



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC APPLICATION NO. E110 OF 2021

MARY WAIRIMU DAMES.....PLAINTIFF/RESPONDENT

VERSUS

LANGATA DEVELOPMENT

COMPANY LIMITED.....DEFENDANT/APPLICANT

RULING

A. INTRODUCTION

1. The Respondent herein (Mary Wairimu Dames) filed her bill of costs dated 17th October, 2018 against the Applicant (Langata Development Company Limited), where the same was taxed and assessed by the Deputy Registrar of this Court vide a ruling delivered on 15th April, 2021.

2. The Applicant being dissatisfied by the Deputy Registrar's ruling filed the instant reference vide the Chamber summons application dated 27th May 2021 with a supporting affidavit of even date sworn by **Eliud Anthony Kariuki** the Applicant's director seeking the following orders:

i) THAT this Honourable Court be pleased to vacate and set aside in its entirety, the Ruling and reasoning of the learned Taxing Master Honourable I.N. Barasa (DR) dated and delivered on 15th April 2021 taxing the Advocate/Respondent's Bill of Costs dated 17th October 2018 at Ksh 26,738,945/=

ii) THAT the Honourable Court be pleased to re-assess the quantum of total fees and disbursements in the party to party's Bill of costs.

iii) THAT in the alternative to prayer (2) above, the Honourable Court be pleased to remit, the Bill of Costs dated 17th October 2018 for re-assessment on the quantum of fees and disbursements chargeable before a different Taxing Master with appropriate directions thereof.

iv) THAT the costs of this Application be provided for.

3. The Applicant also filed a further affidavit sworn on 24th August 2021 in support of their application.

4. The Respondent opposed the application through a replying affidavit sworn by **Mary Wairimu Dames** the Respondent herein on 17th August 2021.

5. The application was canvassed through written submissions. The Applicant's submissions were filed on 29th September 2021 while the Respondent's submissions were filed on 17th September 2021.

B. PARTIES RESPECTIVE CASE/SUBMISSIONS

Applicant's case/Submissions

6. The gist of the Applicant's submission is that the Taxing Master in arriving at the fee of Ksh 26,738,945/= misdirected herself and acted contrary to the established principles of taxation of Party to Party bill of costs. The Applicant challenged the Taxing Master figures of Kshs. 20,000,000/= as Instructions fees, arguing that the same was too high and was arrived at without any itemization, particularization nor

justification for arriving at the same.

7. It was the Applicant's submissions that the Taxing Master erred in wrongly invoking her discretion on grounds that are unclear, unreasonable and legally untenable and consequently mis-exercised such discretion in awarding the impugned taxation sum in instruction fee at Ksh 26,738,945/= when clearly the value of the suit property was unascertainable from the pleadings filed by the parties.

8. In addition, the Applicant also submitted that the Taxing Master erred in law by departing from the precedent without justification, and well established principles and thus arrived at an erroneous decision in the impugned taxation. Particularly the learned Taxing Master failed to give due and/or proper consideration to the rather routine nature of the suit giving rise to the taxation being a dispute about ownership of land; value of the subject matter and absence of complexity of the matter.

9. Further the Applicant submitted that Taxing Master erred by misapprehending and grossly misdirected herself on the principles of law thereby arriving at an erroneous decision.

10. The Applicant also submitted that the value of the subject matter could not be ascertained.

11. In support of their case, the Applicant relied on various authorities including the case of **Evans Thiga Gaturu vs Kenya Commercial Bank Limited [2012] eKLR, Republic vs Commissioner of Domestic Taxes Exparte Ukwala Supermarket Limited and 2 Others [2018] eKLR, Republic vs Minister of Agriculture & 2 Others Exparte Samuel Muchiri W'Njuguna and 6 Others (2006) eKLR and KANU National Elections Board & 2 Others vs Salah Yakub Farah [2018] eKLR.**

12. The Applicant further urged the Court to set aside the Taxing Master's decision in its entirety and order for reassessment of the quantum of fees and disbursement chargeable before a different Taxing Master with appropriate directions.

Respondent's case/Submissions

13. The Respondent opposed the application on various grounds. She submitted that the Taxing Master's Ruling dated 15th April 2021 was proper, fair, reasonable and should not be disturbed in whatever manner.

14. It was the Respondent's submission that the Taxing Master correctly ruled that whereas the Court ordered the Plaintiff to be compensated "at the prevailing market rate of the 85.3 acres comprised in LR No. 7240/23" as on the date of Judgment on 7th February 2016, on absence of a current valuation report, the various Court of Appeal authorities had held that the instructions fees on that assessment would be based on the discretion of the Taxing Master.

15. The Respondent also submitted that the Taxing Master correctly considered the nature of the suit itself, the interest of the parties to the suit property, the complexity of the case, the great labour employed by the Plaintiff's Counsel for 12 years, the time taken of 12 years (2004 to 2016) to conclude the Suit, the appreciation of the Plaintiff's land between the period before the Taxing Master arrived at the global sum of Ksh 20,000,000/= for instructions fees and fees for getting up for trial of Ksh 6,666,667/= and disbursement of Ksh 18,210/= to arrive at the taxed costs of Ksh 26,738,945/=

16. It was further the Respondent's submissions that the matter was dragged up to the Court of Appeal twice in 2019 and then to the Supreme Court in 2020 without any success as all the Appeals and Multiple Applications have been dismissed with costs to the Estate.

17. She further submitted that a valuation report had been filed in May 2016 where an acre of suit land was valued at Ksh 800,000/= which currently could be going for Ksh 15,000,000/= per acre and hence the current prevailing market price could be Ksh 1,279,500,000/=

18. The Respondent also submitted and urged the Court to dismiss the reference which was incompetent, incurable defective and bad in law for want of a Certificate of Costs dated 19th May 2021 issued by the Taxing Master.

19. In support of her submissions, she relied on the case of **NRB PET No. 94 of 2014 Kenneth Matiba vs The Attorney General and Governors Ballon Safaris Ltd vs Sky Ship Company Ltd & Another [2015] eKLR, Singh Gitau Advocates vs City Finance Bank [2021] and KANU National Elections Board & 2 Others vs Sarah Yakub Farah [2018].**

C. ISSUES AND ANALYSIS

20. I have considered the reference, the response and submissions by parties. I have also considered the decisions relied on by parties. The issues which in my opinion arise for determination are as follows:

i) Whether the reference is incompetent for being filed without an accompanying certificate of costs.

ii) Whether the Taxing Officer erred in law and principle while taxing the Party and Party Bill of Costs herein and thereby reached a wrong assessment.

Issue No. I

Whether the reference is incompetent for being filed without an accompanying certificate of costs.

21. The Respondent submitted that the reference was incompetent, incurably defective and bad in law for want of an accompanying certificate of costs. It was the Respondent's contention that the certificate of costs dated 19th May 2021 ought to have been exhibited by the Applicant.

22. The Applicant countered the Respondent's assertions and contended that it is not mandatory for the production of the certificate of costs issued by the Taxing Master as the only mandatory and requisite key documents that ought to be produced when filing a reference was the Notice of Objection and a copy of the Ruling delivered by the Taxing Master which have been exhibited herein as annexures EAK-1 and EAK-2 vide the Supporting Affidavit dated 27th May 2021.

23. The procedure by an aggrieved party seeking to challenge a taxation ruling is set out in the Advocates Remuneration Order Paragraph 11 and is very specific on what an aggrieved party should do. ***A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.***

24. Paragraph 11 of the Advocates Remuneration Order stipulates-

11(1) should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all parties concerned, setting out the grounds of his objection.

3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4) The High Court shall have power in its discretion by order enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.

5) Applications for such an order may be made by chamber summons upon giving ever other interested party not less than 3 clear days' notice in writing or as the court may direct, and may so be made notwithstanding that the time sought to be enlarged may have already expired.

25. It is therefore apparent from the law that the the above provision does not make it mandatory for a certificate of costs to be exhibited while challenging a Taxing Master's ruling on a bill of costs neither have I also seen any other separate provision that mandates such a requirement.

26. On the assertion that there was no certificate of stated costs exhibited, it's my humble view that lack of the same cannot be a ground to invalidate a reference challenging a ruling on taxation.

27. I agree with the sentiments from the Applicant's counsel that it is not mandatory for the production of the certificate of costs issued by the Taxing Master at the time of filing a reference and in the circumstances, I find that the reference is properly filed before this court.

Issue No. ii

Whether the Taxing Officer erred in law and principle while taxing the Party and Party Bill of Costs herein and thereby reached a wrong assessment.

28. The Principles of taxation were aptly stated in **Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162)** where the court noted as follows on the principles on taxation:

“(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) 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.”

29. The circumstances under which a Judge interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the 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; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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 and the Court is not entitled to upset a

taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**.

30. The Applicant's principal argument is that the Taxing Master misdirected herself in taxing the bill at Ksh 26, 738, 945 /= when clearly the value of the suit property was unascertainable from the pleadings filed by the parties while the Respondent on the other hand maintained that the Taxing Master correctly taxed the bill and exercised her discretion properly in taxing the bill.

31. The Taxing Master ruled that this was a bill where the value of the subject matter could not be ascertained for the purposes of taxing the instructions fees and hence the same warranted an assessment based on her discretion. A position which both parties from their submissions agreed with her.

32. In **National Bank of Kenya Limited (As the Successor in Business of Kenya National Capital Corporation Limited "Kenyac" & Another vs Rachuonyo & Rachuonyo Advocates eKLR** at page 5, Majanja J states: -

"The substance this reference concerns the assessment of instructions fees. The principle to be applied when assessing instruction fees in a suit are well settled. The Court of Appeal in the case of Joreth Ltd vs Kigano & Associates [2002] 1 EA 92 outlined the principles as follows: -

We would at this stage point out that the value of the subject matter for a suit for the 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 fees 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 proceedings, any direction by the trial judge and any other relevant circumstances"

33. In **Peter Muthoka and Another vs Ochieng and 3 Others [2019] eKLR**, the Court of Appeal expounded further on its decision on the **Joreth case (supra)** as follows;

"It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructing fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing".

34. The Applicant made general arguments that the taxing officer misapprehended and misapplied the principles on taxation thereby made an inordinately high quantum.

35. In the supporting affidavit, the Applicant deposed that the taxing officer erred in both law and fact by making an improper determination on the Schedule VI of the Advocates (Remuneration) Order, applicable in the instruction fees in the taxation. The Applicant further deposed that the taxing master erred in law and fact in ascribing a blanket sum of Ksh 20,000,000 = as instruction fees without any itemization, particularization or itemization for arriving at the same.

36. I have perused the taxing officer's decision and reasons for it. In my view, the taxing officer considered the material placed before her and stated that since the bill related to a matter where the value could not be ascertained, the same fell for assessment based on her discretion. On this, the taxing officer was right.

37. Regarding item 1 on instruction fee, the taxing officer stated that the Respondent wanted to be paid instruction fee of Kshs. 100,000,000/= a figure that was allegedly derived from the prevailing market value of the suit property as per the Respondent. The Respondent further stated that the judgment of the court had ordered that she be compensated at the prevailing market rate for 85.3 acres by the Applicant. The Respondent stated that she had filed a valuation report in the High Court which subject matter was valued at Ksh 800,000/= in 2016 and that 4 years down the line, the same should be having a current market value of Ksh 15,000,000/= which would translate to Ksh 1,279,000,000/=. However, the taxing master in her ruling pointed out that there was no evidence that the valuation report was obtained with the participation of the Applicant and hence she could not rely on it.

38. In my view, should the Taxing Master have wished to rely on the valuation report having been obtained with the participation of both parties for the purposes of taxation, nothing would have stopped her from doing so.

39. The court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, or refer to other documents provided in the course of the case, and which may point at the value of the subject matter. Indeed, Rule 13 of the Advocates' Remuneration Order does allow the court to even call for evidence for purposes of determining a dispute before it. The said provision of the law is drawn as follows: -

13 A. Powers of taxing officer

"For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."

40. In the instant case, after referring to binding decisions, the taxing officer reiterated the guiding principles, stating:

“where the value of the subject matter cannot be established from the pleadings, it is the discretion of the taxing master to determine what would be reasonable instruction fee in the circumstance.

41. The taxing officer made a finding of fact that the valuation report was not part of the primary proceedings (documents). It was also done without the Applicant’s participation raising its integrity. The taxing officer declined to use the valuation report as the basis for determining the value of the subject matter for purposes of taxing instruction fee.

42. In determining instruction fee, the taxing officer relied on her discretion and went ahead to give her reasons as follows;

“I have considered the suit itself the interest of the parties to the suit property evident in the pleadings and the property and the proceedings on the court record. The dispute between the parties related to 85.3 comprised in L.R No. 7240/23 situated within Thika Municipality. I have considered the care and labour employed by the counsel in the prosecution of the suit. I have also considered the time taken to conclude the suit. The suit was instituted in 2004 and concluded in 2016, 12 years later. I am also alive to the fact that the value of 85.3 acres of land that was in dispute has appreciated since 1989 when it was sold for Ksh 23,500/= per acre. I am persuaded that an instruction fees of Ksh 20,000,000/= in this suit is fair and reasonable. Item 1 is taxed at Ksh 20,000,000/= , Ksh 80,000,000/= is taxed off. Item 35 on getting up fees is taxed at Ksh 6,666,667/= , Ksh 26,633,333 is taxed off”.

43. I have carefully considered the reference and the amount the taxing officer allowed and the reasons given to support her decision. I have also considered the Applicant’s grievances and supporting arguments. I have further considered the principles upon which this court exercises jurisdiction to interfere with the Taxing officer’s exercise of discretion in taxation of bills as outlined earlier and I do not find merit in the reference.

44. The taxing officer properly considered the bill of costs before her and exercised her discretion in making the determination. The taxing officer in my view did not misapprehend the applicable principles and law in arriving at her decision. It is therefore not open for this court to interfere with the same.

45. As was stated by the **Supreme Court of Uganda (Mulenga, JSC) in [Bank of Uganda v Banco Arabe Espaniol, Civil Application No. 29 of 2019];**

...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. (Emphasis added).

46. Flowing from what I have stated above, I am unable to uphold the Applicant’s argument that the taxing officer committed an error of principle or law in her decision. Consequently, the reference is declined and dismissed.

47. Each party shall meet their respective costs of the reference.

48. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF OCTOBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Rono h/b for Mr. Lusi for the Applicant.

Mr. Gitau for the Respondent.

Court Assistant; Caroline.