



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 50 OF 2017

SAMWEL CHELULE KOECH.....PLAINTIFF/APPLICANT

VERSUS

KENYA FOREST SERVICE.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is an Application by way of Chamber Summons pursuant to the provisions of Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Rule 11 of the Advocates (Remuneration Order (2009) dated the 27th July 2020 in which the Applicant herein seeks the following orders:

i. Spent

ii. that the honorable Court be pleased to dispense with the superfluous procedural requirement that the Applicant need(sic) to request for the reasons for the taxations from the Taxing Master before lodging the reference.

iii. That the honorable Court be pleased to set aside the Taxing Master's decision delivered on the 15th July 2020

iv. That the honorable Court be pleased to re-assess the fees due to items No. 1-17 in respect to the Bill of Costs dated the 27th May 2020 and make a fair assessment thereupon

v. That in the alternative and without prejudice to the foregoing, the honorable Court be pleased to remit items No. 1-17 on the Defendant's Bill of Costs dated the 27th May 2020 for review and re-consideration with directions on the taxation before another Deputy Registrar.

2. The said Application was supported by the grounds on its face and the Affidavit, sworn by the M/s Kisilah Daniel Gor, Advocate for the Applicant on the 27th July 2020.

3. The Application was opposed by the Respondent's Counsel M/s Renny Langat Advocate via his Replying Affidavit dated the 13th August 2020 to the effect that it was frivolous, mischievous, lacked merit, was incompetent because it sought for stay of execution of taxed costs pending the hearing of the reference and an intended Appeal and that the same should be dismissed.

4. The application was canvassed by way of written submissions to which the Applicant filed their submissions dated 23rd September 2020 on 25th September 2020 while the Respondent filed their submissions dated 25th September 2020 on an equal date.

Determination

5. I have considered the Applicant's submissions dated the 23rd September 2020 as well as the Respondent's Replying affidavit dated the 13th August 2020 more so at paragraphs 5, 10, 11, 12, 13 14 15 and 16. Curiously to note is that the submissions by both parties as well as the replying Affidavit by the Respondent are at variance with the prayers sought in the foundational Application dated the 27th July 2020 herein above stated.

6. I note that whilst the Application dated the 27th July 2020 sought for setting aside of the Taxing Master's decision delivered on the 15th July 2020, and the re-assessment and/or remitting the Defendant's Bill of Costs dated the 27th May 2020 for review and re-consideration of items No. 1-17, the Replying Affidavit and submissions on the other hand are in respect of 'stay of execution orders' on costs as per the

ruling/order of 15th July 2020 pending the hearing and determination of an intended Appeal.

7. I find that in the first instance, the purported Replying Affidavit filed by the Respondent is fatally defective as the same has no legal value in the matter before me. A Replying Affidavit is the principal document wherein a Respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. In the absence of this foundational Replying Affidavit, it follows that even the Written Submissions purportedly filed by the Respondent on 29th September 2020 are of no effect.

8. Coming to the Applicant's Application dated the 27th July 2020, I find that as a Court of law, I have a duty in principle to look at what the application is about and what orders it seeks, which orders I have enumerated herein above. Having found that the Applicant's submissions into alia are at variance with the foundational Application, I further find that they too are of no consequence herein and I shall disregard them.

9. What then is the court left with? At this stage I find that I am only left with the Application itself which as a matter of fact is not opposed considering the above captioned finding. However it is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, that the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts, point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.(see the Supreme Court findings in **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR**)

10. I shall now proceed to consider the facts before me as against the jurisprudence for setting aside of the Taxing Master's decision, the re-assessment and/or remitting of the Defendant's Bill of Costs dated the 27th May 2020 for review and re-consideration of items No. 1-17 therein.

11. Vide the Applicant's Chamber Summons dated the 27th July 2020, the Applicant seeks to set aside the decision of the Taxing Master, S. K Ngetich the Deputy. Registrar, dated 15th July 2020. The said Application is supported by the grounds on its face as well as an Affidavit, sworn by M/s Kisilah Daniel Gor Advocate, on the 27th July 2020.

12. The Applicant's grounds are based on the following:

- i. The Taxing Master has on the body of his ruling provided the reason for his ruling therefore the need to request for reasons as preliminary procedural step is unnecessary.
- ii. The Taxing Master misdirected himself and acted contrary to the established principles of taxation of party to party bill of costs.
- iii. The Taxing Master erred both in fact and law in awarding instruction fees four (4) times the amount provided for in schedule 6 paragraph 1 (j) of the Advocates Remuneration Amendment Order 2014 in the absence of evidence to justify such a high award.
- iv. The Taxing Master erred both in fact and law in by failing to appreciate that the suit was a straightforward one where the facts were bare, not complex or novel and little time was expended thus arriving at an erroneous high award.
- v. The Taxing Master erred in fact and law in failing to appreciate that the suit was concluded in a very short time a factor not taken into consideration while awarding such high amounts for instruction fees.
- vi. The Taxing Master erred in fact in failing to appreciate that only three (3) copies per pleading was required and/or sufficient thereby arriving at an unjustifiable and exaggerated amounts on items 3 and 4 of the Defendant's bill of costs.
- vii. That there is an error on the face of the ruling in that, the Taxing Master while referring to item 9 on the Defendant's bill of costs, taxed the same at Ksh 6,500/= despite appreciating that the plaintiff was awarded of costs of Ksh 6,500/= which has not been paid by the Defendant.
- viii. That the decision of the Taxing Master to tax items number 10 & 11 at extremely high amount was highly unreasonable and cannot be justifiable and the same amount to gross injustice to the plaintiff/Applicant.
- ix. That this application has been filed without inordinate delay and it is in the interest of justice that this application (sic) be allowed.

13. Based on the above, I find the issues for determination as herein under;

- i. **Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.**
- ii. Whether the Taxing Officer had committed any errors of principle while taxing items 1-17 on the bill of costs.

14. From the analysis of the issue at hand it is clear that the Taxing Officer rendered his written ruling on the 15th July 2020. The Applicant neither sought for reasons nor gave notice in writing to the taxing officer, as required by Rule 11(1) of the Advocates (Remuneration) Order, objecting on Items No 1-17 in the bill of costs.

15. Rule 11(1)(2) of the Advocates Remuneration Order provides as follows:

(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.

16. I note from a copy of the ruling dated the 15th July 2020, that the Taxing Master gave reasons for his decision on the items as taxed and therefore in agreement with the Applicant herein, I do not see the need for seeking further reasons or giving notice in writing to the taxing officer for the said decisions. In my view the omission to file a notice of objection was therefore not fatal, as in any case the ruling containing the reasons was availed.

17. It was held in the case of **Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5** as follows:

“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

18. On the second issue for determination as to whether the Taxing Master committed any errors of principle while taxing items 1-17 on the Bill of Costs, the often cited case of **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64** sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162** and **Arthur vs Nyeri Electricity Undertaking [1961] E.A 492**. The said principles were also re-affirmed by the Court of Appeal in **Joreth Limited vs Kigano and Associates [2002] 1 E.A 92**. These principles include

i. that the Court cannot interfere with the Taxing Master’s discretion 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 interference that it was based on an error of principle;

ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration 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;

iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master 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;

iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

19. From the above stated, it can be discerned that there is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see **Premchand’s case** (supra)

20. The Applicant is aggrieved by Taxing Master’s ‘inflated and exaggerated’ awards on the items 1-17 of the Bill of Costs which was not in tandem with Advocates’ Remuneration Order of 2014.

21. The Applicant contends that in Item 1, the Taxing Master erred in awarding instruction fees four (4) times the amount provided for in schedule 6 paragraph 1 (j) of the Advocates Remuneration Amendment Order 2014 in the absence of evidence to justify such a high award and the fact that the matter had not been complex but straight forward and had been concluded in a very short time.

22. I have considered the plaint herein annexed in the Applicant’s application herein, where the Defendant herein had been sued for trespass on the Plaintiff’s property known as KERICHO MUNICIPALITY L.R NO. 631/1570 in which Plaintiff sought for a permanent injunction restraining the Defendant by itself, its agents, servants, employees and/or assigns or any other party acting on behalf of the Defendant or under the instructions of the Defendant from entering into the Plaintiff’s plot, erecting structures, fencing off, demarcating or dealing in any way against the wishes of the Plaintiff over the suit land, damages, costs of the suit and any other relief that the Honorable court may deem just and fit to grant.

23. In the case of **Joreth Limited (Supra)** the Court of Appeal held that the value of the subject matter 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/her discretion to assess such instruction fee as (s)he considers just, *taking into account, amongst other matters, the nature and the 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.*

24. Schedule 6 paragraph 2 of the Act provides that:

'In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation'.

25. In this case, it is clear from the record that the suit was opposed. There was nothing to show that the matter was complex. In my view, the *responsibility entrusted to Counsel* in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. On this item the Taxing Master awarded the instruction fee of Ksh 300,000/- which was four times more than the minimum instruction fee.

26. I have taken the liberty of randomly perusing some of the items complained of by the Plaintiff herein; for example, on Item No. 5, 6, 7, were mention dates to which from the submissions therein submitted, it is doubtful as to whether Counsel took more than half an hour. The Paragraph 7 Schedule 6 of the Advocates Remuneration Amendment Order 2014 stipulates that for attendance fee that is half an hour or less the ordinary fee is at Ksh 1,100/=, the Taxing Master taxed the said items at Ksh 2,300/- which was even higher than the fee charged at a higher scale.

27. I have also considered Items No. 8 and 11, which was attendance fee, I find that on the 26th June 2018, the matter did not proceed for hearing, the Defendant was awarded the costs of Ksh 7,000/=. on item No 11, on the 23rd May 2019 only one defence witness testified and from the proceeding herein the said testimony could not have taken a half day, yet the Taxing Master did tax the cost for a half day at Ksh 5000/=.

28. Based on the above sampling, it is my conclusion that the Taxing Master did not exercise his discretion judicially thereby following a wrong principle in reaching his decision. I therefore find that the Application dated 27th July 2020 is merited, I allow the same with the following orders:-

- i. *That the taxation of the Defendant's Bill of Costs dated 27th May 2020 and all the consequential orders are hereby set aside.*
- ii. *That the said Bill of Costs be and is hereby remitted back to another Deputy Registrar to be taxed afresh on the items objected to by the Plaintiff.*
- iii. *That each party shall bear its own costs for this Application.*

It is ordered.

Dated and delivered at Nakuru this 18th day of March 2021 (via Teams Microsoft conference)

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE