REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE NO. 48 OF 2019

NURU CHEPLETING CHOGE.....PLAINTIFF/ APPLICANT

VERSUS

RAJAB KIPKOSGEI MAGUT.....1ST DEFENDANT / RESPONDENT

UASIN GISHU LAND REGISTRAR.....2ND DEFENDANT / RESPONDENT

HONOURABLE ATTORNEY GENERAL...3RD DEFENDANT / RESPONDENT

RULING

This ruling is in respect of an application by the Plaintiff/ Applicant dated 23rd December, 2020 seeking for the following orders:

a) There be reference to this Court from taxation by the Deputy Registrar as taxing master of this court and the court be pleased to hear objections by the Appellant on the taxation of the entire bill of costs and make an order that the bill of costs as filed in **ELDORET E&L CASE NO. 48 OF 2019** be taxed ***de novo;***

b) Costs of the reference be provided for.

The brief facts of this reference as stated in the application and submissions are that the plaintiff filed a plaint dated 2nd April, 2019. Subsequently the 1st Defendant filed a Memorandum of Appearance and defence both dated 18th April, 2019 with the 2nd and 3rd Defendants filing a Memorandum of Appearance dated 14th May, 2019.

Before the matter was set down for hearing, counsel for the Plaintiff filed a Notice of withdrawal of the entire suit on 12th November, 2019 while counsel for the 1st Defendant filed a Notice of Motion seeking for orders to strike out the Plaintiff's suit on grounds that the Plaintiff lacks *locus standi* to file the claim noting that the she did not have Letters of Administration *ad litem* together with a List of Documents containing a Valuation Report both dated 11th November, 2019 and filed on 12th November, 2019.

On 12th November, 2019 the Deputy Registrar endorsed the Notice of withdrawal and marked the entire case as withdrawn. The 1st Defendant filed a request for costs under Order 25 Rule 4 of the Civil Procedure Rules dated 26th November, 2019 and on the same day the Deputy Registrar entered judgment for costs in favour of the 1st Defendant on the basis of the provisions of Order 25 rule 3.

The 1st Defendant filed a Bill of Costs dated 26th November, 2019 for a sum of Kshs. 5,121,393/ which was slated for taxation on 24th February, 2020 and 4th March, 2020 before the Deputy Registrar when counsel for the Plaintiff opposed the filing of the Bill of Costs on the ground that the Judge did not award costs to the 1st Defendant.

The matter was referred back to the Judge who delivered a ruling on 28th October, 2020 directing the parties to have the Bill of Costs dated 26th November, 2019 taxed before the Deputy Registrar.

On 2nd December, 2020 the Deputy Registrar delivered her ruling on the Bill of Costs awarding Kshs. 2,709,883.00 to the 1st Defendant and the plaintiff being aggrieved wrote a letter dated 9th December, 2020 requesting to be informed of the reasons why the Deputy Registrar awarded the costs. The Deputy Registrar vide a letter dated 14th December, 2020 stated that her reasons for the award were contained in her Ruling.

Counsel agreed to canvass the application by way of written submissions

PLAINTIFF'S SUBMISSIONS

Counsel submitted that the taxing Master taxed costs of Kenya Shillings Two Million Four Hundred and Eleven Thousand and Ten Only (KShs. 2,411,510/=) was manifestly excessive and that the taxing Master followed a wrong principle in reaching her decision as she improperly exercised her discretion judicially.

Counsel further stated that the Deputy Registrar proceeded to rely on a valuation report filed by the 1st Defendant/ Respondent when the suit had already been withdrawn as the 1st Defendant/ Respondent was served with the notice of withdrawal the same day it was filed on the 12th day of November, 2019.

Mr Isiji relied on the case of **BAHATI SHEE MWAFUNDI VS. ELIJAH WAMBUA [2015] eKLR**, where the Court held that a notice of withdrawal takes effect and brings the proceedings to an end on the date it is served upon the parties and that the withdrawal has the effect of terminating the appeal.

The Plaintiff/ Applicant's counsel further argued that the work done by counsel for the 1st Defendant/ Respondent was not commensurate with the instruction fees awarded and further that the Taxing Master failed to note that the Plaintiff/ Applicant and the 1st Defendant/ Respondent are siblings and that the property in issue belongs to their late father. That the suit herein was not complex to warrant the excessively high award of costs.

Counsel relied on the South African case of **VISSER VS GUBB 1981 (3) SA 753 (C) 7541-1 - 755C** where the court held that:

> *"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue..... The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than Would have sufficed had there been an ordinary right of appeal. "*

Mr Isiji urged the court to be guided by the general principles governing interference with the exercise of the Taxing Master's discretion. Further that the quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order hence there was no justification for the amount awarded.

