



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC No. 253 OF 2014**

**SHITOLE MALESI.....PLAINTIFF**

**VERSUS**

**EDGAR KADENYI.....1<sup>ST</sup> DEFENDANT**

**MOSES M. LIHEMO.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KAKAMEGA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Judgment delivered in this matter on 18<sup>th</sup> February 2020 by sister N.A. Matheka J. The plaintiff's suit was dismissed with costs. Subsequently, the 1<sup>st</sup> defendant filed its party and party bill of costs on 9<sup>th</sup> November 2020. Through ruling delivered on 28<sup>th</sup> January 2021 by Hon. W. Lopokoiyit, Deputy Registrar, the bill was taxed at KShs 51,225. Aggrieved by the said decision, counsel for the 1<sup>st</sup> defendant wrote to the Deputy Registrar on 10<sup>th</sup> February 2021, seeking reasons for the decision. The Deputy Registrar provided the reasons through letter dated 22<sup>nd</sup> February 2021.

2. Still aggrieved, the 1<sup>st</sup> defendant filed Chamber Summons dated 9<sup>th</sup> March 2021. The application, which is the subject of this ruling, seeks the following orders:

*1. THAT this Honourable Court be pleased to set aside the ruling delivered by the Honourable taxing officer on 28<sup>th</sup> January 2021 in relation to the applicant's bill of costs dated 26/10/2020.*

*2. THAT this Honourable Court to be pleased to re-assess the fees due to item 1 and 2 in the Applicant's Bill of Costs dated 26<sup>th</sup> October 2020 and make a finding on the same.*

*3. THAT in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit items No.1 and 2 in respect of the bill of costs dated 26<sup>th</sup> October 2020 for review and reconsideration with directions on taxation.*

*4. THAT costs of this reference be provided for.*

3. The application is supported by an affidavit sworn by Allan K Otsyeno, counsel having conduct of the case on behalf of the 1<sup>st</sup> defendant. He restated the 1<sup>st</sup> defendant's dissatisfaction with the decision of the taxing master. In response, a replying affidavit sworn by Kundu Nigel Wesutsa, counsel having conduct of the case on behalf of the plaintiff, was filed. He supported the decision of the taxing master.

4. The application was canvassed through written submissions. Counsel for the applicant filed submissions while the counsel for the plaintiff relied entirely on the replying affidavit.

5. The applicant argued that the taxing master misdirected himself by pegging instruction fees on schedule 6 (1) (L) of the Advocates Remuneration Order. Further, it was argued that the suit having been filed in the year 2012, the taxing master should have used the Advocates Remuneration Order 2009 as opposed to the Advocates Remuneration Order 2006 in taxing items 1 and 2 of the bill. Further, that the value of the suit property was KShs 3,000,000 and that the taxing master should have based instruction fees on that. That taxing instruction fees at KShs 8,400 for a defended matter in this court was unreasonable and that the taxing master could have called for evidence to determine the value of the suit property. Reliance was placed on the case of **Masore Nyang'au & Co. Advocates v Kensalt Limited [2019] eKLR**.

6. The plaintiff's position as can be gleaned from the replying affidavit is that since the taxing master could not ascertain the value of the suit property from the pleadings, it was proper to resort to discretion and that the amount arrived at as instruction fees was the correct one. Further, that the suggestion that the taxing master ought to have called for a valuation report to ascertain the value of the suit property has no place in law. The cases of **Eglyn Chepchirchir & 3 others v Mohamed Khalid & 2 others [2017] eKLR** and **S.G. Mbaabu & Co. Advocates v Joseph Muoki Kakenyi & 2 others [2018] eKLR** were relied on.

7. I have considered the application, the affidavits and the submissions. In taxing the bill, the taxing officer's decision was made in exercise of discretion. The law relating to appeals from orders made in exercise of discretion was restated in **Mbogo & Another vs Shah [1968] EA 93** as follows:

***An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.***

8. As regards an appeal from a taxation, the Court of Appeal stated in **Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR** thus:

***On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.***

9. In the ruling that provoked this reference the taxing officer rendered himself as follows:

*This ruling relates to the bill of costs dated 26/10/2020.*

*I have gone through the bill together with the submissions by both parties. This suit was filed on 12/11/2012, the defence filed (by 1<sup>st</sup> defendant) 11/1/2013.*

*These items 1, 2, 3, and 4 are taxed according to the remuneration order 2006.*

*Therefore item 1 taxed at Kshs. 160,000/= Kshs. 151,600/= as this matter falls under schedule 6 (1) (I) to sue or defend in any case not provided above.*

*Item 2 taxed at Kshs. 55,000/=. Kshs. 52,200/= is taxed off. Item 3 and 4 taxed at Kshs. 500. Kshs. 185/= is taxed off. The other items on the bill are taxed according to the ARO 2014.*

*Future items are disallowed as submitted by counsel in opposition to the bill. See bill of costs on other items.*

*In conclusion, the bill is taxed at Kshs. 51,225/= only.*

10. Pursuant to his letter dated 10<sup>th</sup> February 2021, counsel for the 1<sup>st</sup> defendant took the position that since the matter was filed on 12<sup>th</sup> November 2012 the Advocates Remuneration Order 2009 ought to have been used in taxing items 1 and 2 of the bill instead of the Advocates Remuneration Order 2006. Going by the said letter and indeed prayers 2 and 3 of the present application, this reference only challenges the taxation as regards items 1 and 2 of the bill.

11. With the above background and general guidelines in mind, the issues that arise for determination are whether the taxing officer properly applied the Advocates Remuneration Order 2006 in taxing items 1 and 2 of the bill and whether the taxing officer rightly exercised his discretion to determine the instruction fees and getting up fees due.

12. The record indeed confirms that this suit was filed on 12<sup>th</sup> November 2012. The 1<sup>st</sup> defendant entered appearance on 20<sup>th</sup> December 2012 followed by statement of defence on 11<sup>th</sup> January 2013. It follows therefore that Schedule VI Part A of the Advocates Remuneration Order 2006 was applicable in taxing items 1 and 2 of the bill. As correctly pointed out by the taxing officer in his letter dated 22<sup>nd</sup> February 2021, Advocates Remuneration Order 2009 did not effect any changes to Schedule VI which remained as it was in 2006. I also note that although the 1<sup>st</sup> defendant has faulted the taxing officer for using the 2006 scale instead of the 2009 one, he has not offered any explanation in his submissions as to the margin by which using the 2009 scale would have affected the outcome. Thus, the taxing officer properly applied the Advocates Remuneration Order 2006 in taxing items 1 and 2 of the bill.

13. Did the taxing officer rightly exercise his discretion to determine the instruction fees and getting up fees due? To begin with, the proceedings were commenced through a plaint and the matter was defended. Consequently, Paragraph 1 (b) of Part A of Schedule VI of the Advocates Remuneration Order 2006 was applicable.

14. So as to ascertain the value of the value of the subject matter of a suit, the taxing officer is required to look at the pleadings, judgment or settlement if any. In **Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92**, the Court of Appeal addressed the matter thus:

***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 the importance of the cause or the matter, the interest of the parties, general conduct of the***

*proceedings, any direction by the trial judge and all other relevant circumstances.*

15. Was it possible to ascertain the value of the subject matter of the suit from the pleadings or judgment? The subject matter of the suit was the parcel of land known as Isukha/Lubao/887. The plaintiff had sought restoration of his name in the register of the said parcel. In other words, he claimed ownership of the property. A perusal of the judgment and the pleadings does not reveal the value of the land. In those circumstances the taxing officer was entitled to use his discretion to assess a just instruction fee while bearing in mind Paragraph 1 (b) of Part A of Schedule VI of the Advocates Remuneration Order 2006.

16. The taxing officer assessed instruction fees under Paragraph 1 (l) of Part A of Schedule VI of the Advocates Remuneration Order 2006. The said provision deals with "... *any case not provided for above* ...". As we have already noted, the proceedings were commenced through plaint and a defence was filed. Clearly, it cannot be categorised under "... *any case not provided for above* ...". To that extent, the taxing officer erred.

17. Among the documents included in the plaintiff's bundle at the filing of the case was a copy of the register in respect of the suit property. The size of the property was captured therein as 1.2 hectares, which translates to about 3 acres. The sum of KShs 8,400 which the taxing officer awarded as instruction fees cannot in the circumstances be a just or reasonable sum. It will be noted that while opposing the bill, the plaintiff in his submissions before the taxing officer suggested KShs 45,000 as instruction fees and KShs 15,000 for getting up and preparing for trial. The taxing officer did not provide any justification for awarding a sum lower than the plaintiff's suggestion. Once again, the taxing officer misdirected himself and as a result arrived at a decision that was both erroneous and unjust. I however do not agree with 1<sup>st</sup> defendant that the taxing officer should have based instruction fees on KShs 3,000,000 as the value of the suit property since that figure is not supported by the pleadings or the judgment. Equally, the taxing officer was not required to call for a valuation report.

18. Taking into account the size of the property in dispute, I would give it a value of KShs 1,000,000 for purposes of taxation. The proceedings were routine with nothing peculiar over and above what is usually expected in a defended case. Thus, in terms of Paragraph 1 (b) of Part A of Schedule VI of the Advocates Remuneration Order 2006, I assess instruction fees at KShs 77,000. Pursuant to Paragraph 2 of Part A of Schedule VI of the Advocates Remuneration Order 2006, I assess KShs 25,700 as the amount due for getting up and preparing for trial.

19. This reference therefore succeeds to the extent that I hereby set aside the orders of the taxing officer in so far as items 1 and 2 of the bill are concerned and replace it with an order taxing the two items at KShs 77,000 and KShs 25,700 respectively. The 1<sup>st</sup> defendant's bill of costs dated 26<sup>th</sup> October 2020 is therefore taxed at KShs 142,725. I also award the 1<sup>st</sup> defendant costs of Chamber Summons dated 9<sup>th</sup> March 2021, which I hereby assess at KShs 4,000.

**Dated, signed and delivered at Kakamega this 2<sup>nd</sup> day of November 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Court Assistant: E. Juma