



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU

MISC APPLICATION NO. E16 OF 2021

WAMAASA, MASESE, NYAMWANGE & CO. ADVOCATES.....APPLICANT

VERSUS

SAMUEL KIBOWEN TOWETT

KENNETH CHESIYNA KIPTOON

ELIAS KIPTOO CHESINEN (sued as officials of EMO CHERGAA NAKURU SHG)...RESPONDENTS

RULING

Application

1. This ruling is in respect to the Chamber Summons application dated **18/08/2021** and filed in court on **25/08/2021**. The application seeking the following orders:

1. ...Spent

2. That the decision of the taxing master Hon. Nancy Makau (DR) delivered on 4th August 2021 on the Bill of Costs dated 24th February 2021 with respect to items No. 1, No. 2, No. 3, No. 34b and 35 be set aside, reviewed or otherwise be varied.

3. That this honourable court be pleased to find that the taxing master erred in law and in principle in assessment of the said bill of costs in arriving at an excessive figure of Kshs. 665,280/= without ascribing to sufficiently justiciable and reasonable grounds.

4. ...Spent

5. ...Spent

6. That costs of this application be provided for.

2. The application is supported by the sworn affidavit of **FJ MUGAMBI** sworn on **18/08/2021**. The grounds on the face of the application and the supporting affidavit are that the bill of costs was taxed in the sum of **Ksh. 665,280/=**; that the sum was excessive in the circumstances; that the learned taxing master erred in holding that **Ksh. 300,000/=** was sufficient as instruction fees; that the fair reasonable instruction fees is **Ksh. 75,000/=** and that the taxing master failed to appreciate that the legal fees should not be so unreasonable as to deter the person from accessing justice.

The Response

3. The respondent filed a replying affidavit sworn by **Lucy Nekesa Cheloti** on **9/09/2021**. She deposes that the application is misconceived and bad in law; that the applicants failed to pay the legal fees leading to the respondent filing the bill of costs which was taxed at **Ksh. 665,280/=** on **4/08/2021**; that the general position of the law is that a court should not interfere with the decision of the taxing officer; that as per the provisions of **Schedule 6** of the **Advocate's Remuneration Order**, the value of the subject matter ought to be determined from the pleading and that the court should find that the bill of costs as taxed by the taxing master was reasonable and within the scale.

Submissions

4. The 1st and 2nd applicants filed their submissions dated 23/09/2021 on 04/10/2021. The respondent had filed their submissions dated 24/09/2021 on 27/09/2021.

Determination

5. After considering the application, the responses thereto and the submissions, the only issue for determination is whether there are sufficient grounds to interfere with the taxing officer's ruling dated 4/08/2021.

6. The applicants are challenging the taxation of **item No. 1** on instruction fees which was taxed at **Ksh. 300,000/=**. They submit that the suitable amount ought to be **Ksh. 75,000/=** and argue that the taxation of **Ksh.300, 000/=** is excessive and reasonable.

7. The Court Of Appeal in the case of **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** in determining the issue of instruction fees stated 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.”

8. The taxing officer in her ruling delivered on 4/08/2021 indicated that the value of the subject properties could not be ascertained and she therefore exercised her discretion and awarded **Ksh. 300,000/=**.

9. From the judgement of the court delivered on 11th February 2021 in **ELC No. 200 of 2015** out of which the Advocate/client bill of costs was filed, it is clear that the value of the subject matter could not be ascertained.

10. The Court of Appeal in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** stated that:

“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.”

11. This is also the holding in the case of **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by **Ringera J.** (as he then was) where it was stated as follows;

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

12. After perusing the ruling by the taxing officer delivered on 4/08/2021, it is my opinion that she correctly applied **Schedule 6A** of the **Advocates (Remuneration) Order, 2014**. In taxing **item 1** which is instruction fees, the taxing officer while considering the guiding law and principles, exercised her discretion and found as follows:

‘Schedule 6 other matters apply and provide for a fee not less than Kshs. 75,000/= where defense has been filed as such considering the pleadings, judgement and no valuation had been filed as such on the value of subject properties cannot be ascertained and I will consider the work done and time taken to conclude the matter and that Kshs. 300,000/= is fair under this head’

13. It is this court's opinion that the taxing officer took into account relevant considerations in the taxation of instruction fees while also giving her reasons. It is also this court's opinion that the taxing of instruction fees at **Ksh. 300,000/=** was not based on any error of principle, neither were the said fees as awarded so excessive as to justify interference by the Court.

14. With regards to **Item 2**, it is to be observed that it was rightly increased by half and taxed at **Kshs. 150,000/=**.

15. **Item No. 3** on VAT is 16% of the instruction fees of **Ksh. 300,000/=** which was taxed at **Kshs. 72,000/=** and therefore it was not in error.

16. **Item No. 34b** is on getting up fees. The applicable provision of law is **Paragraph 2** of **Schedule 6A** of the **Advocates (Remuneration) Order 2014** where getting up fees is one-third of the instruction fees. In this case the taxing officer awarded instruction fees of **Ksh. 300,000/=** and 1/3 of it would be **ksh.100, 000/=** which was the amount that was rightly taxed.

17. **Item 35** was also accurately taxed as the taxing officer correctly applied the lower scale under **Paragraph 7d** of **Schedule 6A** on attendances for hearing in taxing the court attendance fee at **Ksh. 10,000/=**. This is as per the provisions of **Section 50** of the **Advocates Remuneration Order** which provides as follows:

‘Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the

High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.'

18. In conclusion therefore, it is this court's opinion that the chamber summons application dated **18/8/2021** lacks merit and it is hereby dismissed. Each party shall bear their own costs of the reference.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF OCTOBER, 2021

MWANGI NJOROGE

JUDGE, ELC, NAKURU.