



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Civ Appli 149 of 2005

ELIJAH MOMANYI P/A ANASSI MOMANYI & CO. ADVOCATES.....APPLICANT

VERSUS

BARTERA MAIYO:.....RESPONDENT

JUDGEMENT

The Respondent being dissatisfied with the taxation of Advocate – client bill of costs by the Taxing Master, Mrs. A.B. Mongare, Deputy Registrar, on the 13th November,2005, filed this Reference Under the provisions of paragraph 11(2) of the Advocates Remuneration Order.

In the Notice of objection, the Respondent objected to the taxation on items 1 (construction fees), 2,3,6, 14, 15, 16, 17, 18, 19, 20, 21 and 28 (i) and (ii). The Taxing Master provided the reasons for the assessment/taxation on 17th February,2005. However, in my view, the elaborate reasons were contained in her Ruling on taxation delivered on 13th November,2003.

The main objection is the instructions fees where the taxing master awarded Shs.80,000/=. The Respondent set out the following grounds in arguing the application:-

- a) The taxing office failed to appreciate that the applicable paragraph of schedule VI of the Advocates Remuneration Order was 1 (L) and not (b) as the suit was for a Declaration.
- b) Paragraph (a) above notwithstanding and/o in the alternative the Taxing Officer erred when she awarded an instruction fee of Shs.80,000/= for a case not yet completed and in which the matter in dispute (subject – matter) could have been Shs.1,000,000/=.
- c) The Taxing Officer failed to appreciate that if the subject matter had been the value of the land then it could not have been the total costs of the acreage of both the plaintiff's and Defendant's plots of land but the 10 acres in dispute worth approximately Shs.1,000,000/=.
- d) The Taxing Officer whilst appreciating that there was a lot of work yet to be done failed to take that factor in account when determining the instructions fees payable.
- e) The Taxing Officer failed to appreciate that items 14-21 and 28 (i) and (ii) on the Bill were improperly incurred and should not have been awarded to the Applicant.

f) The Respondent who is an old man aged 78 years arrested and committed to Civil Jail on 15th February,2006.

Counsel for the Applicant Mr. Shimenga, submitted that the plaint dated 25th August,2003 sought Declarations in respect of a suit in the Kapsabet Senior Resident Magistrates court namely, Civil suit No. 32 of 1989. He submitted that since there was no pecuniary value in the claims or subject matter in the plaint, taxation should have proceeded on the basis of paragraph 1 (L) of schedule (VI), part a of the Remuneration Order. He added that a sum of Kshs. 30,000/= amounted to 1,300% more than what is provided for in the order. That no reasons were given for this.

The Applicant's Counsel further submitted that even if there was an issue of value the instructions fees ought to have been Shs.55,000/= as the value of land, the subject – matter of the case 10 acres of land was Kshs.1,000,000/= . It was also submitted that the suit was far from being concluded as it had not even gone to Discovery. There has been no change of Advocates and the Respondent's firm was still on record as Advocates for the Applicant. It is asserted that the Taxing Master had appreciated that a lot of work had yet to be done. to the contrary, she taxed the costs as if the entire work had been completed. Further, it was argued that the costs in items 14 – 21 and 28 (I) and (ii) in the Bill of costs was unnecessary to have been included as the application the basis they had been incurred has been withdrawn. The Applicant added that based on a figure of Shs.80,000/= as instruction fees the total taxed costs should have been Shs.166,560 and not 182,980/= and that the taxed costs were excessive and punitive and need to be scaled down.

On the Respondents behalf, his counsel, Mr. Were relied on the Replying Affidavit sworn by Respondent on 28th February,2006. He submitted that the suit was filed in a court which lacked jurisdiction considering the claims set out in the plaint. That the subject-matter was 131 acres and not 10 acres. The trial Magistrate was entitled to look at both parcels of land. He further submitted that the Taxing Master was lenient in awarding Shs.80,000/= as instruction fees. The fact that the suit was pending did not disentitle the Respondent to due fees and a lot of work had been done.

Regarding the application filed in the trial court, the Respondent submitted that it was done on the Applicant's instructions. Although it was withdrawn the advocate was entitled to his fees. Items 28 (i) and (ii) were claimed as they were attendances in court by counsel for the hearing of the case.

I have considered the Reference, the affidavits and counsels submissions. The law regarding references to the High Court in respect of decisions of the Taxing Master is well established. This court would usually only intervene if it is shown that there is departure from the application of the Law i.e. violations of the Law in the decision.

Court would rarely interfere with the proper exercise of the discretion of the Taxing Master in the assessment of the costs. For the court to interfere with the exercise of discretion there must be exceptional circumstances. It must be demonstrated that the exercise of discretion is so unreasonable considering all the facts and circumstances. That it has led to a miscarriage of Justice i.e. the award of such an amount that is grossly excessive considering the case, the pleading and all circumstances and that it has led to a miscarriage of justice.

In the plaint, the prayers sought were as follows:-

- a) A declaration that the Resident Magistrate, Kapsabet lacked jurisdiction to entertain Civil Suit No.32 of 1989 and a further declaration that the decision of the Resident Magistrate in Kapsabet Senior Resident magistrate Civil Suit No.32 of 1989 was null and void.
- b) A declaration that the claim was time-barred under the Limitation of Actions Act.
- c) A declaration that the register in Nandi/Koylat/194 should revert to its position before its rectification pursuant to the said decision.

- d) The procedure adopted to challenge/overturn the decision of the Registrar was illegal, irregular null and void.
- e) A declaration that the decision did not authorize/sanction the exclusive of land reference number Nandi/Koylat/194.
- f) Costs of the suit.

I have carefully perused the pleadings in HC.CC.No.85 of 2003 while the size of land claimed by the Applicant can be determined from the pleading, i.e. 3.34 hectares, is not possible to determine the value of the said portion of land. In the Defence, the Defendant equated this portion to 10 acres of Land (paragraph 12). This figure was confirmed to be correct by counsel for the Applicant during submissions before the Taxing Master.

If the pleadings, judgement or settlement does not disclose material to assist in the determination of the value of the subject matter, nothing would stop the court from determining the value from evidence or material presented to the court during the taxation of Advocate/Court Bill of costs. In this case, the submissions before the Taxing master the ruling show and confirm that both parties agreed that the size of the land claimed by the Applicant was 10 acres.

During the arguments, counsel for the Respondent proposed that the value of an acre of land was Shs.100,000/=. There is nothing on record to show that evaluation report was tabled before the taxing master to support this. the Taxing Master was quite correctly found that the value of the property has not been shown. However, there is no doubt she took into account that this was a claim of land whose size was 10 acres.

From the decision of the Taxing Master, it is certain that she took into account all principles of law which was to guide her in the assessment of the instruction fees. The taxing Master referred to authorities which guided her, counsel and even properly set out some of the principles in decision. She referred to the provisions of law guiding her in making the assessal. She took into account the work done and the that the case was still pending. She clearly knew that the Applicant by himself or through another counsel would have to conclude the case.

I do hereby hold that there was no misdirection or error of the law on the Taxing Officer's part. the effort and industry put in the matter is evident from the Ruling. I also do hereby hold that the Taxing Master exercised her discretion and there is nothing to show that this was done improperly or reasonably.

The Applicant's counsel argued that even if there was a value determinable it was Shs.1,000,000/= and the amount which should have been awarded was Shs.55,000/=. This amount is the basic instructions fees and an addition of Shs.250000/= on the basic instruction on the face of it is not unreasonable. It was within the Taxing Master's discretion. In any case this is academic, as she properly held that the value of the subject matter could not be determined from the pleadings.

With regard to item 14 – 21, it is deemed that the instructions to file the application dated 9/2/2004. It was withdrawn but the work was duly done by the Advocate. The proprietary wisdom or otherwise in so doing is here nor there in the taxation. there is no claim that the amounts charged on the said items were excessive or not accordance with the Remuneration Order.

I have perused the record to inquire into the allegations regarding items 28 (i) and 28(ii) of the Bill of Costs. On the 29th March,2004 the Respondent attended before the Judge in respect of application dated 9/2/2004. The hearing of the application did not proceed and the matter was adjourned. It was a Notice of Motion and it took less than one hour. the charged amount in Kshs.450/= and not Shs.2400/=. Under Schedule VI, (7) ©. There was no attendance or appearance in court on 7th July,2004 as per the court records. The sum of shs.2400/= charged is not chargeable. On the 8th November,2004, the Advocate attended court for the hearing of the suit. the hearing did not proceed. this was a proper attendance to be charged for. Order to make this limited re-assessment.

While this court ordinarily ought not be involved in the re-assessment of bills of costs. Upon a reference, yet I find that it would prolong this matter and increase costs to the parties. If I refer items 28 9i) and (ii) to re-assessment by the taxing master I therefore have involved this court's inherent jurisdiction and powers under Regulation II of the Advocates Remuneration with regard to item 28 (ii), the attendance on 29th March,2004 has already been dealt with in item 28 (i). This is double charging is not allowable. The attendance on 25th May, 2005 took place but the amount chargeable is Shs.600/= and not Shs.450/= as fixed in the Bill of costs. As a result I hereby tax a total sum of Kshs.4,650/=. The Advocate/Advocate Bill of costs finally taxed at Kshs.182,980 – 4,650 = 178,330/=.

For the aforesaid reasons, I hereby reject this Reference except for the limited re-assessment set out above.

As I conclude, it is perhent that I make some observations regarding the execution for the taxed costs herein. First and foremost, I did not see any notice of intention to “**execute**” for the certificate of cots having been sent to the Applicant. Considering that it is a requirement in the execution of normal decrees for a judgement – debtor to be given notice before execution I think that a similar right ought to be available to a person against whom a bill of cots has been taxed. This is a matter that the Rules Committee could possibly look in the future.

The second and more important observation is that, in this case the Respondent immediately went for execution by way of seeking an order of arrest and committal to Civil Jail of the client without first exhausting all other usual forms of execution i.e. by attachment of moveable, salary etc. No attempt was made to do this.

In my view, execution by way of arrest and committal to civil Jail must done the last resort after all other options have been exhausted. The deprivation of an individual's liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the fundamental rights and freedoms of the individual. It should not be taken away easily and particularly in matters relating to commercial transactions or Civil litigation. The circumstances justifying such action area equally established and certain facts and conditions must be shown to exist before an order for committal to Civil Jail is made on the basis of failure to satisfy a property decree. Strictly, committal here is not intended to be punishment but a process through which a debtor can be compelled to pay his just debt after all the other usual methods have been exhausted or have failed. The execution herein lacked all due process.

To demonstrate this court's disapproval of this method execution at the first instance chosen by the Applicant and considering the prejudiced it has caused the Applicant, an old man of 78 years, I shall not award any costs to the Respondent in this Reference.

DATED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF NOVEMBER,2006.

M. K. IBRAHIM

JUDGE