Counsel also cited the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others {2006} eKLR**) where Ojwang, J (as he then was) expressed himself inter alia as follows:-

> *The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…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 factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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…A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved…Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for…The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs…"*

Counsel submitted that costs are awarded to a successful party in order to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled either to initiate or to defend a suit. That the current case was withdrawn after the new counsel on record realized the professional mistake committed by the previous counsel on record and as such the 1st Defendant/ Respondent was not a successful party in essence.

Counsel also stated that the Deputy Registrar did not appreciate the principles of award of costs as was enumerated in the case of **Premchand Raichand Limited and Another vs. Quarry Services of East Africa Limited & Another [1972] EA 162** whereby the court held:

a). Costs should not be allowed to rise to such level as to limit access of the courts to the wealthy only;

b). A successful litigant ought to be fairly reimbursed for the costs he has had to incur;

c). The general level of remuneration of advocates must be such as to attract recruits to the profession;

d). So far as practicable there should be consistency made in the award made.

Mr Isiji therefore urged the court to allow the application as prayed and reduced the taxed costs to Kshs. 100,000/

1ST DEFENDANT'S SUBMISSIONS

It was the 1st Defendant/ Respondent's counsel's submission that the Plaintiff had no *locus standi* to institute a suit on behalf of the estate of the late Bakhit Arap Magut. Further that the 1st Defendant/ Respondent filed an application seeking to strike out the plaintiff's suit on 12th November, 2020 seeking to strike out the suit since the Plaintiff had not obtained Letters of Administration to administer the estate of her late father.

Counsel submitted that where the value of the subject matter cannot be determined in the pleadings, judgment or the settlement, the Taxing Master should exercise her discretion based on the importance of the matter to the parties, complexity and the responsibility placed on the counsel for the parties as was held in **JORETH LIMITED V. KIGANO & ASSOCIATES [2002] eKLR.**

Mr Mathai argued that the Taxing Master exercised her discretion taking note of the fact that the suit land measures approximately 121.51Ha (300.25 Acres) and the work undertaken by counsel in preparation of the brief and filing the relevant compliance documents. That on the basis of the aforementioned facts, the Taxing Master applied her discretion to determine that the instruction fees ought to be Kshs. 3,200,000.00. and also considered the fact that this suit was withdrawn before full trial whereby she applied the provisions of schedule 6(A) (1) (b) of the Advocates Remuneration Order, 2014 which requires that such fees should be 75% of the full fees thus arriving at a sum of Kshs. 2,400,000.00.

Counsel cited the case of **VISSER CASE *(SUPRA)*** and submitted that the facts of the instant case do not meet the threshold to warrant interference with the Taxing Master's discretion.Further that in the case of **JOHANNESBURG CONSOLIDATED INVESTMENT CO. V. JOHANNESBURG TOWN COUNCIL 1903 TS 111** where the court held as follows:

That the Court must be satisfied that the taxing master was clearly wrong before it will interfere with a ruling made by him

Mr. Mathai therefore urged the court to dismiss the application with costs to the respondent

ANALYSIS AND DETERMINATION

The issue for determination is whether this case meets the threshold to warrant the interference with the Taxing Master's discretion. In the case of **NATIONAL OIL CORPORATION LIMITED VS. REAL ENERGY LIMITED & ANOTHER [2016] eKLR** outlined the circumstances under which a Judge of the High Court can interfere with the Taxing Master's exercise of discretion by outlining the following principles to be considered:

(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; 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;

(2) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice 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;…

The plaintiff and the 1st defendant are siblings and that the suit property forms part of the estate of their deceased father which has not been administered. The Plaintiff claims that the Defendant fraudulently transferred the suit property to himself and this issue is yet to be resolved. The Taxing Master awarded instruction fees of Kshs. 2,400,000.00 which according to the circumstances is manifestly high noting that the suit was withdrawn before any further steps were taken that would have involved disbursements and additional costs in terms of attendance and preparation of the case. The plaintiff saved the court's and the 1st defendant's time when she realized that she had not obtained letters of administration *ad litem* before filing the instant claim, an error that goes to the root of the case as was held in the case of **ISAYA MASIRA MOMANYI V DANIEL OMWOYO & ANOTHER [2017] eKLR** held as follows:

"A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void ab initio and cannot be cured by a party subsequently obtaining the letters of administration."

The Taxing Master should also have considered the work that was put in by counsel for the 1st Defendant in the instant claim. It is on record that Counsel for the 1st Defendant had filed a Memorandum of Appearance, a Statement of Defence, a Witness Statement, a List and Bundle

of Documents and a Notice of Motion Application.

