the subject matter.

17. The last issue for determination is whether the taxing officer exercised his discretion in accordance with the law. The clients' complaints about the taxation seem to be based on the wrong notion that the

taxing officer ought to have assessed every item of the bill under Schedule 7 as opposed to Schedule 6 of the *Advocates Remuneration Order*. Applying the correct scale which is Schedule 6 Part A as read with Schedule 6 Part B of the *Advocates Remuneration Order*, I am satisfied that the taxing officer exercised his discretion in accordance with the law in assessing instruction fees at KShs 720,000.

18. Regarding fees for getting up or preparing for trial, Schedule 6 Part A paragraph 2 (ii) of the *Advocates Remuneration Order* provides that fees for getting up or preparing for trial are chargeable in a case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, once the case has been confirmed for hearing. The hearing does not need to have proceeded. It is enough that the suit was fixed for hearing.

19. My perusal of the file has confirmed that a defence was filed by the first defendant on May 16, 2017 wherein he sought dismissal of the suit. The requirement of denial of liability was therefore met. But there is a more important pre-condition: the case should have been confirmed for hearing. The advocate has argued that the case was fully ready for trial as far back as September 2020 and that he had drawn and filed compliance documents. Once again, my perusal of the file has confirmed that whereas the matter came up before the court severally between April 11, 2017 and March 11, 2021, all those appearances were for mentions, applications, and rulings. Meanwhile, on November 30, 2020, the advocate filed Chamber Summons dated November 30, 2020, seeking leave to cease acting for the clients. The application was heard and allowed on April 8, 2021.

20. The proceedings of April 8, 2021 have no suggestion or indication that the suit was scheduled for hearing on that date. On the contrary, the advocate went straight into prosecuting the application, without any mention of any hearing date for the suit. That much is confirmed by the fact that the matter was later listed for pre-trial directions on July 1, 2021, October 27, 2021, January 19, 2022, and February 21, 2022. On February 21, 2022, the suit was given its first ever hearing date: June 16, 2022. In any case, the advocate had put on record his resolve to cease acting for the client as far back as November 30, 2020. Nothing was offered to demonstrate any intention to proceed with any hearing of the suit after November 30, 2020. The taxing officer's finding that the suit was confirmed ready for trial and that a hearing date had been fixed was therefore wrong and a misdirection.

21. I do not agree with the advocate that drawing and filing compliance documents entitles an advocate to fees for getting up or preparing for trial. On the contrary, pursuant to Order 3 Rule 2 and Order 7 Rule 5 of the *Civil Procedure Rules*, drawing and filing compliance documents is primarily to be done by the plaintiff at the time of filing the plaint and by a defendant at the time of filing defence. Remuneration in respect of them is covered mainly under instruction fees and under such other headings as drawings and perusals. It follows therefore that the requirements of Schedule 6 Part A paragraph 2 (ii) of the *Advocates Remuneration Order* had not been met and consequently, fees for getting up or preparing for trial are not due. The taxing officer's taxation of item 2 of the bill is therefore to be set aside. The said item will be taxed off completely. Since the taxing officer had awarded KShs 240,000 under the said item, I will deduct the said sum of KShs 240,000 from the final sum of KShs 1,028,900 that was awarded by the taxing officer.

22. To the extent that the clients' other arguments on taxation of the rest of the items of the bill are grounded on Schedule 7 as opposed to Schedule 6, I find no merit in them. I am satisfied that the taxing officer exercised his discretion in accordance with the law on items 3 to 40.

23. Lastly, as regards the advocate's argument that the taxing officer made a slight error when he assessed attendance fees for half an hour at KShs 1900 which is party and party scale and not advocate/client scale, as well as the advocate's plea that this court awards him the correct figure, I note that the advocate

did not file any reference. There is no basis upon which to increase the taxed costs in favour of the advocate in the absence of a reference by the advocate.

24. In view of the foregoing, Chamber Summons dated March 3, 2022 partly succeeds. I therefore make the following orders:

    a. The taxation of item number 2 of the advocate/client bill of costs dated April 12, 2021 is hereby set aside.

    b. Item number 2 of the advocate/client bill of costs dated April 12, 2021 is hereby taxed off completely.

    c. The advocate/client bill of costs dated April 12, 2021 is taxed at KShs 788,900 (Kenya Shillings Seven Hundred Eighty-Eight Thousand, Nine Hundred).

    d. No order as to costs of this reference.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the applicant

No appearance for the respondents

Court Assistant: E. Juma