



**REPUBLIC OF KENYA**

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

**ELC. MISCELLANEOUS APPLICATION NO. 43 OF 2019**

**PHILIP SAOINA**

**ESTHER SAENIK**

**JONATAN SHANKA MASHULU**

**RUTH TUPEITA**

**CECILIA SISIAN**

**TOMAS RUNKE**

***SP (Suing on their own behalf and as***

***next friend of M N and E P - minors).....*APPLICANTS**

**VERSUS**

**NASSER ABDULHAMID AHMED.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, KAJIADO.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Applicants' Chamber Summons application dated the 19<sup>th</sup> December, 2019 brought pursuant to section 11(2) of the Advocates Remuneration Order. The Applicants seek for the following orders:

1. That the Honourable Court's decision of the Taxing Master made on 25<sup>th</sup> November, 2019 taxing the Bill of Costs dated 9<sup>th</sup> April, 2019 in the sum of Kshs. 2, 114, 184.72 be set aside.
2. That costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of KELVIN MOGENI the Advocate having the conduct of this matter on behalf of the Applicants' where he deposes that the Taxing Master made a ruling dated the 25<sup>th</sup> November, 2019 taxing the 1<sup>st</sup> Respondent's Party and Party Bill of Cost dated 9<sup>th</sup> April, 2019 at Kshs. 2, 114, 184.72/=. He explains that the Applicants wrote a letter to the Taxing Master on 25<sup>th</sup> November, 2019 seeking reasons for the taxation. He contends that the Applicants are objecting to the entire decision of the amount as taxed by the Taxing Master.

The 1<sup>st</sup> Respondent opposed the application and filed a replying affidavit sworn by JACINTA WANGECI WANG'OMBE who is the advocate on record for him where she deposes that the allegation that the instruction fee as assessed by the Taxing Master was over and above what was reasonable is false and misleading. She contends that in his Ruling dated the 25<sup>th</sup> November, 2019, on the 1<sup>st</sup> Respondent's Bill of Costs dated 9<sup>th</sup> April, 2019, the Taxing Master taxed off the sum of Kshs. 3, 860,000 from item one on instruction fee and awarded him Kshs. 1,000,000. She explains that on item one of the Bill of Costs, the 1<sup>st</sup> Respondent billed the sum of Kshs. 4, 860,000 as instruction fees based on the value of the suit property being Kshs. 250, 000,000 as testified by the 1<sup>st</sup> Respondent. Further, the Taxing Master considered the value of the subject matter based on the valuation report dated the 27<sup>th</sup> May, 2014 done by messrs Landmark Realtors where

the property was valued at Kshs. 110,000,000. She insists the Taxing Master observed that the Valuation was prepared at the instance of the 1<sup>st</sup> Respondent without the participation of the Applicants and was therefore reluctant to rely on it, in awarding instruction fees. She avers that the Applicants did not contest any of the items in the Bill of Costs despite having been given an opportunity to file submissions. Further, the Applicants were first given directions for filing of submissions but failed to do so. She states that the Applicants have not identified any error in principle on the part of the Taxing Master to warrant interference of his discretion. Further, that the Taxing Master properly exercised his powers and discretion under the Advocates (Remuneration) Order and made a proper including reasonable determination. She reiterates that the instant application is defective, does not lay any basis for exercise of discretion by this Honourable Court and ought to be dismissed.

The Application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the instant Chamber Summons application including the respective affidavits and submissions, the only issue for determination is whether the Taxing Master's decision made on 25<sup>th</sup> November, 2019 taxing the Bill of Costs dated 9<sup>th</sup> April, 2019 in the sum of Kshs. 2, 114, 184.72 should be set aside.

The Applicants in their submissions contend that the fees of Kshs. 1, 000, 000 was arbitrary. Further, the Taxing Master taxed the instructions fees without ascribing to it any justifiable reason. They insist the Taxing Master misapprehended and grossly misdirected himself hence arriving at an erroneous decision. To buttress their averments, they relied on the following decisions: **Canadian Case of Reese Vs Alberta; Opa Pharmacy Vs House & McGeorge Ltd Kampala HCMA No.13 of 1970 (HCU) (1972) EA 233; Premchand Raichand Ltd & Another Vs Quarry Services of East Africa Ltd & Another (1972) EA 162; and KANU National Elections Board & 2 Others V Salah Yakub Farah (2018) eKLR.**

The 1<sup>st</sup> Respondent in opposition to the application relied on the Advocates Remuneration Order and the following authorities: **Arthur Vs Nyeri Electricity Undertaking (1961) EA 492; Steel Construction & Petroleum Engineering (EA) Ltd Vs Uganda Sugar Factory Limited (1970) EA 141; Premchand Raichand Limited & Another Vs Quarry Services of East Africa Limited & Another (1972) EA 162; and First American Bank of Kenya Vs Shah & Others (2002) 1 EA 64.**

I note the Applicants' main contention is on the amount taxed as instructions fees. I wish to make reference to the Advocates Remuneration Order 2014 at Schedule 6 which 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..'*

In the case of **Joreth Limited V Kigano & Associates [2002] eKLR** the court held that:-

**“ 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.”**

Further in **Republic v Ministry of Agriculture and 2 others: Exparte 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.”**

I note both the Applicants and 1<sup>st</sup> Respondent cited various authorities to support their position in respect to established principles on assessment of costs. Moreso, they all relied on the case of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] EA 162** where the Court in outlining principles in assessment of costs, observed as follows:

**‘That costs must not be allowed to rise to such a level as confine access to the court to the wealthy; That a successful litigant ought to be fairly reimbursed for the costs incurred; That the general level of remuneration of advocates must be such as to attract recruits to the profession, and,; that so far as practicable there should be consistency in the awards made; 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 this instance the Taxing Master in his Ruling stated thus: **' Part of the documents filed by the 1<sup>st</sup> Respondent was a valuation report dated 27<sup>th</sup> May, 2014 and done by Landmark Realtors Limited. In the said report, the subject matter is valued at Kshs. 110,000,000 being the open market value as at the said date. It nonetheless suffices to point out that the said report was prepared at the instance of the 1<sup>st</sup> Respondent and without participation of the Applicants. I am therefore reluctant to rely on the said report in reaching what should be awarded as instructions fees.....Considering the work undertaken by counsel for the 1<sup>st</sup> Respondent and the wisdom of the superior courts as quoted above, I find that instruction fee of Kshs. 1,000,000 is reasonable and sufficient in the circumstances. I therefore tax off Kshs 3, 860,000 from item one and award Kshs. 1,000,000 as instruction fee.'**

I have highlighted this excerpt as this is the fulcrum of the dispute herein. In applying the principles established in the **Premchand Case**

*supra*, I note the Taxing Master proceeded to give reasons and even declined to rely on the Valuation Report, before reducing the instruction fees as presented by the 1<sup>st</sup> Respondent. It is my considered view that the figure of Kshs. 1, 000, 000 is not arbitrary. Further, after perusal of the impugned Ruling of the Taxing Master, I do not find that he misapprehended and grossly misdirected himself hence arriving at an erroneous decision.

Except for the instruction fee, I note the Applicants did not highlighted any other line item where they deemed the Taxing Master to have erred in arriving at his decision and I will hence not interfere with the same.

Based on the facts as presented, while relying on the legal provisions cited above and associating myself with the quoted decisions, I do not see the need of interfering with the Taxing Master's findings and will proceed to uphold it.

It is against the foregoing that I find this reference unmerited and will proceed to dismiss it with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**