This matter had not been fixed for hearing at the point when it was withdrawn and the fact that very limited progress had been made in the suit ought to have been factored in the taxation and award of costs. The valuation report upon which the Taxing Officer based the instruction fees was also disputed as to when it was filed in the suit. The court stamp indicates 12th November 2019 and the Notice of withdrawal also indicates the same date. Unfortunately, it does not indicate the time when it was filed.

On 12th November 2019 the Deputy Registrar endorsed the withdrawal of the suit and the same was marked as withdrawn. The issue of taxation was raised and the Judge ruled that the matter be referred back to the Deputy Registrar who has the mandate to handle taxation matters and not the Judge.

In the Court of Appeal case of in **KIPKORIR, TITOO & KIARA ADVOCATES V DEPOSIT PROTECTION FUND BOARD [2005] eKLR** where the following was observed:

> *It is apparent from the grounds on which the learned judge allowed the reference that the learned judge was satisfied that the taxing officer had committed grave errors of principle in assessing the costs. The appellant had pegged the instruction fees on the sum of Shs.116,344,781.30 which as the ruling dated 23rd February, 2004 correctly stated, was not the value of the subject matter of the suit. If anything the value of the subject matter of the suit would only have been the value of the two properties that the three plaintiffs wanted to save. However, the value of the two properties was not stated. The learned judge found that the taxing officer erroneously still used the value of the subject matter of the suit supplied by the appellant's counsel in assessing the instruction fee. Further, it does not appear that the taxing officer gave due consideration to all relevant circumstances preceding the filing of the bill of costs. For instance, the taxing officer does not seem to have considered, the instructions fees previously claimed by the appellant; the fact that no reasonable progress had been made in the suit; the fact that DPFB was merely sued as a liquidator and was a party in the loan transaction; the amount of work done by the appellant in the suit and the conduct of the appellant.*

It should be noted that instruction fees and costs awarded should be reasonable and not to drive litigants into suicide after losing a case and forced to pay unreasonable punitive costs. This is a case involving siblings and courts should encourage amicable settlements in such cases where possible so as not to break the institution of the family which is crumbling in the 21st century due to too many squabbles. Advocates should also try not to reap too much from the misfortune of the litigants.

In the case of **KEZIAH GATHONI SUPEYO V YANO T/A YANO & CO. ADVOCATES [2019] eKLR** outlined the principles on taxation of the Advocates Client costs as follows:

> *In the case of **Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162)** the court stated as follows on the principles on taxation:*
>
> *(a) successful litigant ought to be fairly reimbursed for costs he has had to incur*
>
> ***(b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy.***
>
> *(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and*
>
> *(d) that as far as practicable there should be consistency in the awards made.*
>
> *(e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances*
>
> *(f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically*
>
> *(g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party*.

In **R. Kuloba in Judicial Hints on Civil Procedure 2nd Edition Law Africa, Nairobi 2011 at page 94** it states that:

> ***…** the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.*

The court is alive to the fact that it will only interfere where there has been an error in principles applied since questions solely on quantum are regarded as matters in the Taxing Master's discretion as was held in the case of **James Arthur vs. Nyeri Electricity Undertaking [1961] EA 492**, The court will only intervene in such circumstances where the principles used to arrive at the quantum are flawed and the award is excessively high.

In the case of **EVANS M. GAKUU & 66 OTHERS V NATIONAL BANK OF KENYA LTD & 8 OTHERS[2013]eKLR** Odunga J held that:

> "*Whereas the discretion to increase the instruction fees by the Taxing Officer ought not to be lightly interfered with, in my view an*

increase of instructions fees by over 100% would require very cogent grounds to justify especially where it is appreciated that the suit was determined in a summary manner. In fact from the proceedings the suit was terminated almost immediately after the defence was filed before any other step was taken in the matter. In my view the increase of 100% by the Taxing Officer had the effect of increasing the instructions fees to a sum which was manifestly excessive in the circumstances and amounted to an error in principle. Accordingly I would reduce the figure of Kshs 10,000,000.00 awarded to Kshs 6,500,000.00 which is approximate increase of the basic fee by one half."

In this case the suit was terminated immediately and not much was done in pursuing the claim. In the case of **Ngome vs Plantex Company Limited (1984) KLR 792**, the Court of Appeal held that a judgment is a judicial determination or decision of a court on the main question or questions in a proceeding. There must be a consideration of, and determination on the issues before the court, before judgment is entered with regard to the said issues or questions. The case was not heard on merit to determine the issues

Order 25 Rules 1 and 2 of the Civil Procedure Rules states that:

"1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just."

I have considered the submissions by counsel and find that this is a matter that the court intervenes in the interest of justice and order that this matter be remitted to another Taxing Master other than the one who dealt with the taxation for fresh taxation taking into consideration the issues raised above. The taxation and all consequential orders are hereby set aside. It is also advisable that the parties try mediation to come up with an amicable settlement. Each party to bear their own costs.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE