



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 25 OF 2014

THE CO-OPERATIVE BANK OF KENYA LTD APPELLANT

VERSUS

JOSPHAT KIRIGIA ABURI RESPONDENT

RULING

1. By a reference dated **6.11.2020** the court is asked under **Rule 11 (1) & 2 of the Advocates Remuneration Order 2014** to set aside the Taxing Master's decision delivered on **9.10.2019** with regard to appellant's bill of costs dated **26.4.2019** and re-assess the fees due as per the presented bill.

2. The grounds upon which the application is made are:

- a) **The Taxing Master disregarded the weight of evidence on the record;**
- b) **Did not follow settled principles;**
- c) **Misdirected himself on the principles applicable regarding the subject matter and value of the suit;**
- d) **Went outside the law;**
- e) **Exceeded or abused his discretion and**
- f) **In the interest of justice the application ought to be allowed.**

3. The application is supported by an affidavit sworn by **Patrick Kimathi Muchena** on **6.11.2020** in which he states the bill was of **Kshs. 2,145,752** but was taxed at **Kshs. 122,780/=** reasons for taxation were given and which he has annexed as PKM1; that the Taxing Master elected to apply the scale for proposing or opposing an appeal rather than on the suit value; gave **Kshs.75,000/=** as instruction fees instead of the proposed **Kshs. 432,500/=** yet the subject value **L.R Ntima/Igoki/4279** if sold would have been detrimental to the appellant.

4. The summons is opposed through a replying affidavit sworn on **21.5.2021** by **Christine Murithi** who takes the view the value of the subject matter was never an issue in the appeal but in the primary suit; there was no valuation report over the property and the figure of Kshs. 20 million quoted had no basis but was imaginary. **Schedule 6 of Advocates Remuneration Order** was the applicable Section; the Taxing Master applied the relevant law and its principles in reaching a just taxation; costs should not be avenues of unjust enrichment especially through grossly exaggerated bills and lastly he who comes to equity must come with clean hands.

5. Parties filed written submissions dated 30.9.2021 and 4.10.2021 respectively.

6. The appellant relies on:

- a) **Joreth Ltd –vs- Kigano & Associates [2002] eKLR** on the proposition that the value of subject matter, nature and importance of the matter, interest of parties and general conduct of proceedings should be the guiding principles.
- b) **Kyalo Mbobu T/A Kyalo Mbobu & Associates Advocates –vs- Jacob Juma [2015] eKLR** on the proposition that if the subject matter value is not ascertainable a Taxing Master ought to use his discretion to assess such instructions as he considers just, as per **Schedule VIA (1) of the Advocates Remuneration Order.**

c) Kamunyori & Co. Advocates –vs- Development Bank of Kenya Ltd [2015] eKLR on the proposition that the failure to ascertain the subject matter and value is an error of principle in taxation.

7. The respondent had in the lower court sued the appellant to stop an intended auction sale over **Parcel No. Ntima/Igoki/4279** and for discharge of the liability thereof. After hearing the matter, the trial court found the respondent had discharged his obligations to the bank and hence the purported auction was declared premature.

8. The appellant opposed against the said decree issued on 4th July 2014 through a memorandum of appeal dated 31.8.2014. An application for stay of execution was also filed on 19.8.2014 leading to appointment of M/s Arimi Kimathi & Co. Advocates for the respondents who promptly filed a replying affidavit on 8.10.2018 and written submissions on 9.1.2015. A ruling was delivered on 19.3.2015 where stay was granted and a deposit of Kshs. 300,000/= ordered to be paid as security.

9. By an application dated 11.4.2016, M/s Arimi Advocates applied for hearing on priority basis. Similarly an application was also made dated 18.9.2017. The same was responded to by the appellant through a replying affidavit sworn on 10.11.2017. Later the appeal was canvassed by way of written submissions dated 8.2.2019. Eventually the appeal was dismissed by the court.

10. Aggrieved by the said judgment the appellant filed a notice of appeal to the Court of Appeal on 5.4.2019 and a stay of execution application leading to a ruling made on 25.4.2019 declining stay. Afterwards a bill was filed on 29.4.2019 and an objection by the respondent was subsequently filed on 13.6.2019 leading to the Taxing Master's ruling dated 9.10.2019.

11. On 11.1.2019 the appellant filed a notice of motion dated 23.1.2020 seeking for enlargement of time to file a reference since he got the ruling on 17.1.2020. The same was opposed through a replying affidavit sworn by Christin Mukami on 10.2.2020.

12. Parties wrote written submissions dated 20.7.2020 and 14.8.2020 respectively leading to a ruling dated 28.10.2020 granting leave to file the response out of time.

13. It is not in dispute the appeal was dismissed for non-compliance on 27.3.2019 leading to notice of appeal to the Court of Appeal.

14. Given the protracted legal battle herein, it is clear the value, importance and interest, the appellant had attached to this matter and its reputation as a financial institution. All these are factors which ought to have been considered in assessing the instruction fees. It does not appear if the Taxing Master considered all those parameters in assessing instruction fees on the appeal. Those factors could only be considered at the appeal stage and not in the primary suit. The appeal was dismissed with costs to the respondent and hence costs of the appeal are to be assessed separately.

15. I find the reference merited and hereby set aside the bill as taxed and remit the file to a different Taxing Master for re-assessment.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

Kimathi for appellant

Murithi for respondent

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE