REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 3 OF 2020

NOLLY K. MUSANGO..... APPLICANT

-VERSUS-

PETER ODANGA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

(Application by the plaintiff to set aside the ruling of the taxing officer for enhancing the instruction fees in the party to party bill of costs; considerations that the taxing officer took in order to enhance the fees not found to be inappropriate but the amount awarded constituted an amount that was manifestly excessive in the circumstances; instruction fees reduced)

1. Through a Chamber Summons dated 20 February 2020, the applicant has sought the following orders:

(a) That there be a stay of execution of the ruling dated 23 January 2020 awarding costs due to the defendant from the plaintiff at Ksh. 440,663.66;

(b) That the ruling dated 23 January 2020 be set aside;

(c) That the cost of the Application be provided for.

2. The ruling of 23 January 2020 is a ruling by the Deputy Registrar on the taxation of the party & party costs in the suit *Mombasa ELC No. 123 of 2011, Nolly K. Musango vs Peter Odanga and the Attorney General (sued on behalf of the Land Registrar, Kwale)*. The applicant was the plaintiff in that case, and she commenced the suit through a plaint filed on 7 November 2011. In the plaint, she pleaded to be the owner of the land parcel Ukunda/Kwale/4054 whereas the 1st respondent (sued as 1st defendant) was owner of the land parcel Kwale/Ukunda/2882 which parcels are located within the same vicinity. The applicant accused the 1st respondent of embarking on a survey which led to the 1st respondent encroaching on her land. In the suit, she sought a declaration that the 1st respondent has encroached on her land; an order that the identification of the boundaries done by the 1st respondent was biased; a further order to have the District Land Registrar, Kwale, repeat the survey exercise; a mandatory injunction to compel the 1st respondent to vacate the applicant's land; a permanent injunction to stop the 1st respondent from interfering with her land; general damages for trespass; costs and interest.

3. The 1st respondent's response to the suit was that the applicant started constructing on land that the 1st respondent believed was his land, and he thus requested the District Surveyor to identify the boundaries. The Land Registrar attended the exercise with the District Surveyor, upon which it was found that the applicant is the one who had encroached. The matter proceeded for full hearing and judgment delivered on 29 March 2019. The applicant's case was dismissed with costs.

4. Subsequently, the 1st respondent filed his party and party bill of costs. The main contention was, and still is, on the instruction fees. The 1st respondent billed the sum of Kshs. 6,300/= per Schedule VI Part A (L) but sought an increase by a further Kshs. 300,000/= pursuant to the proviso, submitting inter alia that the matter had unusual complexity and raised novel issues of law; further, that the matter was of great importance to the parties and the proceedings highly emotive; and that the subject matter was prime. The applicant referred to a transfer instrument relied upon by the 1st respondent at trial, vide which the property was transferred to the 1st respondent for Kshs. 130,000/= , and sought this to be considered the value of the subject matter. Counsel for the applicant thought that the sum of Kshs. 49,000/= pursuant to Schedule VI (b) was reasonable.

5. Upon hearing the parties, the taxing officer taxed the 1st respondent's bill at Kshs. 440,663.66/=. On instruction fees, the taxing officer

found that the applicable law as the Advocates Remuneration Order, 2006. She found that the value of the subject matter was not disclosed and could not be determined from the pleadings and judgment. She meant to proceed on the basis of Schedule VI (L), though it does actually appear that she mistakenly proceeded on the basis of (K) which provided for a basic fee of Kshs. 8,400/=, and not the Kshs. 6,300/= in (L). She then took into consideration *"the level of work done, the volume of pleadings in the file, the issues litigated at trial and the duration taken by the matter in court (around 8 years)"* and she proceeded to exercise her discretion and increased the basic instruction fees from Kshs. 8,400/= (should have been Kshs. 6,300/=) to Kshs. 200,000/= which she found fair remuneration for the work done. Some other items in the bill were also taxed thus the total figure of Kshs. 440,663.66/=.

6. Aggrieved, the applicant filed this reference. In a nutshell, the applicant's position is that the taxing officer erred and did not properly exercise her discretion. In his submissions, Mr. Gathu, learned counsel for the applicant, inter alia submitted that the matter was not fairly complex; that the time taken to complete the matter cannot be attributable to the complexity of the matter but on various adjournments and interlocutory applications. Mr. Karina, learned counsel for the 1st respondent, did not agree. He submitted that the taxing officer correctly assessed the instruction fee by applying Schedule VI of the 2006 Advocates Remuneration Order. He submitted that what was in issue was a boundary dispute and thus it would be erroneous to plead the sum of Kshs. 130,000/= as the value of the subject matter.

