**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 193 OF 2017**

**(FORMERLY HCCC No. 286 OF 2005)**

**JOAN NYOKABI NDUNGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**STANLEY MUTIMI NJOGU.....1ST DEFENDANT/RESPONDENT**

**GEORGE NGANGA WANYOIKE.....2ND DEFENDANT/RESPONDENT**

**DISTRICT LAND REGISTRAR, THIKA.....3RD DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **24th August 2020,** by the Plaintiff/ Applicant seeking for orders that;

> ***1. That the Taxing Masters Decision of allowing Kshs. 122,400/= as basic instructions fees in respect of item (i) of the Party and Party bill of costs dated 15th July 2019 in the Ruling delivered on 13th August 2020 be varied and /or set aside.***
>
> ***2. That the Honourable Court in the spirit of expeditious disposal of the subject matter be at liberty to re tax the said item (i) with a view of enhancing the fees payable under the said item and /or in the alternative, the matter be referred back for re taxation before another taxing master on such guidelines that the Honourable Court may deem just and appropriate to issue.***
>
> ***3. That the Costs of this Application be provided for.***

The Application is premised on the grounds that the taxing master in her Ruling delivered on **13th August 2020,** misdirected herself both in law and in fact in arriving at a basic instructions fees of **Kshs.122,400/=** in respect of item (i) of the bill of costs. That despite estimating the value of the subject matter at **Kshs. 20,000,000/=** the taxing master misdirected herself on wrong principles of law and arrived at a figure on the basic instructions fees that was manifestly too low. Further, that the taxing master failed to exercise her discretion judiciously, by allowing a figure in respect of the instructions fees that was manifestly too low. That the decision is based on an error of principle.

In her Supporting Affidavit, **Victoria Wambua** Counsel on record for the Plaintiff/ Applicant averred that the bill of Cost dated **15th July 2019,** was allowed in the sum of **Kshs. 259,722.40/=** in favour of the Plaintiff/ Applicant. That based on the value of the property of Kshs. **20,000,000/=** the calculations of the instructions fees should translate to **Kshs.620,000/=.** Further that the instructions fees having been arrived at based on the wrong principle of law, ultimately affects **item 39** of the bill of costs, which is the getting up fees which is calculated as **1/3** of the sum allowed as instructions fees. The Court was therefore urged to allow the Application.

The Application is opposed and the 2nd Defendant/Respondent swore a Replying Affidavit on **16th October 2020** through **Charles Mbugua Njuguna,** his Advocate and averred that the Applicable **Advocates Remuneration Order,** for the purpose of ascertaining instructions fees is that which was operational at the time of filing the suit and as the suit was filed in **2005**, the applicable Remuneration Order is **Schedule VI** of the Advocates Remuneration (Amendment) **Order 1997.** That it is a trite principle of taxation that assessment of costs is based on the value of the subject matter, as disclosed from the pleadings. Further that from the pleadings, the 2nd Defendant's /Respondent's documents indicate that the value of the subject matter is **Kshs. 900,000/=** a fact noted by the taxing master and that as per **Schedule VI (1) (b)** of the Advocates **Remuneration Order 1997**, the scale fees is **Kshs.55,000/=**. That the amount taxed was already enhanced by two times the scale fees and the same is more than fair

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court finds that the issue for determination is ***whether the Application is merited*** .

It is the Applicant's contention that the Court did not arrive at the correct figure while taxing the instructions fees, as the taxing master used the wrong principle. This Court will only interfere with the discretion of the taxing master if it was to finds that the Deputy Registrar applied the wrong principles in arriving at her decision. See the case of ***Eddy Nicholas O Orinda p/a One and Associates Advocates…Vs…Victoria Commercial Bank Limited [2020] eKLR*** where the Court stated;-

> ***"Similarly, in Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others 1984 (3) SA 15 (A) at 18F C G the court held that:***
>
> ***" . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling."***

Further in the case of *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.***

It is not in doubt that the taxing master in arriving at the instructions fees based the value of the suit property at **kshs.1 million to 20 million**. That the Deputy Registrar relied on the Sale Agreement filed in Court, entered between the Defendants/ Respondents in the **year 2004** and the purchase price was **kshs. 900,000/=.** That the suit was filed in the **year 2017,** the value of the suit property must have risen and hence the value used. Further that since the suit was filed in **2017**, then the applicable Remuneration Order is the **Advocates Remuneration Order 2014**. From the onset, it is clear that the Deputy Registrar took into account a wrong fact and thereby necessitating error on principle.

Though this suit was transferred to the **Thika Environment & Land Court** in **2017,** the instant suit was initially filed in 2005, and therefore the Applicable Remuneration Order ought to be that which was applicable at that time. See the case of ***N. O. Sumba & Co Advocates …Vs.. Piero Cannobio [2017] eKLR*** where the Court held that

> ***"The applicable Advocates (Remuneration) Order for the purpose of ascertaining instruction fees would be that which was operational at the time of filing suit. In the bundle of documents annexed to the supporting affidavit there is the amended plaint dated 9th April, 2014 indicating the date of the original plaint as 3rd December, 2009 clearing the air on the particular year of filing of the initial suit. The taxation officer indicated that, "The remuneration order l will tax with is the Advocates (Remuneration) Order 2009 as at when the suit was first filed in the lower Court"***

Further the Court notes that the Taxing Master further took Kshs. 900,000/= to be the value of the suit property as it was the purchase price that was provided in the Defendants sale Agreement The Plaintiff/ Applicant contested the use of the said value and noted that the same was not the actual value of the land as the sale was fraudulent. The Court concurs with the Applicant , having found that the sale was fraudulent to base the value of the suit property on a sale agreement that has been impugned, in the Court's considered view would not be the right thing to do as the Defendants/ Respondents did not provide proof of what the value of the suit property would be and therefore the same cannot be the only basis of consideration in getting the value of the suit property. See the case of *Sammy Some Kosgei ….Vs… Grace Jelel Boit [2014] eKLR* where the Court held that;-

> "***As noted in proviso (i) to Schedule VI, the taxing officer is not strictly obliged to tax a bill only on the basis of the value of the subject matter, assuming that the value is in the pleading, proceeding or judgment. In the case of Sarah Chepkosgei v Tito Tarus, Eldoret E&L No. 916 A of 2012 I held that the taxing master ought to take into account all relevant circumstances when taxing the bill. At the end of the day, it is upon the taxing master to decide what he/she thinks is a relevant circumstance and the discretion on this point is very wide. At times, the value of the subject matter as stated in the pleadings, proceedings or judgment may not be much, yet the suit itself may involve fairly complex questions of law. The suit may have numerous witnesses, may cover a considerable length of time, or may be absolutely involving and absorbing. Thus solely taking into account the value of the subject matter in the pleadings, judgment or settlement, may at times not do justice to the parties when it comes to the taxation of the bill of costs. All relevant matters need to be taken into account so as to arrive at a figure that is fair in the peculiar circumstances of each case. It could also be that an external valuation is considered as a relevant matter in the instance of the case."***

This suit having been filed in 2005, and the fact that the Court held that the 1st Defendant obtained his registration through fraud, the Court finds that it is imperative then that the taxing master in arriving at the value of the suit property should consider all relevant circumstance to arrive at the value of the suit property.

Further the Plaintiff/ Applicant has contended that in calculating the instructions fees, the taxing master erred in principle. That while the taxing master calculated the instructions fees, she failed to add the fees for the next 19,000,000/= and arrived at the incorrect figure. The Court notes the calculation by the taxing master of the instructions fees. The Court concurs that instead of adding the 2% to the value of the land, the taxing master added the 2% to the amount for the first Kshs.1 million being Kshs. 120,000/= and therefore failed to calculate the amount for the rest of the value. The Court finds and holds that indeed the taxing master erred in principle and therefore arrived at the wrong figure.

Having founds that the taxing master erred in principle in taxing the bill, it therefore follows that the Court must then remit the bill back to the Taxing master for the decision on quantum . See the case of ***Kipkorir Titoo & Kiara Advocates -Vs- Deposit Protection Fund Board [2005]*** **eKLR;**

> ***"We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer. (See - D'Sonza Vs Ferrao (1960) EA 602. (See Devshi Dhanji Naran Patel (No.2) [1978] KLR 243."*** (Our emphasis)

Therefore, this Court remits the bill back to the **taxing master** and finds that the said **taxing master** should consider the right year of **filing** of the suit and thus the Applicable Remuneration Order, further in arriving at the value of the land, in setting the instructions fees, she ought to consider all the relevant factors and not only the value in the Sale Agreement.

Consequently, the Court finds the Application dated **24th August 2020,** is merited and the same is allowed entirely.

The matter is referred back to the taxing master and she should consider the right year of filing the suit and thus use the correct Remuneration Order.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 10TH DAY OF JUNE 2021.**

**L. GACHERU**

**JUDGE**

**10/6/2021**

**Court Assistant - Dominic**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Cheruto holding brief for M/s Wambua for the Plaintiff/Applicant**

**No appearance for the 1st Defendant/Respondent**

**Mr. Githire holding brief for Mr. Njuguna for the 2nd Defendant/ Respondent**

**No appearance for the 3rd Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**10/6/2021**