



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CASE NO.201 OF 2017
(FORMERLY NAIROBI ELC NO. 518 OF 2009)
IN THE MATTER OF
A REFERENCE AGAINST THE TAXING MASTER'S RULING
DELIVERED ON 30TH NOVEMBER 2020,

BETWEEN

CATHERINE NJERI ANGOTE

(Suing as the Administratrix of the Estate of

Samuel Angote Babu).....PLAINTIFF/RESPONDENT

VERSUS

LUCY WANGARI NGUGI.....1ST DEFENDANT/APPLICANT

JERRY WESTGATE LIMITED.....2ND DEFENDANT/ APPLICANT

RULING

The matter for determination is the Chamber Summons dated 24th December 2020, by the Defendants/ Applicants seeking for orders that;

- 1. That the decision of the Taxing Master as contained in the Ruling and award delivered on 30th November 2020, in respect of the Defendants/Applicants' Party and Party Bill of Costs dated 27th January 2020, be and is hereby set aside.***
- 2. That this Honourable Court be pleased to order that the Defendants/ Applicants Party and Party Bill of Costs dated 27th January 2020, be taxed afresh by a different Taxing Master .***
- 3. That in the alternative to orders (1) and (2) above, this Honourable Court be pleased to re assess and /or re tax the costs lawfully payable under the Defendants/ Applicants party and Party Bill of Costs dated 27th January 2020, as pertains the instructions fees . getting Up fees and VAT items***
- 4. That this Honourable Court do issue any such other and further orders and or directions as it may deem fit to issue in the interest of justice.***
- 5. That the Costs of this reference be provided for.***

The Application is premised on the grounds that by a Ruling delivered on 30th November 2020, in respect of the Applicant's Party and Party Bill of Costs dated 27th January 2020, the Taxing Maser awarded the Applicants Instructions fess (item No. 1 in the Bill of Costs) in the sum of **Kshs.244,800/=** whereas the Applicants had sought for the sum of **Kshs.6,000,000/=**. Further that the Taxing Master entirely failed to award any **Getting up Fees** at all without giving any reasons whatsoever and despite the fact that the matter had clearly proceeded for hearing and Judgment delivered in favour of the Applicants in respect of both the suit and the Counter Claim.

Further that the Applicants Advocates were supplied with reasons for the Ruling and a review of the same shows that the Taxing Master grossly erred in Law and in Principle by taxing instructions fees for prosecuting the suit and a similar sum for defending the Counter Claim. Further that the Taxing Master erred in law and in principle by relying on the purchase price value set out in a Sale agreement executed in 1993, in order to find that the subject matter of the suit was a merely sum of **Kshs.1,400,000/=** despite the suit herein having been filed in 2009, and Judgement delivered on **15th November 2019**. Further that the **Taxing Master** failed to take into account the current market value of the suit property being **L.R No. 4953/2413**, which has since appreciated to an estimated sum of **Kshs.80,000,000/=** as pleaded by the Applicants in their bill of costs

That whereas the Taxing Master in her Ruling acknowledged the obvious appreciation of the value of the subject matter since 1993, the Taxing Master nevertheless failed to take into account the appreciated value at all when calculating the instructions fees, so as to make adjustments. That it is trite that the Taxing Master is not only limited to the Pleadings, Judgment and Settlement in determining the value of the subject matter of the suit, but is further granted discretion to summon and examine witnesses, administer paths and direct and adopt all other proceedings as may be necessary for determination of any matter in dispute.

That it was clear that the Taxing Master had powers to call other forms of evidence in order to assist her in assessing the value for purposes of calculating instructions fees, but failed and or neglected to exercise the said discretion. That the Taxing Master erred in Law and in principle in entirely disallowing the item on getting up fees without giving any reasons whatsoever, whereas the same is provided for under **Paragraph (2) of Schedule 6 of the Advocates Remuneration Order 2014**. That it follows that VAT which was chargeable on the awards is similarly erroneous and should therefore be reassessed. It is therefore fair, equitable and just in the circumstances that the orders sought are granted.

In her Supporting Affidavit **Lyn Kemboi**, an advocate of the High Court of Kenya practicing in the **Law Firm of Nyachoti & Company Advocates**, who are on record for the Defendants/Applicants averred that it is apparent that the Taxing Master misdirected herself on the principles of law applicable to the Taxation of the subject Bill of Costs and as a result the items on instructions fees, getting up fees and VAT are inordinately low.