7. I have considered the matter.

8. I do not think that this was a matter where the value of the subject matter was in issue at all. The parties were not contesting title and neither was one claiming money from the other party, save of course for the claim of general damages by the plaintiff, which was not awarded. This was a straight forward boundary dispute and I cannot fault the taxing officer for not considering the value of the subject matter. I am of opinion that she was correct on that and I am not persuaded by the arguments of the applicant that the court ought to consider the sum of Kshs. 130,000/= noted in the transfer instrument. This was not a case where any party was going to gain any value; it was a matter for the court to ascertain whether the boundaries as delineated by the Land Registrar were the correct boundaries or not, and the court was persuaded that these were the correct boundaries.

9. The taxing officer was also correct in finding that the applicable remuneration order in respect of instruction fees was the 2006 Advocates Remuneration Order (ARO). Schedule VI thereof would be applicable for proceedings in the High Court. Since the subject matter was not in issue, I further find that the taxing officer correctly referred to Schedule VI (L) {though she mistakenly applied (K)}that is :-

> *To sue or defend in any case not provided for above, such sum as may be reasonable but not less than Kshs. 6,300/=.*

There is a proviso that :-

> *(i) The taxing officer, in the exercise of his discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances.*

10. The taxing officer applied this proviso, and that is why she took into consideration the level of work done, the volume of pleadings in the file, the issues litigated at trial and the duration taken by the matter in court (around 8 years). Using that discretion, she increased the instruction fees to Kshs. 200,000/=.

11. The applicant argues that the taxing officer ought not to have taken into consideration the duration of time. I disagree. I think the time taken in litigation is one critical factor that the taxing officer can take into account when assessing instruction fees, unless it can be demonstrated that the successful litigant ought not to benefit from this time, because he/she is the very party who led to the delay of the matter, and cannot therefore use the element of delay to his/her benefit. It has not been alleged that the delay herein was caused by the 1st respondent, and in fact, my assessment is that the delay was indeed caused by the applicant, who appears not to have been keen to take hearing dates and the matter only proceeded upon being listed for service week (a programme for disposal of old cases that contribute to case backlog). It cannot also be argued that the taxing officer erred in taking into consideration the level of work done, the volume of the pleadings, and the issues litigated. Those are proper considerations to take into account. I am not therefore persuaded that the taxing officer applied any erroneous principle when taxing the bill of costs.

12. It should be recalled that the taxing officer was exercising a discretion and any court should be slow when overturning the exercise of a discretion. In the case of *B. Mbai & Associates vs Clerk, Kiambu County Assembly & Another (2017) eKLR*, the court stated as follows on the interference of a taxing officer's discretion :-

> *24. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an*

advantage against the adversary. These principles were stated in the case of ***First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64***.

13. I am in agreement with the above dictum and I am not, in the circumstances of this case, persuaded that the taxing officer proceeded on any error of principle. The only issue I need to address is whether the increase of fees from Kshs. 6,300/= to Kshs. 200,000/= was manifestly excessive. I think this is an enormous increase of fees, and although reason for the increase has been given, in my view, the increase is manifestly excessive. I have mentioned that there was no value attached to the subject matter, since this was a case over boundaries, and to me, the closest equivalent would be a matter of zero value, thus falling within the scale of Kshs. 0 – Kshs. 500,000/= within the context of Schedule VI (I) (b), where the fees payable would have been a maximum of 49,000/= if the case was defended. I think this figure would have constituted a good reference point on what would be reasonable. Kshs. 200,000/= is more than four times this amount of Kshs. 49,000/= and that is why I am of the opinion that the award of it as instruction fees in the circumstances was manifestly excessive. Even if one takes into consideration the other factors that the taxing officer properly took into account, still, Kshs. 200,000/= would appear to be way off the mark.

14. I am thus persuaded to disturb the assessment of instruction fees at Kshs. 200,000/= on account of it being manifestly excessive. I have the option of remitting the matter back to the taxing officer or dealing with it myself. To save the parties time and trouble of going back and forth, I opt to deal with the matter myself. Taking into consideration all factors, I will tax the instruction fees at Kshs. 75,000/=. Any sums affected by this will including VAT, to be adjusted accordingly. The other items will remain as taxed as they do not appear to have been in contention.

15. There will be no orders as to the costs of this reference.

16. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA