



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC NO. 285 OF 2012**

**JULIA WANJIKU GABURIA (Suing as the Legal Administrator of the Estate of the late**

**JOSEPH GABURIA MITARU.....APPLICANT**

**-VERSUS-**

**SAMMY NDUNGU MUNGAI.....1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The applicant moved the court through Chamber Summons dated 17/8/2021 brought under **(Rule 11(2) of the Advocates Remuneration Order, 1962)** seeking the following orders:-

**a. THAT this Honorable Court be pleased to set aside the decision of the taxing officer delivered on the 4<sup>th</sup> day of August, 2021 in its entirety as far as the same relates to taxation of the Party to Party Bill of Costs dated 30<sup>th</sup> November, 2020 as the orders given are inconsistent with the provisions of the Advocates (Remuneration) Order 1962 and the Advocates Act.**

**b. THAT this Honorable Court be pleased to re-tax the said Advocate/Client Bill of Costs.**

**c. THAT in the alternative to prayer 2 above, this Honorable Court be pleased to remit the Party to Party Bill of Costs dated 30<sup>th</sup> November, 2020 for re-taxation before a different taxing officer with appropriate directions thereof.**

**d. THAT the costs of this Application be provided for.**

2. The application is supported by an affidavit sworn by Sammy Ndungu Mungai dated 17/8/2021 where he deposed that the plaintiff filed their Party to Party Bill of Costs dated 30/11/2020 drawn at an amount of **Kshs.2,393,360**; that the learned taxing officer erred in law and principle by failing to take into account the proviso under **Schedule 6** of the **Advocates(Remuneration) Order, 2014** which requires the taxing officer to take into consideration the nature and importance of the matter the amount involved, interests of the parties as well as the general conduct of the proceedings and that being dissatisfied with the decision for the reason that it offends the basic principles of taxation.

3. He further deposed that the taxing officer erred in law and in principle by failing to consider his submissions particularly regarding **items No 1 and 2** (instruction fees and getting up fees) in the Bill of Costs; that she further misdirected herself by failing to take into cognizance the provisions of **Schedule 6(1) (b)** of the **Advocates Remuneration Order 2014** while taxing the Party to Party Bill of Costs; that the taxing officer erred in law and principle by considering the plaintiff's valuation report whilst calculating the instruction fees and which report should have been taken into account before judgment was delivered and not during taxation.

4. He went on to depose that judgement was delivered on 1/10/2020 while valuation report for **Kiambogo/Kiambogo Block 2/498 (Mwariki)** was filed in court on 27/5/2021. He annexed a copy of the valuation report. He stated that the valuation was solely by the plaintiff and therefore it is prejudicial to the defendant's interests as it was not carried out by a neutral valuer elected by both parties; that the taxing master misdirected herself by taxing the instruction fees at an amount that was inordinately high and not commensurate to the work done and as a result relied on the wrong figure to tax the instruction fees and getting up fees.

5. He further deposed that the taxing master erred in law and principle by taxing the instruction fees at an exorbitant amount taking into cognizance that the value of the subject matter could not be discerned from both the pleadings and the judgement; that the plaintiff and 1<sup>st</sup> defendant/applicant had entered into a consent on 20/5/2021 where they agreed that Party to Party Costs be taxed at **Kshs.700,000/=** but the

plaintiff failed to file the same. He finally deposed that the taxing master erred in principle by erroneously awarding **Kshs.1,502,843/=** and urged this court to set aside the decision of the taxing officer delivered on **4/8/2021**.

### **The Response**

6. The plaintiff/respondent filed a replying affidavit dated **22/9/2021** where she deposed that she filed a bill of costs dated **30/11/2020** and the same was taxed on **4/8/2021** at **Kshs.1,502,843**; that the claim was on fraud and the value was not expressly stated hence a valuation for purposes of taxation was important; that on **27/5/2021** the valuation was filed and served upon the 1<sup>st</sup> defendant/applicant who despite having sufficient time to oppose the valuation report failed to do so; that the Deputy Registrar was right in considering the valuation report.

7. He further deposed that it is not enough for the 1<sup>st</sup> defendant/applicant to make a bare statement that the taxed costs were exaggerated and unfair without elaborating the same; that the consent was not filed in court as the 1<sup>st</sup> defendant/applicant's counsel rejected the consent by refusing to sign and file the consent and it was only after taxation when the 1<sup>st</sup> defendant/applicant's counsel decided to sign the same; that the matter had been mentioned about four times for purposes of recording the consent and when the same was not forthcoming, the court directed that submissions be filed. She finally deposed that the 1<sup>st</sup> defendant/applicant has not stated the specific provision of the law on taxation hence the same is made in bad faith only to deny her the cost awarded to her.

### **Submissions**

8. The 1<sup>st</sup> defendant/applicant filed his submission on **14/10/2021** while the plaintiff/respondent filed hers on **18/10/2021**.

### **Determination**

9. The main issue that arises for determination in the application dated **17/8/2021** is whether the taxing master applied the correct principles in taxing the party and party costs.

10. It is a well-established principle of review that the exercise of the taxing master's decision will not be interfered with "*unless it is found that he/she has not exercised his/her discretion properly.*" See the case of **Kanu National Elections Board & 2 Others V Salah Yakub Farah 2018 eKLR**.

**11. Schedule 6 A paragraphs 1 (a) and (b)** of the **ARO** stipulates that the instruction fees are to be calculated on the basis of the value of the subject matter, which is to be determined from the pleadings, judgment or settlement between the parties. The taxing officer in the instant case found this particular Schedule applicable on the ground that the value was ascertained from the valuation report filed and proceeded to use the valuation report as a basis to tax the bill of costs under this provision.

12. The 1<sup>st</sup> defendant/applicant averred that the taxing master misdirected herself by failing to take into cognizance provisions of **Schedule 6 (1) (b)** of the **ARO 2014** while taxing the applicant's party and party Bill of Costs. It provides that the value of the subject matter can only be deciphered from the pleadings or the judgement of the case. He averred that the value used in the instant case by the taxing master was that done by a valuer in **2021** which valuation report was introduced during taxation hence erroneous to be used in the instant taxation. The 1<sup>st</sup> defendant/applicant's argument is that he has been greatly prejudiced arising from the reliance of the valuation filed after delivery of judgement and after filing of the bill of costs. The 1<sup>st</sup> defendant/applicant while placing reliance on the case of **Peter Muthoka & Another v Ochieng & 3 other [2019] eKLR** submitted that the taxing officer in the instant case ought to have relied on the judgement of this matter to arrive on the value of the subject matter and if unable then use her discretion at arriving at a reasonable figure in the circumstances.

13. On the other hand, the plaintiff/respondent submitted that the 1<sup>st</sup> respondent/applicant failed to provide reasons on which it objects to the taxation ruling. She placed reliance on the case of **Republic vs Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 others**. She further argues that the 1<sup>st</sup> defendant/applicant fails to show the grounds on which he premises his reference besides the valuation report he objects to. She finally submitted that the instant application fails to show any proof of error of principle on the part of the taxing officer; rather, he stated, reliance is placed on a valuation report to which the defendant did not object to or show it was in any way biased.

14. The taxing officer in her ruling on item 1 stated as follows:

**'I have perused the entire file and a valuation report was filed showing the value of the property subject and filed in court at a value of Kshs.30,000,000 as such looking at pleadings filed and judgement by court value of subject matter can be ascertained...'**

15. From the above ruling, it is clear that the taxing officer while arriving at the party and party costs, based the same on the valuation report filed by the plaintiff/respondent. A closer look at the file, it is my view that the value of the subject matter was not in issue in the suit and the parties never came close to ascertaining the same. What was in issue was whether an injunction should issue against the defendants for issuance of title to the suit property in a fraudulent manner; there is no claim for damages in the plaint.

16. In the case of **Sammy Some Kosgei v Grace Jelel Boit [2014] eKLR** the court held as follows:

**"The other bone of contention is whether or not the taxing master could have relied on the valuation report to tax the plaintiff's bill. It is not denied that that valuation report which gives the sum of Kshs.60 million as the value of the two properties in issue, is not in the pleadings, proceedings or judgment, as it was filed after judgment was delivered, and in my view, was done for the purposes of taxation of the plaintiff's bill of cost. The question whether an extraneous valuation can be**

utilized for purposes of taxation was addressed in the case of *Joreth v Kigano*. In the matter the Court Of Appeal frowned on the practice of its utilization in place of the value in the pleadings, judgment or settlement. The court stated as follows:-

**“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”.**

17. From the above, it is clear that the value of the suit property could not be obtained from the pleadings, judgement or settlement. However, the taxing officer in the instant case used a valuation report but failed to note that the same was filed on **27/5/2021** almost a year after judgement was already delivered on **1/10/2020**. It is my opinion that the taxing officer erred in principle by basing her taxation on a valuation document filed after judgement and which did not form part of the pleadings, judgement or settlement.

