



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

MISCELLANEOUS APPLICATION REF NO. EOO2 OF 2021

MBIYU MWAURA.....OBJECTOR/APPLICANT

VERSUS

THOMAS NGARACHU NGUGI.....1ST RESPONDENT

MARY NJAMBI NGUGI.....2ND RESPONDENT

SIMON KURIA KUNGU.....3RD RESPONDENT

DAVID MWAURA KANGETHE.....4TH RESPONDENT

JOSEPH GITAU WAITHERA.....5TH RESPONDENT

JOHN NDEGWA KANGETHE.....6TH RESPONDENT

RULING

By a **Chamber Summons Application** dated **7th of July 2021**, brought under Section 11 of the Advocates Act, Cap 16 Laws of Kenya, the Applicant sought for orders;

a. That the Order of Taxation of the 5th Defendant's Bill of costs dated 14th December 2020, issued on 14th June 2021, be set aside and this Court be pleased to assess the costs or remit the bill of costs to the taxing master with directions.

b. That the costs be provided for.

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit dated **7th July 2021**, sworn by **JEREMIAH N MUTHIA**, Advocate. The Applicant contends that the taxing master when taxing fees on instructions, failed to consider their submissions and instead considered the prayers in the Plaintiff. That the

taxing master relied on the provisions of **Schedule VI of the 2006 Advocates Remuneration Order**, in place of **Schedule VI of the 2014 Advocates Remuneration Order**.

The Application is opposed through Grounds of Opposition dated the **9th September 2021**, and filed in Court on **13th September 2021**. In the said grounds of opposition, the Respondents contend that the Court lacks jurisdiction to deal, with the matter. That the application offends the provisions of Regulation 11 of the **Advocates Act** to wit, a Reference be filed within **14 days** from the date of Ruling. The Respondents further contend that the application does not meet the threshold for grant of the orders sought. The Respondents aver that this Court can only interfere with the decisions of the **taxing master** if there is an error in principle or if the award is low or high.

The Application was canvassed by way of written submissions. The Applicant filed its written submissions dated **8th November 2021**, through the **Law Firm of J. N Muthia & Co. Advocates**. The Applicant submitted that the application was filed within the required timelines. That the Applicant was issued with a copy of the Ruling on **25th June 2021**, and filed the Application on **9th July 2021**, which was within the timelines. The Applicant asked the Court to exercise its discretion and excuse the delay if any, and invited the Court to the decision of **Peter Kamau Ikigu Case** and **Governors Balloon Safaris Limited Case**.

On setting aside, the Applicant submitted that the taxing master erred in principle by considering that the value of the subject matter of the suit is zero based on the Plaintiff. That the Court ought to have been guided by the submissions and the judgment of the trial Court, which indicated the

value of the subject matter. That the taxing master applies his or her discretion only if there is no material as to the subject matter from the pleadings, judgment or settlement as was settled in **Joreth Limited Case**. In the end the Applicant urged the Court to be guided by the **KANU National Elections Board Case**, on the relevant factors to guide in assessment.

The Respondents also filed their written submissions dated **18th October 2021**, through the **Law Firm of Kamau Kuria & Company Advocates**. The Respondents submitted that the application is premature and should be dismissed with costs. That it offends the requirements that the Reference should be filed within **14 days** of the Ruling. The Ruling according to the Respondents was delivered on **14th June, 2021**, and the application ought therefore to have been filed on or before **28th June, 2021**. To buttress this, the Respondents relied on the case of **Twiga Motors Limited vs. Dalmas Otieno Onyango 2015 eKLR**. The Respondents relied on litany of cases that elaborate on the procedure to be followed before a reference can be filed which the Applicant ought to have followed but eschewed.

In addition, the Respondents submitted that the taxing master took into consideration the factors for determining a reasonable sum as was stated by the Court in **Twiga Case (supra)**. Therefore, the Applicant has not established any basis to warrant the setting aside of the decision of the taxing master. Further, that the decision of the taxing master can only be interfered with if the same is likely to cause injustice for being high or low.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is **whether the Application is merited**.

