



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**MISC CIVIL APPL. 16 OF 2020**

**KIAMBU MURUTANI CO. LIMITED.....PLAINTIFF/RESPONDENT**

**VS**

**KAMINDI SELFRIDGES SUPERMARKET.....DEFENDANT/APPLICANT**

**RULING**

1. The Defendant/Applicant filed instant Application dated 15/2/2021 under Order 11(2) of the Advocates Remuneration Order for Orders;

**a. THAT the Honorable Court be pleased to set aside the Taxing Officers' Ruling delivered on 4<sup>th</sup> February 2021 as it relates to the reasoning and determination pertaining to item 1 and 2 of the Defendant's Bill of Costs dated 26<sup>th</sup> June 2020.**

**b. THAT this Honorable Court be pleased to adjust and find the sum due to the Applicant in the taxation cause is as presented in the Plaintiff's (sic) Bill of Costs dated 26<sup>th</sup> June, 2020.**

**c. THAT costs of this application be provided for.**

2. The Application is based on the grounds thereto and Supporting Affidavit of the **Jamuel Mwakandana Kiwinda, Advocate** sworn on even date. He deponed that the award of Kshs. 160,000/= by the Taxing Officer on Item 1 in their Bill of Costs dated 26/6/2021 was erroneous and manifestly low. That the Taxing Officer failed to take into consideration the amount of Kshs. 800,000/= initially charged by the former counsel. He faulted the Taxing Officer for misdirecting her discretion in taxing items 1 and 2 thereby arriving at contemptuously low costs. He reiterated this Court's jurisdiction to set aside the impugned Ruling and re-asses the fees due.

3. Opposing the Application, Advocate **Carol Wanjiru Kimachia** on behalf of the Respondent's firm of Advocates swore the Replying Affidavit dated 7/10/2021. She deponed that the Court decree issued on 26/11/2019 was not a money decree and that the value of the property was not disputed. She defended the Taxing Officer's award as proper and based on Schedule V1 (A) (I) of the Advocates Remuneration Order, 2006. That the Taxing Master's decision in Milimani ELC Misc. Application No. 295 of 2016 related to Advocate-Client Bill of Costs and thus not binding on the Taxing Master herein. She urged the Court to dismiss the Applicant's application with costs.

4. Directions were taken on 25/10/2021 to prosecute the application by way of written submissions. Only the Respondent filed submissions dated 16/11/2021 through the firm of **S. M.Chege & Co. Advocates**.

5. Highlighting the nature of their claim in the main suit, the Respondent submitted that it is the nature of the claim that determines the applicable scale. That the orders sought were injunctive in nature as opposed to a money decree as revealed in the Court's decree issued on 26/11/2019. That the suit having been filed on 17/8/2011, the applicable order is the Advocates Remuneration Order, 2006. Accordingly, the costs for suing or defending thereunder is any sum that maybe reasonable but not less than Kshs. 8,400/=.

6. Addressing the getting up fees award of Kshs. 53,333.33 being 1/3 of the instruction fees was correct and based on the Advocates Remuneration Order provisions. The Respondent maintained that the decisions of Hon. Barasa on 18/11/2017 cannot be binding on the Taxing Master herein on the basis of *stare decisis*. In conclusion, the Respondent rehashed the general principles governing interference of the Taxing Master's discretion and cited the cases of **KANU National Elections Board & 2 others v Salah Yakub Farah [2018] eKLR** and **Sally Mwembu Manyara v S. Nyakundi & Co. Advocates [2021] eKLR**.

**Analysis & Determination**

7. The main issue for determination is whether the Applicant has established a case for this Court to interfere with the Taxing Officer's decision.

8. It is trite that in a reference case like this one, the governing principle that guides exercise of the Court's jurisdiction was well summarized in the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** where the Court of Appeal distilled the principle 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 v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: “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”.**

9. The gist of the application revolves around the award of Items 1 and 2 (instruction and getting up fees) which the Applicant contends is manifestly too low to warrant this Court's re-assessment. The Respondent's suit before Court was dismissed with costs and *inter alia* a declaration made that the sale agreement dated 24/10/2009 was illegal, null and void and unenforceable.

10. The suit was filed in the year 2011 and determined in the year 2019. The applicable Remuneration Order is the 2006 for the instruction fees and 2014 Advocates Remuneration Order for the services rendered after 2014.

11. Instruction fees is calculated from the value of the subject matter. The value of the subject matter 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 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 the matter; the interest of the parties, the general conduct of the proceedings, any directions by the trial Judge and all other relevant circumstances. See the Court of Appeal case in **Joreth Limited v Kigano & Associates, Civil Appeal No. 66 of 1999**.

12. In this matter the value of the land in question was Kshs. 40,250,000/- as shown in the pleadings. The value of the subject matter for purposes of taxation is therefore Kshs. 40,250,000/- and pursuant to Paragraph 1(b) of Schedule 6 of the Advocates Remuneration Order, 2009 the instruction fees work as follows;

1 <sup>st</sup> Kshs. 1,000,000	-	77,000
2 <sup>nd</sup> Kshs .20,000,000x 1.5/100	-	300,000
Balance Kshs 19,250,000x1.25/100	-	240,625
Total	-	<b>Kshs. 617,625</b>

Item No. 1 on instruction fees is taxed at Kshs. 617,625/=.

13. Getting up fees flows directly from the instruction fees. Paragraph 2 of the above mentioned schedule provides as follows;

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

Therefore, getting up fees works out as follows;

**Kshs. 617,625/- x 1/3 = Kshs. 205,875/-.**

14. It is the finding of the Court that the Taxing Master erred in her assessment hence arriving at the wrong assessment of costs.

15. For the reasons above the application is allowed and the decision of the Taxing Master dated the 4/2/2021 is hereby set aside.

16. I order each party to meet their costs.

17. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF NOVEMBER 2021.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Ms. Kimachia for the Plaintiff/Respondent

Kiwinga for the Defendant/Applicant

Phyllis Mwangi – Court Assistant