18. It is therefore my opinion that the taxing master erred by using the figure of **Kshs.30,000,000** as provided for in the valuation report as the sole basis of taxing the bill of costs, since that figure was not in the pleading, judgment or settlement of the parties. The bill was to be taxed pursuant to **proviso (i) of Rule 1 of Schedule VI of the Advocates Remuneration Order** and the taxing officer, in absence of a value in the pleading, judgment or settlement, should have exercised her discretion and considered all relevant matters. Upon perusal of the file, the 1<sup>st</sup> defendant/applicant during hearing produced as **DEXB 2** a sale agreement dated **24/10/1989** where the suit property had been sold for a consideration of **Kshs.20,000** however, keeping in mind the aspect of depreciation of the Kenyan shillings as well as the inflation rates from **1989** to date, it is my opinion that the suit property cannot be valued at that amount but the court has to base its value with that of the current market, acreage as well as its location.

19. It is my opinion that this court having found that the taxing officer erred in principle, it has the discretion to either remit the bill to the taxing officer with appropriate direction on how it should be taxed or to proceed and tax the same. In the case of ***Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board* (supra)** the Court of Appeal stated as follows:-

**“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 v Ferrao* [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel* (No. 2) [1978] KLR 243).”**

In the case of ***Orion East African Ltd vs Permanent Secretary of Agriculture & Another*, Nairobi High Court, Petition No. 100 of 2012 (2013) eKLR**, Majanja J. stated thus at Para 17:-

**“Should I remit the matter to the Deputy Registrar for taxation? Both parties have cited authorities to support the position that the judge in finding an error ought to refer back the matter to the taxing master. In this regard and in the circumstances of this case, I prefer to adopt the position taken by Hon. Justice Ringera in *First American Bank (First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 E.A. 61,) where the court stated as follows, “I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.” I adopt these sentiments”.**

20. From the above, it is clear that this court has the discretion to order that the matter be taken back for taxation or to assess the costs itself. The just course would be for this court to exercise its jurisdiction in a reference on taxation so as to bring the matter to finality. Before getting into re-taxation, the 1<sup>st</sup> defendant/applicant in his submission raised the issue of the executed consent dated **20/5/2021** agreeing to settle the matter where the bill of costs to be taxed at **Kshs. 700,000**. However, on **24/3/21** the parties confirmed that they could not agree and the taxing master recorded the same thus the said consent cannot be considered.

21. It is my opinion that this court should only interfere with **item 1** and **2** of the bill of costs while the other items remains as taxed. The taxing officer taxed **item 1** that is instruction fee at **Kshs. 1,060,000**. The court in re-taxing the same should take into account the nature and importance of the instant suit which involved the determination by the court on title that was alleged to have been acquired fraudulently.

22. Looking at the pleadings filed, the labour of the advocate, complexity of the case and general conduct of the proceedings, it is my opinion that the sum of **Kshs. 600,000** would be a more fair figure as instruction fees and the court should proceed to tax **item 1** at **Kshs. 600,000/=**. Further, **item 2** getting up fees which is **1/3** of the instruction fees should therefore be at **Kshs. 200,000/=**.

23. Regarding the rest of the **items 3-98** in the bill of costs, it is my view that since the same have not been interfered with, they should remain as taxed by the taxing master. They amount to a total of **Ksh 89,510/=**.

24. In the end the global sum to be awarded to the plaintiff/respondent party and party bill of costs dated **30/11/2020** should be **Kshs. 889,510/=** made up as follows:

**Instructions fees .....Ksh 600,000/=**

**Getting up fees ..... Ksh 200,000/=**

**All other items .....Ksh 89,510/=**

**Total .....Ksh 889,510/=**

25. It is also this court's view that each party should bear their own costs of this reference.

26. In the upshot, the application **17/8/2021** succeeds in terms of **prayer (a), (b) and (c)**.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU.**