



REPUBLIC OF KENYA



KENYA LAW
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Kenya Electricity Transmission Company Limited v Njeri & another (Environment & Land Case 214 of 2014) [2023] KEELC 17115 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 214 OF 2014**

CA OCHIENG, J

MAY 3, 2023

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED PLAINTIFF

AND

ALEX GATHIRUA 1ST DEFENDANT

WINNIE NJERI 2ND DEFENDANT

RULING

1. What is before Court for determination is the 2nd Defendant/Applicant's Chamber Summons Application dated the July 7, 2020 brought pursuant to Rule 11 (1) and (2) of the [Advocates Remuneration Order](#). The Applicant seeks the following orders:
 1. The Honourable Court be pleased to set aside the Deputy Registrar's Ruling delivered on January 16, 2019 as it relates to the reasoning and determination pertaining to Item 1 of the Party and Party Bill of Costs dated August 15, 2018.
 2. That the court determines the proper fees payable on Item 1 of the Bill of Cost dated August 15, 2018.
 3. That in the alternative, the Bill of Costs dated August 15, 2018 be remitted back to Taxation on Item No 1 (Instruction Fees).
 4. That the cost of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Stephen Gitonga Mureithi Advocate where he deposes that the Applicant filed his Bill of Costs dated the August 15, 2018 on October 4, 2018. He explains that on January 16, 2019, the Taxing Officer delivered her Ruling on the impugned Bill of Costs which the Applicant is dissatisfied with. He contends that the amount awarded is fundamentally different from what was awarded to the 1st



Defendant for the same set of facts. He insists that the Ruling of the Deputy Registrar is grossly per incuriam and has an error of principle. Further, that the Deputy Registrar in assessing Item one (1) of the Bill of Costs used Schedule VI (I) (I) to assess costs in a suit, where the subject matter was disclosed in the pleadings and thus warranting assessment under Schedule VI (I) (b) of the Advocates (Remuneration Order). He reiterates that the Deputy Registrar ignored binding decisions of the High Court handing down the ratio decidendi to be applied on exactly similar issues as the issues before the Hon Deputy Registrar. Further, that the Hon Deputy Registrar by her impugned decision occasioned gross injustice to the 2nd Defendant, warranting consideration of redress.

3. In opposition, the Plaintiff filed a Replying Affidavit sworn by its Advocate Yabesh Nyandoro Kambi where he deposes that the instant Application is an abuse of the Court process including time and should be dismissed in limine. He explains that the 2nd Defendant filed his Bill of Costs dated August 15, 2018 which was taxed appropriately and a Ruling issued by the Deputy Registrar on January 16, 2019. He contends that the Applicant has not demonstrated any error in part of the Registrar in taxing the impugned Bill of Costs. He insists that the Applicant's valuation of the subject matter at Kshs 8,000,000 as drawn under Item one (1) of the Bill of Costs dated the August 15, 2018 is fictitious and baseless as the value of the said subject matter was neither disclosed nor proved. Further, that it was not ascertainable from the pleadings as the assessment and compensation were not done prior to filing the suit. He reiterates that though the Deputy Registrar ought to consider the existing *ratio decidendi* on record when making a decision, she is also independent in arriving at a sound and fair decision to all parties. Further, that the Deputy Registrar is not bound to pass the exact same orders issued earlier, but has discretion. He reaffirms that the Deputy Registrar duly adhered to the provisions of the Advocates Remuneration Order in taxing the Applicant's Bill of Costs hence the 2nd Defendant will suffer no injustice.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits as well as the rivalling submissions, the only issue for determination is whether the Ruling of the Deputy Registrar delivered on January 16, 2019 as relates to the Applicant's party and party Bill of Costs dated the August 15, 2018 should be set aside.
6. The Applicant in his submissions insists that the value of the subject matter was disclosed in the pleadings and refers to the Plaintiff/1st Respondent's submissions dated the February 29, 2016. He argued that instruction fee is a static item charged once and it is not affected or determined by the stage the suit has reached. To buttress his averments, he relied on the following decisions: Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR; KANU National Elections Board & 2 Others v Salah Yakub Farah [2018] eKLR and Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR.
7. The Plaintiff/1st Respondent in its submissions insists that the amount awarded by the Deputy Registrar after taxation of the Applicant's Bill of Costs dated the August 13, 2018 is adequate. It avers that the value of the subject matter was not discernable from the pleadings or in the suit. Further, that the suit herein was not for a liquidated claim. It reiterates that the instant Application is not merited as it does not raise any omissions or mistakes that arise from the Taxing Officer's Ruling. To support its averments, it relied on the following decisions: Joreth Limited v Kigano & Associates Civil Appeal No 66 of 1999 [2002] 1 EA; Swarn Singh (K) Limited & Communications Authority of Kenya [2017] eKLR; Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR; Premchand Raichand Ltd v



Quarry Services of East Africa Ltd (No 3) [1972] EA 162; and *First American Bank of Kenya v Shah & Others* [2002] EALR.

8. On awarding instruction's fees, Schedule 6 of the *Advocates Remuneration Order 2014* provides that:

"The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties."

9. In the current scenario, the Applicant's main contention is the failure of the Taxing Officer to award a higher amount on the Instruction Fees in respect to their Bill of Costs. Upon perusal of the pleadings herein, I note this suit was withdrawn before being set down for hearing. Schedule 6 of the *Advocates (Remuneration) (Amendment) Order, 2014* clearly provides on how the value of the subject matter should be determined while assessing instructions fees and these are from the pleadings, Judgment or settlement between the parties. In the current scenario, the Taxing Officer noted that the instructions fees was not ascertainable from the pleadings and proceeded to award an amount based on her discretion. The Applicant insists that the 1st Respondent had stated in his submissions that the suit land was valued at roughly Kshs 8,000,000. The 1st Respondent argued that the instant Application is not merited since the award of instructions fees was proper. The Applicant argues that the Taxing Officer failed to rely on the ratio decidendi which was in place.

10. In the case of *Joreth Limited v Kigano & Associates* [2002] eKLR the court held inter alia:

"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."

While in the case of *Republic v Ministry of Agriculture and 2 others: Ex parte Muchiri W'Njuguna & others* [2006] eKLR it was held as follows:

"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. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts."

See also the case of *Peter Mutboka & Another v Ochieng & 3 Others* [2019] eKLR.

11. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the Applicant has failed to demonstrate that the calculation of instruction fees was erroneous since the value of the suit land was not indicated in



the pleadings. It seems the Applicant sought to rely on averments in the 1st Respondent's written submissions which were filed on February 29, 2016 but it is trite that submissions are not pleadings. I hold that the Taxing Officer did not err in principle by determining the instructions fees based on her discretion as she had powers to do so. In the circumstances, I will proceed to uphold the determination of the Taxing Officer as regards the Item (1) of the Party and Party Bill of Costs dated August 15, 2018 in respect to instructions fees.

12. It is against the foregoing that I find this reference unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

