



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN SIAYA

MISCELLANEOUS APPLICATION NUMBER 10 OF 2021

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER [2014]

IN THE MATTER OF THE REFERENCE AGAINST ASSESSMENT OF COSTS

BETWEEN

WILMINA NEKESA.....1st APPLICANT

WILLIAM ONYANGO MUTHACH.....2nd APPLICANT

VERSUS

AMOS OMONDI MBALA.....RESPONDENT

RULING

Introduction

1. A background of the suit that gave rise to this reference is of importance. The respondent herein filed a suit in **Maseno ELC No.2 of 2019** praying for a permanent injunction restraining the applicants from trespassing, building, constructing or in any way interfering with his land parcel number **NORTH UGENYA/UYUNDO/296 (the suit property)**. Upon the applicants raising an objection on the jurisdiction of the court, the respondents by a notice dated 22/09/2019 withdrew the suit. The value of the subject matter in the suit was never disclosed by either of the parties.

2. Upon withdrawal of the suit, the applicants filed a bill of costs dated 14/11/2019 which was taxed on 19/03/2020 at Ksh 176,625/-. It is common ground that this taxation was set aside by the court. Subsequently, the applicants filed another party and party bill of costs dated 30/09/2021 which was taxed by the Hon. taxing officer on 23/02/2021 at Kshs.15,525/=. This taxation is the subject of this ruling.

3. Aggrieved and dissatisfied by the decision of the taxing officer, the applicants filed the instant chamber summons dated 9/3/2021 within the provisions of **Paragraph 11** of the **Advocates Remuneration Order**. The reference had earlier been filed in the ELC court in Kisumu as **ELC Misc App.No. 5 of 2021** but was subsequently transferred to Siaya ELC for hearing and determination.

4. The chamber summons seeks the following verbatim reliefs:

a) Spent

b) The ruling of Hon. C.N.C. Oruo SRM on the assessment of the applicants' party and party bill of costs that was delivered on 23/02/2021 be set aside and it be substituted with an order that items 1, 2 and 7 of the applicant's bill of costs as drawn or at such quantum as may be respectively set thereon by the superior court.

c) That in the alternative to prayer (b) above the ruling of Hon. C.N.C. Oruo SRM on the assessment of costs that was delivered on 23/2/2021 be set aside and the applicants party and party bill of costs dated 30/9/2021 be placed before a different magistrate for a fresh assessment.

d) That the cost of the reference filed herein be met by the respondent.

Applicants' case

5. The chamber summons is based on the grounds on the face of the application and is reiterated in the supporting affidavit of the 2nd applicant dated 8/03/2021 which are; (i) that the learned magistrate misdirected himself by failing to take into account instruction fees, (ii) that the learned magistrate misdirected himself by disregarding the applicants' assessment on the value of the land, (iii) that the learned magistrate failed to take into account the nature and importance of the case, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances and, (iv) that the learned magistrate erred in law and fact by failing to award items on expenses without due consideration of relevant factors. He urged the court to allow the chamber summons as prayed.

Respondent's case

6. The Respondents filed grounds of opposition dated 20/3/2021. The grounds stated among others; (i) that the Hon. taxing officer was within the law in his assessment of the bill of costs because the value of the subject matter was neither pleaded nor apparent from the pleadings, (ii) that the Hon. taxing officer did not err in the way he assessed the costs, (iii) that the Hon. taxing officer did not misdirect himself on matters of principle in the taxation or assessment of the instruction fees, (iv) the chamber summons is misconceived, bad in law, an abuse of the court process and contravenes the provisions of the **Advocates Remuneration Order** and, (v) based on the material placed before him, the Hon. taxing officer applied the correct legal principles in making the award.

The applicants' submissions

7. The applicants filed written submissions dated 30/6/ 2021. They contended that they were dissatisfied with the award made by Hon. taxing officer on items 1, 2 and 7 of the bill of costs. He contended that the Hon. taxing officer misdirected himself in failing to make an award on item 1 which was on instructions fees despite relevant guidelines and factors. He submitted that **Paragraph 2 of schedule 7** of the **Advocates Remuneration Order** was ignored by the taxing master and that the award of Kshs.15,525 was inordinately low and lastly, he argued that in assessing costs, the Hon. taxing officer erred in failing to award travel expenses. They placed reliance on the authority of **Belgo Holdings Ltd vs Robert Kotch Otachi & Another (2019) eKLR**.

The Respondent's submissions

8. The Respondent filed his written submissions dated 29/05/ 2021. He contended that the chamber summons was in contravention with **Order 11 (1) and (2)** of the **Advocates Remuneration Order** for failing to issue a notice in writing to the Hon. taxing officer within 14 days of his decision. On this contention he placed reliance on the authority of **Dally & Figgis v Karaturu Networks & another [2009] eKLR**. He contended that the bill of costs offended the provisions of **Order 25 rule 3** of the **Civil Procedure Rules**. On Item 1 on instruction fees, he submitted that he agreed with the decision of the Hon. taxing officer because the value of the subject matter was not discernible from the pleadings and that the Hon. taxing officer rightly so in his view, exercised his discretionary powers in disallowing this item. On this, he equally placed reliance on the case of **Belgo Holdings Ltd vs Robert Kotch Otachi & Another (2019) eKLR** among others. On items 2, 5 and 7, he contended that the taxing master rightfully disallowed these items because receipts were not adduced and, in any case, **Schedule 7 Rule 10 (ii)** of the **Advocates Remuneration Order** only allowed travelling and subsistence allowance for a process server. He urged the court to uphold the decision of the Hon. taxing officer.

Analysis and determination

9. Having carefully considered the applicants' chamber summons, supporting evidence, rival written submissions and caselaw stated therein, the court considers that these are the two issues falling for determination; (i) whether the reference is in contravention with **Paragraph 11** of the **Advocates Remuneration Order** and, (ii) whether the Hon. taxing officer properly directed himself in not awarding costs on items 1, 2 and 7 of the bill of costs. I will proceed to analyse the issues in a sequential manner.

10. The answer to the first issue of whether the reference is in contravention with **Paragraph 11(1) and (2)** of the **Advocates Remuneration Order** lies with understanding the legal framework and jurisprudence on this provision of law. The paragraph reads as follows;

“(1) Should any party object to the decision of the Hon. Taxing Officer, he may within fourteen days after the decision give notice in writing to the Hon. Taxing Officer of the items of taxation to which he objects.

(2) The Hon. 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”.

11. A plain reading of this provision of law implies that apart from delivering a ruling, a taxing officer has to give reasons for his decision once the requisite notice has been tendered to him within 14 days from the date of delivery of the ruling. Once the reasons are rendered, an objector in this case the aggrieved party, has to file his objection notice within 14 days. In this case, though the ruling and certificate of costs were delivered on 23/02/2021, the applicants bypassed the process of filing an objection notice and instead filed the instant chamber summons. The respondent has contended that the failure by the applicants to follow due process was fatal.

12. Is failing to adhere to due process fatal? It is the considered view of this court that it has to carry out substantive justice without the need to follow procedural technicalities and it would be foolhardy for a taxing officer to issue reasons for his decision which would be more or less a replication of his ruling. This court has carefully looked at the ruling of the taxing officer and it is quite obvious that the taxing officer gave reasons for his findings on items 1, 2 and 7. This position was upheld in the case **Ahmed Nassir –Vs- National Bank of Kenya Ltd [2006] E.A** his point was made thus: -

“Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the

date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

13. Ultimately, it is the finding of this court that the ruling dated 23/02/2021 contained sufficient reasons as to why the Hon. taxing officer refused to award costs to the applicants on items 1, 2 and 7 and therefore there was no need for the applicants to seek additional reasons within the auspices of **Paragraph 11(1) and (2) of the Advocates Remuneration Order.**

14. The 2nd issue is whether the Hon. taxing officer properly directed himself in not awarding costs on items 1, 2 and 7 of the bill of costs. Item 1 was on instructions to defend the suit while items 2 and 7 were on travel expenses.

15. It is settled law that the jurisdiction to tax bills of costs is vested in a taxing officer and a judge will not ordinarily interfere with the decision of a taxing officer unless the taxing officer fundamentally erred in principle in his assessment of costs. **(SEE Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR).**

16. The figure that was tendered to the taxing officer of Ksh 3,840,000/- by the applicants as the value of the suit property was in the view of this court rightfully rejected by the court because it was based on the applicants personal assessment. If the value of the suit property cannot be ascertained from the pleadings, judgment or settlement by the parties, what then guides a taxing officer in a situation such as this one? The judicial officer has to exercise his discretion judiciously and consider other factors such as the nature and importance of the matter, **complexity of the suit, the interest of the parties and the general conduct of the proceedings, difficultness of the suit and the urgency of the suit.**

17. **The applicants having not elected to file their bill of costs within the provisions of Paragraph 22 of the Advocates Remuneration Order, it therefore follows that the bill was filed within the auspices of Schedule 7 of the Advocates Remuneration Order. Rule 2 of this Order clothes a taxing officer with discretion to assess fees of between kshs. 20,000/- to 50,000/- in a suit where the value of the subject matter cannot be ascertained. The court was of a similar position in the case of First American Bank of Kenya Limited v Gulab P Shah & 2others [2002] eKLR quoted Thomas Arthur v Nyeri Electricity Underwriters [1961] E.A. 492 which that held that once instructions are taken and a defence is filed, the instruction fees are earned.**

It is therefore the finding of this court that the taxing officer erred in failing to award costs on item number 1.

18. **Having filed their bill within Schedule 7 of the Advocates Remuneration Order, the applicants were bound by this schedule. A look at schedule 7 demonstrates that travel expenses are only allowed for a process server within the provisions of Rule 10 thereof and the taxing officer had jurisdiction under Paragraph 74 of the Advocates Remuneration Order to request for vouchers for all expenses charged in the bill. It is the finding of this court that taxing officer erred in failing to assess costs on items 2 and 7.**

19. The upshot is that I find the applicants' chamber summons meritorious. I proceed to grant the disposal orders: -

a) The applicants' prayer (c) in the chamber summons dated 9/03/2021 is hereby granted.

b) Costs shall be in cause

Judgment delivered virtual court platform.

Dated, signed and delivered this 15th day of November 2021.

In the Presence of

No appearance for the applicants.

No appearance for the respondents

Court assistant Sarah Ooro

HON. A. Y. KOROSS

JUDGE

15/11/2021