



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 10 OF 2014

IN THE MATTER OF: THE ADVOCATES ACT

AND

IN THE MATTER OF: THE ADVOCATES REMUNERATION ORDER, 1962 AS AMENDED IN 2014

AND

IN THE MATTER OF THE PETITIONER'S BILL OF COSTS DATED 14TH OCTOBER 2020 AND THE RULING OF THE DEPUTY REGISTRAR DATED AND DELIVERED ON 17TH AUGUST 2020

BETWEEN

- 1. OMAR ABDALLA JELANI**
- 2. KASSIM SHAHALI ALI**
- 3. SHUMI BAMKUU**
- 4. KHAIRU OMAR**
- 5. SWALEH MOHAMED ATIK**
- 6. MOHAMED RAJAB.....PETITIONERS**

VERSUS

- 1. THE HON. ATTORNEY GENERAL**
- 2. MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT**
- 3. KENYA PORTS AUTHORITY**
- 4. LAPSSET CORRIDOR DEVELOPMENT AUTHORITY**
- 5. NATIONAL LAND COMMISSION.....RESPONDENTS**

RULING

1. By this Chamber Summons application dated 27th October 2020, the Kenya Ports Authority (the 2nd Respondent/Applicant) prays for orders: -

2. (That) the Court be pleased to review and set aside the Ruling of the Deputy Registrar dated 17th August 2020 taxing off and awarding the Petitioners costs at Kshs 50,126,353.00;

3. That this Honourable Court be pleased to tax the Petitioners' Instruction Fee for the Petition at Kshs 2,000,000/- and consequently to tax the entire Party and Party Costs at Kshs 2,126,353/-; and

4. That in the alternative to Prayer No. 3 above, this Honourable Court be pleased to refer the Bill of Costs dated 14th October 2019 back to the Deputy Registrar for a fresh taxation based on the documents filed by the parties, the consent recorded, the circumstances of the Petition, the proceedings of the Court and this Honourable Court's Ruling dated and delivered on 8th October 2019.

2. The application is supported by an Affidavit sworn by Stephen Kyandih, an Advocate employed by the 3rd Respondent and is premised on the grounds, inter alia: -

a. That the Honourable Deputy Registrar delivered her Ruling on 17th August 2020 without any notice to and in the absence of all parties;

b. In her Ruling, the Deputy Registrar awarded the Petitioners Kshs 50,126,353/- out of which Kshs 50,000,000/- is the enhanced Instruction Fees;

c. The 3rd Respondent/Applicant is aggrieved by the decision to enhance the Instruction Fee for a straight forward Petition by 500% from Kshs 100,000/- to Kshs 50,000,000/- without any justification;

d. The taxation, enhancement and award of costs of Kshs 50,126,353/- is exorbitant, unreasonable and unjustified, the same having been made without taking into consideration the nature of the subject matter and the circumstances, the documents (produced by) all parties, the compromise reached by the parties within two weeks of filing of the Petition and the purposes of the taxation as directed by the Court;

e. In making her decision, the Taxing Master did not consider the pleadings, documents and written submissions filed by the 3rd Respondent or any other Respondent; and

f. The Taxing Master erred in both law and fact and eventually made a self-contradicting Ruling where she finds on the one part that the value of the subject matter was yet to crystallise and could not be ascertained there being no Judgment, but finding on the other hand that the value of the subject matter was Kshs 1,319,586,674.55/- which was the amount paid to all beneficiaries. Out of the 165 Project Affected Persons, only six of them filed this Petition.

3. The application is opposed. By their Grounds of Objection dated 13th January 2020, the Petitioners object to the application on the grounds: -

1. That the entire Party and Party costs was based on a ruling by Hon. Justice Olola made on 14/10/2019 which marked the matter as compromised.

2. That the compromise was for the payment of Kshs 1,319,586,674.55/- which is the value upon which basic instruction fee should be pegged on in terms of Schedule 6 of the Advocates Remuneration Order.

3. That the Taxing Master carefully and properly applied the principles of taxation as stipulated in Joveth Limited –vs- Kigano & Associates Civil Appeal No. 66 of 1999 (2002) 1 EA 92.

4. That the Taxing Master properly and judiciously exercised her discretion where she was required to do so.

5. That the Taxing Master carefully and properly considered the nature and importance of the matter, the complexity of the matter, the difficulty and novelty of the question raised, time expedited and value of the subject matter and correctly arrived at the amount taxed.

6. That there was no error in the application of legal principles and in as much as the applicant is merely contesting the quantum, the application has no merit and the same should be dismissed.

7. That this is a lone battle waged by the Applicant Kenya Ports Authority alone against the Petitioners in this 2014 matter with the sole aim of denying the Petitioners the fruits of their Judgment and the application dated 27/10/2020 should therefore be dismissed.

4. I have carefully considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties. While they did not file any response to the application, the Honourable the Attorney General as well as the Ministry of Lands and Urban Development (the 1st and 2nd Respondents respectively) filed submissions herein in support of the application by the 3rd Respondent.

5. The application before the Court is the Reference filed by the 3rd Respondent from the decision of the Deputy Registrar made under Rule 11 (2) of the Advocates Remuneration Order. The same is in respect of the Ruling of the Deputy Registrar dated 17th August 2020 in relation to the Petitioners' Party and Party Bill of Costs dated 14th October 2019. In particular, the Respondents are unhappy with the decisions of the Honourable Deputy Registrar Hon. D. Wasike to enhance the Instruction Fees from the sum of Kshs 100,000/- to Kshs 50,000,000/-.

6. The Applicant asserts that the taxation, enhancement and award of costs at Kshs 50,126,353/- is exorbitant, unreasonable and unjustified and that the same was made without taking into consideration the nature of the subject matter and the circumstances surrounding the settlement of the dispute.

7. I think the approach that this Court should take in dealing with such a matter was settled by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates –vs- The Deposit Protection Fund Board (2005) eKLR* where the Court distilled the principles as follows: -

“On a 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. In Arthur –vs- Nyeri Electricity Undertaking (1961) EA 497, the predecessor of this Court said at page 492 paragraph 1: -

“Where there has been an error in principle the Court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.”

8. The Applicant herein is particularly aggrieved by the Taxing Officer’s assessment of the Instruction Fees. The principle to be applied in assessing such fees was again settled by the Court of Appeal in *Joreth Ltd –vs- Kigano & Associates (2002) eKLR* where the Court outlined the position as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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.”

9. That was indeed the same position taken by the Court of Appeal in *Peter Muthoka & Another –vs- Ochieng & 3 Others (2019) eKLR* where the Court expounded on the principle as follows: -

“It seems to us quite plain that the basis for determining the subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before Judgment, it is the pleadings that form the basis for determining the subject value. Once Judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the Judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded gets its true value as adjudged by the Court.”

10. From a perusal of the record herein, this Petition was lodged on 25th November 2014 by the six (6) Petitioners seeking various declaratory and prohibitory orders against the five Government Agencies named herein as the Respondents. The Petitioners also sought an order directed at the Ministry of Transport and Infrastructure (which was not enjoined specifically as a party herein) as well as the Chairman of the 3rd Respondent/Applicant to honour a list of some 146 beneficiaries, and to compensate them for their land at the rate of Kshs 1,500,000/- per acre.

11. Shortly thereafter, the parties appear to have entered into negotiations. Some two (2) weeks after the institution of the Petition, the parties filed a consent order in Court on 8th December 2014 wherein they basically agreed to expedite the process of verifying those that ought to be compensated for some land that had been acquired by the Government for the Lamu LAPPSSSET Corridor Development Project. Clause 4 of the consent Order provided as follows: -

“4) That the parties herein concur that this is a representative suit and the Advocate of the Petitioners undertakes to enjoin to this suit all Project Affected Persons who occupy/own land at Kililana, Mashudwani and Hindi Magogoni Settlement Scheme within 14 days as from 1st December 2014.”

12. By the same consent, the parties then agreed to mention the matter on 12th January 2015 to confirm compliance therewith. As it turned out the said Project Affected Persons were never enjoined to the suit as envisaged. It would appear that the Project Affected Persons lost interest in being enjoined in the suit after the National Land Commission (the 5th Respondent) compensated them for their respective parcels of land.

13. Some three years later on 4th May 2018, the Petitioners filed an application herein dated 19th December 2017 seeking an order that this suit be marked as compromised and that they be awarded costs in the sum of Kshs 132,511,044/-. That figure was apparently arrived at after the Petitioners and their Advocates realized that the 5th Respondent had released a total of Kshs 1,319,596,674.55 to compensate all those whose parcels of land had been acquired for the Lamu LAPSSET Corridor Project.

14. In her Ruling dated 17th August 2020, the Honourable Taxing Officer properly assessed the situation at the point of institution of the suit and states as follows at page 2 of the Ruling: -

“In this case, this was a Petition that was seeking various declaratory orders including that each beneficiary be paid Kshs 1,500,000/- per acre of the land that was to be acquired.

The value of the subject matter therefore was yet to crystalize as the acres had to be specific in order for the value to crystalize. As it is, the matter did not proceed to full hearing as it was compromised and settled through various negotiations.

The value could therefore not be ascertained from a Judgment as there was no Judgment.”

15. In the subsequent paragraphs of her Ruling however, the Learned Deputy Registrar appears to have assumed that all the beneficiaries of the monies paid out in compensation were parties to the suit. On that account, the Learned Deputy Registrar proceeded in her Ruling to state as follows: -

“Was there settlement?. Yes. There was a settlement and this is as held in the Ruling of Justice Olola of 08/10/2019 that a compromise was reached. A perusal of the Court record, on the Supporting Affidavit sworn by Christine Kituyi on 19/12/2017 annex “CK2” confirms that Kshs 1,319,586,674.55/- was paid out directly to the beneficiaries. This the Honourable Judge noted was as a result of the Petition. This was the value of the settlement that compromised the suit.

The value will therefore be considered when determining the Instruction Fee.”

16. With respect, while the suit had certainly been compromised, its value could only be the totality of the value of the parcels of land for which compensation was given to the six Petitioners in this suit and not, for persons who never joined the suit in the first instance. In that respect I am in agreement with the submissions of the Respondents that there was a misdirection on the Deputy Registrar’s part in assessing the value of the suit property.

17. At any rate, I did not think that it was open for the Learned Taxing Officer having established that the basic fee chargeable for such a defended Petition is Kshs 100,000/- to increase the same to Kshs 50,000,000/- on the purport that the value of the subject matter was colossal. The Taxing Officer had already found there was nothing complex in the matter. As Odunga J stated in **Republic –vs- Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Ltd & 2 Others (2018) eKLR:-**

“.....whereas the figure sought was huge, the issue in dispute was clearly a simple legal issue that did not require exceptionally detailed legal research and this was rightly appreciated by the Taxing Officer. Whereas the figure in issue could rightly be taken into consideration, in public law litigation, the amount involved is not the sole determinant when it comes to costs. Whereas the amounts involved may cause unnecessary anxiety to the parties and Counsel may be called upon to put extra effort in the matter, at the end of the day, the other factors such as the importance of the matter, its complexity, novelty of the question raised and time expended by the Advocate would no doubt carry more weight in such matters.

In this case the effect of the decision of the taxing officer was to increase the basic instruction fee 50 times.

In my view, the fees awarded in respect of the instruction fees in this matter was clearly manifestly excessive as to justify an inference that it was based on an error of principle.”

18. Unlike the matter before Odunga J in the said **Republic –vs- Commissioner of Domestic Taxes Ex-parte Ukwala Supermarket Ltd (supra)**, in the matter herein, the instruction fee was increased some 500 times. That was clearly excessive and a wrongful exercise of the discretion given to the Taxing Officer. This Court has the power to correct the Taxing Officer’s ruling where it is clear that the Taxing Officer has not exercised her discretion judicially and or acted on a wrong principle.

19. In the premises, I hereby find that there is merit in the Chamber Summons application dated 27th October 2020. I allow the said application and make the following orders: -

i. That the taxation of the Petitioners Party and Party Bill of Costs dated 14th October 2019 rendered on 17th August 2020 is hereby set aside.

ii. That the said Bill of Costs be and is hereby remitted back to the Taxing Master to be taxed by a different Taxing Master of this Court.

iii. Each party shall bear their own costs for this application.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021

J.O. OLOLA

JUDGE