The Application was opposed and **Victor Olewe**, an Advocate of the High Court of Kenya Practicing in the **Law Firm of Mbugua Mureithi & Company Advocates**, swore a Replying Affidavit dated **19th July 2021**, and averred that the **Taxing Master** was right in awarding the instructions fees as the said subject matter was to be priced at **Kshs.1,400,000/=** at the time of the sale. That as the suit was filed in 2009, it could be expected that the value of the suit property would have appreciated to a value between **Kshs.1,400,000/= and 20,000,000/=**. That the **Advocates Remuneration Order 2014**, is clear on the amount that ought to be taxed for property that fall within the said limits, which is **Kshs.120,000/=** plus an additional 2% interest which the Taxing Master did and came to the right amount of **Kshs.122,400/=** for the main suit and the Counter Claim

That the Applicants did not attach any documents in support of the alleged value of **Kshs. 80,000,000/=**. Further that the **Advocates Remuneration Order** is clear that **Getting up fees** should be one third of the instructions fees being **Kshs.244,800** and not **6,000,000./=** as alleged and therefore the amount should be **Kshs.81,600/=**. That in her Ruling, the **Taxing Master** appreciated that the value of the suit property had gone up and allowed the correct position for taxing such property at the estimated value. That there is no proof provided to show that the value of the suit property is **Kshs.80,000,000/=** and the Taxing Master clearly broke down how she came to the said Value. It is clear that she took into account the appreciated value, and she only questioned the Applicants assertions that the value of the suit property was **Kshs.80,000,00/=** yet they had not provided any documentation. Thus the Applicants have failed to prove any misconduct or error on the part of the Taxing Master.

The Application was canvassed by way of written submissions and the Defendants/ Applicants filed their written submissions through the **Law Firm of Nyachoti & Company Advocates** dated **24th June 2021**, and submitted that in the case of **Zephania Ngaria Angwenye... Vs... Moses Lutomia Washiali & Anr (2015) eKLR**, the learned Judge declined to disturb the findings of a Taxing Master on whether the latter had considered that although the subject matter was purchased at **Kshs.2,100,00/=** the land had appreciated over time and arrived at a value of **kshs.2,800,000/=** for purposes of taxation correctly. That the Taxing Master erred in Law by failing to consider other relevant factors such as the nature and importance of the case or matter to the parties, complexity of the matter, interest of the parties duration of the matter and the scope of the work done generally.

That it is clear that the Taxing Master erred in failing to award the Applicants **Getting up fees**, in view of the fact that a denial in liability in the form of a Defense and the matter clearly proceeded for hearing and Judgment. The Court was urged to review the Taxing Master's decision on Instruction fees and getting up fees.

The Plaintiff/ Respondent filed her written submissions through the **Law Firm of Mbugua Mureithi & Company Advocates** and submitted that the Taxing Master has discretion to arrive at a decision and the Appellate Court cannot interfere with the said decision unless it is clear that the Taxing Master clearly gave a wrong Ruling and did not follow the correct **Remuneration Order** or did not take into account the necessary factors.

That there is no sufficient proof to show that the Taxing Master acted unjustly and thus there are no grounds for reviewing the Bill of Costs, as the Taxing Master followed the right guidelines in arriving at her decision and that the VAT that was awarded ought to be struck out as it has been held that a **Party to Party Bill of Costs**, should not be awarded VAT. It was thus submitted that the Application has no merit and ought to be dismissed with Costs.

The Court has carefully read and considered the Application, the Affidavit and the Written Submissions and finds that the issue for determination is **whether the Defendants/ Applicants are entitled to the orders sought**.

The Defendants/ Applicants have sought for the setting aside of the Taxing Master's decision of **30th November, 2020**. It is their contention that the Taxing Master erred in law and in principle by finding that the purchase price of the suit property in the sum of **Kshs. 1,400,000/=** as set out in the sale agreement executed on **12th June 1993**, for assessing the instruction fees, despite the fact that the suit had appreciated

as at the time when the Judgment was delivered. Further that the Taxing Master failed to award **Getting up fess** and failed to give any reasons.

It is now trite law that the High Court (read Environment and Land Court), will only interfere with the decision of a Taxing Master in cases where it is evident that there is an error in principle.

The circumstances under which this Court can interfere with the Taxing Master's exercise of discretion and the principles are to be found in the case of **PremchandRaichand 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 LimitedVs...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.”

The Court will only interfere with the decision of the Taxing Master where there is a clear error of principle or the sum awarded are manifestly high or low so as to lead to an injustice.

The Defendants/ Applicants have contended that the Taxing Master failed to take into account the correct valuation of the suit property as at the time the Judgment was being delivered and further that the **Taxing Master** failed to consider other factors such as the nature and importance of the case or parties, the complexities of the matter whether novel issues were raised duration of the matter and the scope of work done.

In the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006] eKLR**, the Court held that;

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... 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 interference 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 factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

Having perused the decision by the Taxing Master, the Court notes that in her decision, the Taxing Master valued the suit property at **kshs. 20,000,000/=** and in valuing the same, the Taxing Master appreciated that the suit herein was filed in the year **2009**, that as per the sale agreement entered into in **1993**, the value of the said suit property was **Kshs. 1,4000,000/=**, but that the same had appreciated by the time of filing the suit.

Did the Taxing Master therefore err in principle? The Defendants/Applicants have contended that the Taxing Master ought to have appreciated that the value of the suit property had since risen as at the time the Judgment was delivered.

The instruction fees are not based on the time the Judgment was delivered, but when the suit was filed. It is the Court's considered view that in appreciating that a suit property had appreciated over **10 times**, is not an error and in the absence of any valuation as at the time of filing the suit, the Court finds no reason to interfere with the Taxing Master's discretion in giving the appreciating value of the suit property.

The Defendants/ Applicants have also contended that the Taxing Master failed to take into account other relevant factors and only took into account the value. In the above case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others the Court stated that**

The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

The Court has carefully perused the Bill of Costs dated **27th January 2020, that had 257 items**, and also perused the submissions dated **9th March 2020**, by the Defendants/Applicants in support of their Bill of Costs. From the Taxing Master and notes that various actions done in relation to the suit were catered for in the Bill of Costs. That apart from listing the reason why they were claiming the **Kshs. 6,000,000/=** instruction's fees as the matter was complex, matter was important and placed a heavy responsibility and enormous time and research was spent, there were no details set out in a conscientious mode nor the complex issues that had arisen. Therefore, this Court finds and holds that the Taxing Master did not error in relying on the value of the suit property in arriving at the instruction fees.

However, the Court notes that in taxing the Bill, the Taxing Master in using the **Remuneration Order 2014**, correctly taxed the amount as of **Kshs. 1,000,000/=** being **Kshs. 120,000/=**. However in considering that an amount of **1,000,000/= to 20,000,000/=** the amount was to be fees as for **Kshs.1,000,000/=** plus an additional 2%, in considering the 2%, the Taxing Master calculated 2% of the **Kshs. 120,000/=** as opposed to 2% of the remainder of the value of the suit property. As the value was **Kshs. 20,000,000/=**. having given the amount of **Kshs. 1,000,000/=**, **the 2% ought to be of the remainder Kshs. 19,000,000/=** The Court therefore finds and holds that the same is an error that ought to be corrected.

Further the Defendants / Applicants have contended that the Taxing Master failed to award fees for Getting Up. On **Getting Up fees**, the **Remuneration Order 2014, Schedule 6 Paragraph 2**, provides that;

“2. Fees for getting up or preparing for trial In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Provided that—

(i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each

From the above, it is thus very clear that the Defendants/ Applicants are entitled to **Getting up fees** and such the same should be included in the Bill of Costs.

The Plaintiff/ Respondent has also sought for the setting aside of the VAT taxed. **Section 6 (1) of the VAT Act 2015** provides as follows-

Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.

Section 2 of the Act defines “supply” to include the sale or provision of taxable services to another person and “a taxable service” as that which has not been specified in the Third Schedule. Legal services are not listed amongst exempt supplies in the Third Schedule of the Act.

The purpose of the **Party to Party Bill of Costs** is to compensate the successful party for the costs that the party incurred in either prosecuting and/or defending the case. The Court concurs with the Plaintiff/ Respondent that there should be no re assessing of the amount and that the same should be taxed from an **Advocate Client Bill** of Costs as the Advocate is compensated for the services rendered, but in a party to **Party Bill of Costs**, there are no services rendered. See the case of **Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR** where the Court held that;

“30. On the final issue of VAT, I hold the simple view that in allowing the same, the Master erred under the Value Added Tax Act, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True,

legal services were rendered, but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a vatable person. I would vacate the award on VAT as the Master erred.

The Upshot of the foregoing is that the Taxing Master erred in failing to use the correct value in calculating the **additional 2%** and further failed to award the **Getting Up Fees**. On the issue of VAT, the Defendants/ Applicants are not entitled to the same, and the said amount is thus taxed off. In the circumstances, the Court remits the Bill of Costs back to the Taxing Master to consider the issue of **additional 2%, Getting Up Fees** and tax off the **VAT** and hence tax the Bill of Costs afresh.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy