



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. CAUSE NO. 168 OF 2019

THE UNIVERSITY OF NAIROBI.....APPLICANT

VERSUS

KTK ADVOCATES.....RESPONDENT

JUDGMENT

Background:

1. Sometimes in 2011, a company known Aberdares Engineering Contractors Limited filed a suit against the Applicant herein before this court namely, ELC Suit No. 330 of 2011, Aberdares Engineering Contractors Limited v The University of Nairobi (hereinafter referred to as “the first suit”). In the first suit Aberdares Engineering Contractors Limited (hereinafter referred to only as “Aberdares”) sought an order that the Applicant vacates all that parcel of land known as L.R No.1/5514 Nairobi (hereinafter referred to as “the suit property”) within such time as the court may consider fit and in the alternative an order that Aberdares be allowed to evict the Applicant from the suit property. Aberdares also sought mesne profits, costs and interest.
2. The Applicant instructed the Respondent to act for it in the first suit. The Respondent entered appearance and filed a statement of defence on behalf of the Applicant denying Aberdares claim. In 2016 while the first suit was pending hearing, Ethics and Anti-Corruption Commission (hereinafter referred to only as “EACC”) filed a suit against Aberdares also before this court in ELC Suit No. 955 of 2016, Ethics and Anti-Corruption Commission v Aberdares Engineering Contractors Limited (hereinafter referred to as “the second suit”). In the second suit, EACC sought a declaration that Grant No. 112612 that had been issued to Aberdares in respect of the suit property was null and void and an order cancelling the same. EACC also sought an injunction restraining Aberdares from interfering with the exclusive ownership of the suit property by the Applicant and the costs of the suit. In its suit, EACC claimed that Aberdares acquired the suit property fraudulently.
3. The first and second suits were consolidated on 17th July, 2018 for hearing together with the second suit as the lead file. The consolidated suits never proceeded to hearing. On 18th January, 2019, the parties filed a consent in court settling the consolidated suits. The terms of the settlement were that; Aberdares abandoned all the claims that it had over the suit property, all records at the Land Registry bearing the name of Aberdares as the owner of the suit property were to be expunged from the record and/or cancelled, the Applicant was recognized as the owner of the suit property and each party was to bear its own costs of the consolidated suits.
4. On 30th September, 2019, the Respondent filed its Advocate-Client Bill of Costs for taxation in respect of the services that it rendered to the Applicant in the consolidated suits. The Bill of Costs that was dated 30th September, 2019 was drawn in the sum of Kshs. 164, 268, 177.10. The Respondent claimed Kshs. 71,020,000/- as instruction fees and Kshs. 23,073,333.33/- as getting up fees. Several items in the Bill of Costs were contested notably the instruction fees and getting up fees. The parties made written submissions before the taxing officer. In a ruling dated 6th July, 2020, the taxing officer (Hon. I.N. Barasa) taxed the Respondents Bill of Costs at Kshs. 49,127,929.08. The taxing officer taxed the instruction fees at Kshs. 21,000,000/- and getting up fees at Kshs. 7,000,000/- being a third of the instruction fees. The other contested items in the Bill of Costs were also taxed accordingly.
5. On 6th July, 2020, the Applicant’s advocates wrote to the taxing officer giving notice of the Applicant’s objection to the taxation of the entire Bill of Costs. In the same letter, the Applicant’s advocates requested for the reasons for the taxation. The request was made pursuant to Rule 11 (1) and (2) of the Advocates Remuneration Order. Through a letter dated 15th July, 2020, the taxing officer (hereinafter referred to as “the taxing master”) informed the Applicant’s advocates that her reasons for the taxation were contained in the body of her ruling dated 6th July, 2020.
6. On 17th July, 2020 the Applicant brought an application by way of Chamber Summons dated 16th July, 2020 seeking orders that; the ruling and orders made by the taxing master on 6th July, 2020 in respect of the items on instruction fees and getting up fees be set aside and that the court be pleased to issue appropriate directions as to the re-taxation of the said items. The Applicant also prayed for the costs of the application. The application was supported by the affidavit of Prof. Stephen G.Kiama sworn on 16th July, 2020.

7. The Applicant's application was opposed by the Respondent through a replying affidavit sworn by Donald B. Kipkorir on 26th November, 2020 and filed on the same date. The Applicant filed a further affidavit in support of the application sworn by Caroline Nyaga on 25th March, 2021.

8. The parties were directed to file written submissions which they highlighted orally. The Applicant filed submissions and further submissions dated 3rd February, 2021 and 25th March, 2021 respectively. The Respondent filed its submissions on 18th February, 2021.

Applicant's case:

9. The Applicant's application was brought on the following grounds;

i. That the taxing master erred in law by awarding the Respondent Kshs. 21,000,000/- as instruction fees and Kshs. 7,000,000/- as getting up fees and in taxing the Respondent's Bill of Costs at Kshs. 49,127,929.08/- which was exorbitant and not in accord with the legal services that were rendered by the Respondent.

ii. That the taxing master erred in law and fact because in awarding the instruction fees, she stated that the pleadings on the court record did not reveal the value of the subject matter and in the absence of the same, the basic instruction fee would be Kshs. 8,400/- as set out in Schedule VI rule (I) of the Advocates Remuneration Order. The Applicant averred that having regard to the said basic instruction fees the award Kshs. 21,000,000/- was excessive and amounted to abuse of discretion.

iii. That the taxing master failed to exercise her discretion judicially and thereby awarded the Respondent a manifestly excessive amount as instruction fees justifying an inference that the decision was based on an error of law and fact.

iv. That the taxing master's decision was based on an error of principle in that in awarding the Respondent the excessive and unjustified sum of Kshs. 21,000,000/- as instruction fees, the taxing master failed to consider relevant factors such as ; the fact that the claim in the first suit was straight forward seeking ordinary order of eviction with a two paged plaint and two paged defence prepared by Respondent with documents relied on being an indenture, deed of surrender and a few correspondences with no bundle of documents to be studied; the work involved did not go beyond the ordinary work of an advocate and the suit did not proceed for trial as it was settled by consent through the efforts of EACC.

v. That the taxing master committed an error of principle in that she failed to appreciate the rule which regulated the legal services rendered by Respondent and to establish first the basic instruction fees. The Applicant contended that by not appreciating the basic instruction fees, the awarded sum was taken from an abstract and the same had no relation to the Advocates Remuneration Order.

vi. That the instruction fees awarded to the respondent in the sum of Kshs. 21,000,000/- was excessive and unjustified and the same has no nexus to the work that was done by the Respondent hence this court is entitled to interfere with the taxing master's decision.

vii. That the reasons for the taxation and the reference were filed within time.

Respondent's case:

10. In its replying affidavit, the Respondent contended that the Applicant's reference does not comply with the law as set out in Rule 11 of the Advocates (Remuneration) Order.

11. The Respondent contended that the Applicant's reference was filed three (3) months after the ruling by the taxing master without explanation for the delay.

12. The Respondent contended further that the Applicant's reference is couched as an appeal rather than a reference.

13. The Respondent contended that the Applicant has misunderstood, misapprehended and does not appreciate the law relating to references.

14. The Respondent contended that the application seeks the High Court to supplant the role of the taxing master.

15. The Respondent contended that the reference does not meet the legal threshold.

Submissions:

The Applicant's submissions:

16. In its written submissions, the Applicant argued that the taxing master failed to exercise her discretion judiciously thereby awarding the Respondent a sum that was excessive on account of instruction fees. The Applicant submitted that where the value of the subject matter cannot be ascertained from the pleadings or settlement which was the case here as was found by the taxing master, the taxing master had a discretion to assess instruction fees. The Applicant submitted that in making that assessment, the taxing master had to take into account factors such as the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and any direction by the trial court. In support of this submission, the Applicant relied on Joreth Limited v Kigano & Associates, Court of Appeal Civil Appeal No. 66 of 1999.

17. The Applicant submitted further that the discretion exercised by the taxing master in assessing the instruction fees must be exercised judiciously and not in a capricious manner. In support of this submission, the Applicant relied on Peter Muthoka & Another v Ochieng & 3 others [2019] eKLR. The Applicant submitted that it had demonstrated that the taxing master failed to exercise her discretion judiciously as a result of which she awarded the Respondent excessive and unjustified amount as instruction fees.

18. The Applicant submitted further that the taxing master committed an error of principle in failing to first set out the basic instruction fees due to the Respondent before proceeding to consider whether to increase it or reduce it taking into account the factors that have been highlighted above. The Applicant submitted that since the value of the suit property in the first suit could not be ascertained from the pleadings and the settlement, the basic instruction fees that was payable to the Respondent under Schedule VI rule (I) of the Advocates Remuneration Order, 2009 was Kshs. 8,400/-.

19. The Applicant submitted that the taxing master should have first indicated the basic instruction fees after which she was to give reasons why that basic instruction fees was to be increased to Kshs. 21,000,000/- that she awarded to the Respondent. The Applicant submitted that the taxing master committed an error of principle in her failure to identify or establish the basic instruction fees that was payable to the Respondent before making a decision to award the Respondent Kshs. 21,000,000/- as instruction fees. The Applicant submitted that since the taxing officer did not first ascertain the basic instruction fees payable, the sum of Kshs. 21,000,000/- that was awarded to the Respondent was taken from an abstract and had no relation whatsoever to the Advocates Remuneration Order. In support of these submissions, the Applicant relied on Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. [2014] eKLR and Manyonge Wanyama & Associates v County Government of Kirinyaga [2019] eKLR.

20. The Applicant also submitted that the taxing master committed an error of principle in failing to consider relevant factors in her assessment of the instruction fees such as the care and labour employed in the prosecution of the suit, the fact that the work involved did not go beyond the ordinary work of counsel and the fact that the suit did not proceed to trial. The Applicant submitted that if the taxing master had taken into account the foregoing factors, she would not have awarded the Respondent Kshs. 21,000,000/- as instruction fees. The Applicant submitted that the said sum of Kshs. 21,000,000/- that was awarded to the Respondent had no nexus to the work that was carried out by the Respondent.

21. The Applicant submitted that although the taxing master stated in her ruling that she had noted the care and labour employed by the Respondent in the prosecution of the suit, she did not set out the said care and labour allegedly rendered by the Respondent that would have justified an award of Kshs. 21,000,000/- as instruction fees. The Applicant submitted that by failing to set out the care and labour that was allegedly employed by the Respondent, the said award of Kshs. 21,000,000/- was unconscionable and without legal basis. The Applicant submitted that the work that was entrusted to the Respondent was nothing out of the ordinary and as such would not have justified a premium on costs payable.

22. In support of these submissions, the Applicant cited Republic v Minister of Agriculture & 2 others, Ex parte Samuel Muchiri W Njuguna & 6 others [2006] eKLR where 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.”

23. The Applicant also relied on Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board, Civil Appeal No. 220 of 2004, Akhtar Shahid Butt & Another v David Kinusu Sifuna T/A Sifuna & Company Advocates [2009] eKLR and Kanu National Elections Board & 2 Others v Salah Yakub Farah [2018] eKLR.

24. The Applicant submitted that this is an appropriate case in which the court should interfere with the decision of the taxing master on instruction fees and getting up fees the applicant having proved that the taxing master’s decision was based on error of principle and that the fees awarded to the Respondent was manifestly excessive. In support of this submission, the Applicant relied on Eastland Hotel Limited v Wafula Simiyu & Co. Advocates [2014] eKLR.

The Respondent’s submissions:

25. In its written submissions, the Respondent raised a technical issue on the competency of the reference. However, the point was dropped by the Respondent during the highlighting of submissions. I will therefore not consider it.

26. On the merit of the application, the Respondent submitted that the taxing master did not commit an error of principle and as such there is no basis upon which this court can interfere with her decision. In support of this submission, the Respondent relied on Republic v Kenyatta University & Another Ex parte Wellington Kihato Wamburu [2018] eKLR in which the court cited with approval the Ugandan Supreme Court case of Bank of Uganda v Banco Arabe Espanol SC Civil Application No. 23 of 1999, where the court stated that:

“Save in exceptional circumstances, 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 with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

On the same point, the Respondent also cited Joreth Ltd. v Kigano & Associates(supra), First American Bank of Kenya v Shah and others [2002] E.A 64 at 69.

27. The Respondent submitted further that the principles of taxation were set out in Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] E.A 162 as follows;

- (a) Costs should not be allowed to rise to a level as to confine access to justice to the wealthy,**
- (b) A successful litigant ought to be fairly reimbursed for the cost he has had to incur,**
- (c) The general level of remuneration of Advocates must be such as to attract recruits to the profession and**
- (d) So far as practicable there should be consistency in the awards made.**

28. In response to the Applicant's contention that the taxing master failed to exercise her discretion judiciously, the Respondent submitted that the taxing master did in fact take into consideration the amount of work that was involved in preparing the suit for hearing together with the difficulty and importance of the matter in arriving at the instruction fees of Kshs. 21,000,000/-. The Respondent submitted that the first suit was not an ordinary suit. The Respondent submitted that ordinary suits do not take 8 years to be concluded and do not attract public interest. The Respondent submitted that the fact that the suit did not proceed to hearing had nothing to do with its complexity.

29. The Respondent submitted that the Applicant was reducing taxation to a mathematical exercise and that the instruction fees that was awarded by the taxing master was reasonable and that the same was arrived at after careful consideration of all the factors surrounding the case. In support this submission the Respondent cited B. Mbai & Associates Advocates v Clerk Kiambu County Assembly & Another [2017] eKLR, Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd.(supra), Republic v Ministry of Agriculture & 2 others Ex pare Muchiri W' njuguna & 6 Others (supra), Paul Ssemogerere & Olum v Attorney General, Civil Application No.5 of 2001 and Amuga & Co. Advocates v Joyce Nzisa & 4 others [2015] eKLR.

30. In conclusion, the Respondent urged the court to dismiss the reference since the taxing master applied the principles of taxation appropriately and the Applicant has failed to demonstrate any error of principle on the part of the taxing master.

Submissions in reply:

31. The Applicant filed a reply to the Respondent's submissions in which the Applicant emphasized that the taxing master ought to have identified and listed the elements of complexity of the suit that distinguished it from an ordinary suit. The Applicant submitted further that the time taken in determining a suit is not relevant in assessing instruction fees. The Applicant submitted that the taxing master increased the basic instruction fee 2500 times without setting the reasons for the increment. In support of this submission, the Applicant cited among others, Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Limited & 2 Others [2018]eKLR.

32. On the Respondent's contention that its reference is incompetent and devoid of legal and factual basis, the Applicant submitted that it requested for the reasons for taxation on 6th July, 2020 soon after the ruling was delivered and that the taxing officer did not respond to that request. The Applicant submitted that it obtained a copy of the ruling by the taxing officer which contained the reasons for the ruling on 15th July, 2020 and proceeded to file the reference on 17th July, 2020. The Applicant submitted that since the reasons for the taxation were in the ruling, it was not necessary to ask for other reasons. The Applicant submitted that the reference was filed within time. As I mentioned earlier in the ruling, the Respondent dropped its technical objection to the reference.

Highlighting of submissions:

33. The advocates for the parties highlighted their respective submissions on 21st April, 2021 during which they reiterated the contents of their written submissions and the authorities cited in support thereof.

Determination:

34. I have considered the reference together with the affidavits filed in support thereof. I have also considered the submissions filed by the advocates for the parties and the authorities cited in support thereof. In my view there is only one issue arising for determination in this reference namely; whether valid grounds have been put forward to warrant interference by the court with the decision of the taxing master made on 6th July, 2020.

35. In Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. (supra), the court stated that:

“The circumstances under which a judge of the High Court 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 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;

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 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;

3. 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 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.”

36. In the South African case of, Visser v Gubb 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in KTK Advocates v Baringo County Government [2017] eKLR, the court stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

37. The reference before the court is in respect of only two items; the instruction fees and getting up fees. Getting up fees where it is payable is a fraction of the instruction fees. The main contention therefore is on the instruction fees. It is common ground that instruction fees is to be determined from the value of the subject matter of a suit. It is also common ground that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement. It is also common ground that where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement, the taxing officer has a discretion to assess the instruction fees taking into account various factors. In this case, it is not in dispute that the value of the subject matter could not be ascertained from the pleadings or the consent that the parties entered into while settling the suit. The taxing master therefore had the discretion to assess the instruction fees. In her ruling the taxing master stated as follows: *“As the pleadings on the court record and the settlement do not reveal the value of L.R No. 1/5514 also known as L.R No. 1/5511, this is a bill that calls for my discretion in assessing the instruction fees due to the applicant.”* That finding by the taxing master has not been challenged.

38. What I need to determine is whether the taxing master committed any error in the exercise of her discretion. In Joreth v Kigano & Associates(supra) that was cited by both parties the Court of Appeal stated as follows:

“We would at this stage point out that the value of the subject matter of a suit 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 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”.

39. Also in Eastland Hotel Limited v Wafula Simiyu & Co. Advocates [2014] eKLR the Court of Appeal stated that:

“This Court’s decision in JORETH LIMITED v KIGANO & ASSOCIATES (supra) which was cited to us by both the appellants and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take 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 and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.

40. It is very clear from the above decisions what factors the taxing master was to consider while exercising her discretion in assessing the instruction fees. In her ruling, the taxing master stated as follows before awarding the Respondent a sum of Kshs. 21,000,000/- as instruction fees:

“I have considered the property itself. L.R No. 1/5514 also known as L.R No. 1/5511 is situated in Kilimani Area of Nairobi County and comprises 4.97 acres or thereabouts. The University stated that it purchased the property in 1964 for consideration. The value of land appreciates with time and there is no doubt that the value of L.R No. 1/5514 has appreciated 55 years later when the dispute

between Aberdares and the University was settled. Two suits were filed in relation to this property and were later consolidated. The dispute over the property was in court for a period of 8 years. I have noted the care and labour employed by the applicant in the prosecution of the suit. I have also taken into consideration the interest of both Aberdares and the University in the suit property, interest that brought in EACC into the dispute, with a valuation of the property and the interest that generated the media scrutiny around the dispute. Having taken all these factors into consideration, I am persuaded that an instruction fees of Kshs. 21,000,000/- is fair and reasonable.”

41. There is no doubt from the above excerpt from the ruling of the taxing master that she did consider several factors before reaching a decision as to what she considered a fair instruction fees. The Applicant’s complaint is not that the taxing master did not consider any factor in reaching her decision. The complaint is that she started her consideration of the factors that she considered from a wrong premise and as such she could not arrive at a correct decision. The Applicant has also contended that the taxing master took into account factors that she ought not to have taken into account and failed to take into account factors that she ought to have considered. The other complaint is that of the relevant factors that the taxing master is said to have taken into account, there is no evidence of what was actually considered by the taxing master. In other words, the taxing master did not give the particulars of what she considered. The Applicant contended also that even if all relevant factors were considered, the award of Kshs. 21,000,000/- was manifestly excessive.

42. Advocates’ cost is assessed under the Advocates (Remuneration) Order. Schedule VI of the Advocates Remuneration Order(ARO) provides for minimum fees payable to advocates for contentious work. I am in agreement with the contention by the Applicant that the taxing master’s discretion was on whether or not to increase the minimum instruction fees provided for in the ARO. It follows therefore that before considering whether or not the minimum instruction fees was to be increased, the taxing master had a duty to ascertain the basic minimum instruction fees provided for in the ARO. I am in agreement with the Applicant that without ascertaining the basic minimum instruction fees, the sum of Kshs. 21,000,000/- that was awarded to the Respondent as instruction fees was awarded in abstract. It was plucked from nowhere.

43. I am also in agreement with the Applicant that since the ARO gave the taxing master a discretion to increase or decrease the basic minimum fees and set out expressly what the taxing master was to consider while exercising that discretion, it was not enough for the taxing master to state generally that she has considered this and that. If it was the nature and importance of the matter that influenced the adjustment of the instruction fees upwards, the taxing master should have stated clearly the nature of the dispute between the parties and how it was important to the parties. If the increase in the basic minimum fees was on account of care and labour employed, there was a duty to set out that care and labour to justify the increment. Although these factors that are said to have been considered by the taxing master were relevant, it is difficult to see how they influenced the discretion of the taxing master to increase the instruction fees. There are no details of the care and labour that was employed by the Respondent beyond the ordinary services rendered by advocates. There are also no details as to what was unique in the suit in which the Respondent acted for the Applicant in which the dispute was over ownership of land. I am also in agreement with the Applicant that some of the factors that were considered by the taxing master were irrelevant. The fact that a suit had remained unprosecuted in court for 8 years was not a relevant factor to consider while assessing instruction fees. The same applies to the interest that the suit generated in the media.

44. As rightly submitted by the Applicant, the basic instruction fees that the Respondent was entitled to under Schedule VI Part A (I) of the Advocates (Remuneration) Order 2006 was Kshs. 8,400/- which the taxing master had a discretion to increase. I am in agreement with the Applicant that having regard this minimum instruction fees and taking all factors into account, an award of Kshs. 21,000,000/- was manifestly excessive.

45. Due to the foregoing, I am satisfied that the taxing master did not exercise her discretion judiciously with regard to the instruction fees and that her decision was based on an error of principle. It was common ground that the first suit in which the Respondent represented the Applicant was fixed for hearing on several occasions although the hearing did not take off. I am satisfied that the Respondent was entitled to getting up fees. The error that was committed by the taxing master in relation thereto was only with regard to its computation since it is a fraction of the instruction fees.

46. In the final analysis, the Applicant has made out a case for this court to interfere with the decision of the taxing master with regard to instruction fees and getting up fees. The Applicant urged the court to set aside the decision of the taxing master on the two items and give directions as to the re-taxation of the same. Having found that the taxing master committed an error of principle, I have the discretion to either remit the bill to the taxing master with appropriate direction on how it should be taxed or to proceed and tax the same. In Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board[2005]1KLR528 the court stated as follows:

“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D’Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243.”

47. Having regard to the time the dispute between the parties over fees has taken to be resolved and the fact that only the taxation of two items in the bill was contested, the main one being the instruction fees, I am of the view that it would be in the interest of justice for the court to exercise its discretion in favour of taxing the bill instead of remitting the bill to the taxing master for the taxation of these items. In First American Bank of Kenya Ltd v Gulab P Shah & Others (2002)1 E.A. 61 the court stated that:

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

48. Having perused the pleadings filed in the consolidated cases, I am in agreement with the Applicant that the consolidated cases were ordinary disputes over ownership of land. I am however in agreement with the taxing master that the dispute was over a prime parcel of land in the City of Nairobi measuring 4.7 acres. There was therefore so much at stake in the dispute for the Applicant. I have noted that before the

taxing master, the Applicant had submitted that a sum of Kshs. 750,000/- would be adequate remuneration for the Respondent as instruction fees. Taking into account the foregoing factors and the fact that the basic minimum instruction fees is Kshs. 8,400/-. I will tax the instruction fees at Kshs. 6,000,000/-. The getting up fees being a third of that amount is taxed at Kshs. 2,000,000/-.

49. Conclusion:

In conclusion, the Applicant's application dated 16th July, 2020 is allowed on the following terms;

1. The decision of the taxing master made on 6th July, 2020 in respect of instruction fees and getting up fees (items 1 and 2) in the bill of costs dated 30th September, 2019 is set aside and in place thereof, the said items are taxed as follows;

(i) Item 1 is taxed at Kshs. 6,000,000/-. A sum of Kshs. 65,020,000/- is taxed off.

(ii) Item 2 is taxed at Kshs. 2,000,000/-. Kshs. 21,073,333.33/- is taxed off.

2. The other items in the bill shall remain as taxed by the taxing master.

3. Each party shall bear its own costs of the reference.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021

S. OKONG'O

JUDGE

JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Ms. Nyaga for the Applicant

Mr. Kipkorir for the Respondent

Ms. C. Nyokabi - Court Assistant