The Applicant was awarded costs in **Murang'a E.L.C. No. 204 of 2017**, which culminated to the Bill of Costs dated **14th December, 2020**. The Bill of Costs was drawn at **Kshs. 1,304,106.00/=**, but the taxing master did tax off the bill to **Kshs. 172,950.33**, as is evident by the annexed Certificate of Costs dated **29th June 2021**. The Applicant being dissatisfied with the decision of the taxing master (*hereinafter referred to as TM*) appealed against the decision solely on item 1 and 2 as taxed.

Item 1, on instruction fees, the Applicant had made a proposition of **Kshs. 867,500/=**, but the taxing master taxed off **Kshs. 818,500/=** and awarded **Kshs. 49,000/=**. Item 2 stems from the award in item one and the Applicant had taxed it at **Kshs. 289,166/=** but the Court Taxing Master taxed off **Kshs. 272,832.67/=** and awarded **Kshs. 16,333.33/=**. The Applicant contends that the taxing master applied the provisions of **Advocates Remuneration Order of 2006**, in place of the 2014 one.

Before looking at the merits of the application, the Respondents aver that this Court lacks the requisite jurisdiction to determine the case. The jurisdiction of this Court flows from **Article 162 (2)(b)** of the **Constitution**, as well as **Section 13** of the **Environment & Land Court Act**. **Section 13 (7)** provides:

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

- (a) Interim or permanent preservation orders including injunctions;
- (b) Prerogative orders;
- (c) **Award of damages;**
- (d) Compensation;
- (e) Specific performance;
- (g) Restitution;
- (h) Declaration; or
- (i) **Costs.**

Therefore, this Court finds that it has the jurisdiction to determine issues on costs and award of damages, as provided by the foregoing sub-section as read with sub-section 4. The impugned Ruling was delivered on **14th June, 2021**, and counsel for the 5th Respondents were present, a Certificate of Costs was issued on **29th June, 2021**. The instant application was filed on **7th July, 2021, (23) twenty three days**, after the Ruling.

Rule 11 of the **Advocates Remuneration Order**, makes provision for the procedure that an aggrieved party must adopt. It provides:

(1) Should any party object to the decision of the taxing officer, he may within fourteen 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 fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the 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 subsection (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 to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

The procedure contemplated above is;

- a. The aggrieved party issues a notice within 14 days on the items objected
- b. The Taxing Officer shall forthwith give reasons for his decision
- c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
- d. If dissatisfied with the High Court, the objector shall with leave of Court appeal to the Court of Appeal.

The procedure as provided above carries a mandatory requirement. Undoubtedly, the Applicant did not comply, and what stands out in the Applicant's submissions is that the Ruling of the taxing master in itself gave reasons for the taxed items. It is trite that rules of procedure are

handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. (*See Nairobi Civ No. 810 of 2001 Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR*)

Article 159(2) (d) of the Constitution and the Oxygen principles as drafted were meant to cure technicalities in the process of administration of justice. Even so, in agreeing with the dictum of Kiage J in *Nairobi CoA Application No. 228 of 2013, Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*, the learned judge held:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all Courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

The Court notes that no plausible reasons have been advanced by the Applicant for non-compliance, save for the ideology that the Ruling gave reasons for the taxation. The Court of Appeal in *Nairobi CoA Appeal No. 199 of 2002 Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR*, held that the purpose of filing a References is for expeditious disposal of cases and if notices as required by procedure are vague, the same defeats the purpose of procedure.

A perusal of the ruling shows that the taxing master only gave reasons for concluding that the value of the subject matter was zero, **“I note that the prayers sought in the Plaint did not enumerate any value of the said property...”** Save for concluding that the Remuneration Order makes provision for **Kshs. 49,000/=**, no other reason was advanced by the Taxing Master for awarding the amount.

When the value of the subject matter cannot be ascertained, the Taxing Master is by law granted the discretion to assess instruction fees. The Taxing Master will consider the basic instruction fee as required by the Statute, and then decide on whether to increase or reduce it, and this is discretionary. In deciding so the Taxing Master will be guided by the relevant factors as was set out in *and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92*. The Court held **“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”** Whether the Court took into consideration the foregoing would perhaps have become evident had an objections been lodged as required by law.

On timelines, the Applicant had **14 days** after delivery of the ruling to file the present Reference. He submitted that he was supplied with a copy of the ruling on **25th June, 2021**. The ruling indicates that the same was certified on the said date, at the delivery of the same, counsel for the Applicant was present. He had the obligation to request for certified copy of the ruling then. No material evidence has been placed before this Court as to the attempts made to obtain certified copy of the ruling. The decision to file a Reference was in the Court's considered opinion an afterthought and the Applicant is economical with information as to when a request for certified copy of ruling was made.

No reason for the delay, was advanced and delay even for a day is delay. (*See Supreme Court Civ Application No. 4 of 2020 Charles Karathe Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others [2020] eKLR*)

If this Court was to pardon the delay and excuse the non-filing of Reference and look into the substantive application, the Applicant is

seeking for an order that the ruling be set aside. The principles of setting aside the decisions of taxing master were well established in the cases of *PremchandRaichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162*, *First American Bank of Kenya vs Shah and Others (2002) EA 64* and *Joreth Ltd vs Kigano and Associates (2002) 1 EA 92*. These includes

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the Court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

It is the Applicant's contention that the Taxing Master failed to consider their submissions in order to establish the value of the subject matter. That her conclusion that the Applicant was engaged in a speculative process was erroneous. Further that the Taxing Master ought to have applied the provisions of the **2014 Remuneration Order** and not the 2006 one.

The Taxing Master has to consider the following factors as settled in *First American Bank of Kenya (supra)* the nature and 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

directions by the trial judge.

The Applicant has an issue with the instruction fees and the getting up fees as drawn. It is trite that instruction fees are charged from the value of the subject matter. However, there are suits where the value cannot be drawn from pleadings or judgment.

Having perused the Application, it is evident that this was not a monetary claim. To ascertain the value, the Taxing Master would be guided by the pleadings or judgment failure to which she would consider the above mentioned factors. The taxing master in her Ruling noted that the Plaintiff did not indicate the value of the subject matter, and this has not been rebutted by the Applicant, save to state that the value was contained in his submissions. This begs the question whether submissions are pleadings?

In answering the foregoing question in the negative, reliance is placed in *Nairobi Civ Appeal No. 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR* where the Court held;

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondents. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained”

This does not mean that the Court will ignore the submissions, what the Court does is to look at their relevance and take them into consideration, but the Court is not bound by the said submissions. (*See Mombasa Civ Appeal No. 68 of 2012 Imperial Bank Limited v Bakari Juma Bechpende [2016] eKLR*)

The Taxing Master was under no obligation to be bound by the said written submissions, as she considered that was a speculative amount. The Applicant has not led this Court into the circumstances he took into consideration in arriving at the sum suggested. On this ground, the Court upholds the decision of the **Taxing Master** in concluding that there was no value of the subject matter.

On Application of **2006 Remuneration Order**, this Court notes that the suit subject to taxation was **Murang'a E.L.C No. 204 of 2017**. From the Bill of Costs attached, the date of instructions is **11th June 2013**, and there is no way the **2014 Remuneration Order** would be applied.

The Applicant has not demonstrated that this Application meets the principles for setting aside the decision of the Taxing Master.

Consequently, the Court finds the Applicant's Chamber Summons Application dated **7th July, 2021**, is **not merited** and the same is dismissed entirely with cost to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF NOVEMBER, 2021

L. GACHERU

JUDGE

In the presence of;

Alex Mugo - Court Assistant

M/s Murira H/B Mbuthia for the Applicant

Mr. Elemene HB Mr. Munyori for the Respondents

L. GACHERU

JUDGE