



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**MISCELLANEOUS APPLICATION REF NO. E001 OF 2021**

**DEL MONTE KENYA LIMITED .....OBJECTOR/APPLICANT**

**VERSUS**

**KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY**

**(KNCCI) MURANG'A CHAPTER.....1<sup>ST</sup> RESPONDENT**

**PETER KIGUTA KAMAU .....2<sup>ND</sup> RESPONDENT**

**JOAN NJERI WANJIKU .....3<sup>RD</sup> RESPONDENT**

**RULING**

By a **Chamber Summons Application** dated **2nd of July 2021**, brought under Section 11 of the Advocates Act, Cap 16 Laws of Kenya, the Applicant sought for orders;

- a. That the Honourable Court be pleased to vacate and set aside in its entirety the Ruling of the Honourable S.K. Nyaga, Deputy Registrar, dated and delivered on 25<sup>th</sup> January 2021, and the reasons thereof given on 21<sup>st</sup> June 2021.***
- b. That the Court be pleased to refer the 1<sup>st</sup> Defendants Bill of Costs dated 29<sup>th</sup> June, 2020, for fresh taxation before Taxing Master and with suitable directions.***
- c. That in the alternative to (2) above, this Honourable Court be pleased to exercise its discretion and to tax the Bill of costs dated 29<sup>th</sup> June 2020 itself.***
- d. That the costs of this application be provided for.***

The Application is founded on the grounds set out on the face of the Application and on the Supporting Affidavit sworn on **2<sup>nd</sup> July 2021**, by **Gerishon N. Thuo, Advocate**. The Applicant contends that by a Ruling given on **25<sup>th</sup> January 2021**, the Honorable **Taxing Master** taxed the 1<sup>st</sup> Defendants Party to Party Bill of Costs dated **29<sup>th</sup> June 2020** at **Kshs 532,050/=**. The instruction fees component was given as **Kshs. 75,000/=**. That the amount awarded by the Taxing Master is so manifestly low as to constitute an error of principle and to call for interference by this Honourable Court. That the Learned Taxing Master failed to consider relevant principles in taxation of instruction fees including complexity of the subject matter, value of the subject matter, importance to the parties and the work involved. That the Taxing Master misdirected herself as she held that instruction fees for an injunction application cannot be charged separately from the instruction fees in respect of the main suit.

That the Taxing Master misdirected herself both in law and in fact by taxing off items in the **Bill of costs** without assigning reasons thereof. The items being taxed off were No. **73,80,83,84,93,97,107,109,112, and 113**. That the Taxing Master misdirected herself on fundamental points of law and the reasoning thereof ought to be set aside.

The Application is not opposed by any of the Respondents despite there being evidence of service. This Court perused the Affidavit of Service filed on **13<sup>th</sup> October 2021**, and the one filed on **28<sup>th</sup> October 2021**, and it was satisfied on the element of service.

The instant Application was canvassed by way of written submissions. The Applicant filed its written submissions dated **22<sup>nd</sup> November 2021**, through the **Law Firm of Njoroge Regeru & Company Advocates**. The Applicant relied on the case of **Republic Vs. Ministry of Education and 2 Others Ex parte Muchiri W. Njuguna and Others (2006)**, that outlined several principles which the court would consider in deciding whether or not to interfere with the decision of a taxing master. The Applicant also relied on the case of **KANU National**

**Elections Board & 2 others vs. Shah Yakub Farah (2018) eKLR**, that reiterated the aforementioned principles. The Applicant submitted that the Taxing Master failed to consider the relevant factors which ought to be considered in taxing off instruction fees. That the taxing master held the view that whenever the value of the subject matter is not disclosed in pleadings and judgment in shillings, the amount to be awarded as instruction fees was **Kshs. 75,000/=**. The Applicant submitted that **Kshs. 75,000/=** connotes a minimum and it is applicable for small cases or cases where the Subject Matter is small in measurement. It was submitted further that the said instruction fees is bound to be affected by other factors. It was the Applicant's further submission that the **Taxing Master** failed to consider the relevant factors in awarding instruction fees at **Kshs. 75,000/=**.

The Applicant relied on the case of **Shiva Enterprises Ltd vs. Mwangi Njenga & Co Advocates (2020) eKLR**, to buttress his point. In addition the Applicant submitted that the **Taxing Master** failed to consider the principle of fair reimbursement in awarding **Kshs.75,000/=** as instruction fees. That **Murang'a ELC 86/2018**, raised complex legal issues which the Taxing Master failed to appreciate and consider.

The Applicant also submitted that the **Taxing Master** failed to give reasons for taxing off some items on the **Bill of Costs** and as a result the said items should be allowed as prayed. The Applicant therefore urged the Court to exercise its discretion and set aside the Ruling given on **25<sup>th</sup> January 2021** and the Certificate of Costs issued thereunder.

The Court has considered the instant application, the pleadings herein, the written submissions, the impugned Ruling, the cited authorities and the relevant provisions of law and finds the issues for determination are as follows: -

- a. **Whether the application dated 2<sup>nd</sup> July 2011 is merited?**
- b. **Who should bear the cost of this application?**

**1. Whether the application dated 2<sup>nd</sup> July 2011 is merited?**

Rule 11 of the **Advocates Remuneration Order** makes provision for the procedure 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 above as drafted carries a mandatory requirement. The Court notes that the Applicant has complied with all the requirements outlined in Section 11 above. The Court will then proceed to look at the application on its merits.

The Court finds that there are two aspects to this Reference; Whether the value of the subject matter was ascertainable and, secondly whether the Ruling given on **25<sup>th</sup> January 2021**, in **Murang'a ELC 86 of 2018**, should be set aside.

However, before analyzing the above issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice. The Court in the case of **Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR** was categorical that;

**“On 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.”**

The proper exercise of discretion by the Taxing Officers was restated in **Kamunyori & Company Advocates vs. Development Bank Of Kenya Limited** (2015) Civil Appeal 206 of 2006, where it was held that;

**“.. Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”**

The Applicant is seeking an order that the ruling delivered on 25<sup>th</sup> January 2021, be set aside. The principles of setting aside the decisions of Taxing Master were well established in the cases of **Premch and Raichand 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.*

With these principles in mind, the issues for determination are whether, the Taxing Officer herein rightly exercised her discretion in determining and taxing off instruction fees in the **Party to Party Bill of costs** dated 29th June 2020. In the case of **Joreth Ltd vs Kigano and Associates [2002] 1 E.A. 92**, this Court addressed the issue thus;

**“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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”**

There are two limbs of this passage which the Court wishes to emphasize. First, in taxing an **Advocate’s Bill of Costs**, the value of the subject matter must be ascertained *a priori*. Where the value of the subject matter of a suit is known or can be determined from the pleadings, judgment or settlement, the Taxing Officer has no discretion in assessing instruction. However, where the value of the subject matter is unknown or cannot be ascertained, then the Taxing Officer is expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider to assess instructions fees.

The passage also stresses the three levels from which the value of the subject matter may be ascertained. Before the hearing of an action, from the pleadings, or at the end of a trial, from the judgment or where a suit has been compromised, from a settlement. (See **Peter Muthoka & another vs. Ochieng & 3 Others [2019] eKLR, Kamunyori & Co Advocates vs. Development Bank of Kenya Limited [2015] eKLR**, and **Lucy Waithira & 2 others vs. Edwin Njagi T/A E. K Njagi & Company Advocates [2017] eKLR**.)

**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. It is trite that instruction fees are charged from the value of the subject matter, but there are suits where the value cannot be drawn from pleadings or judgment.

Having perused the Application, it is not in doubt that the value of the subject matter in **Murang’a ELC No. 86 of 2018**, could neither be ascertained from the pleadings filed nor from the judgment of the court. In fact, Taxing Master in her ruling noted that neither the pleadings nor the judgment of the court disclosed the value of the subject matter. This has not been rebutted by the Applicant, save to state that the value was contained in their submissions. This then 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 is not bound by them. (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 submissions, as she considered that a speculative amount. The Applicant has however led this court into the circumstances they took into consideration to arrive at the sum suggested. On this ground, the Court upholds the decision of the Taxing Master to conclude that there was no value of the subject matter disclosed from the pleadings or judgment in Murang'a ELC 86 of 2018.

However, the Court notes that the subject matter is a portion of land measuring about **1500 acres**. Further the Court notes that the said **Murang'a ELC 86 of 2018** raised complex issues of public interest involving renewal of the lease held by the Applicant herein for over **99 years**. The 1<sup>st</sup> Respondent herein sought for land measuring **1500 acres** to be excised from various parcels of land owned by the applicant and be held in trust by the 1<sup>st</sup> Respondent for the benefit of its members. It also sought for an injunction to restrain the Defendants therein from renewing the leases of the parcels of land in favour of the Applicant.

Taking into account the above analysis, the Court finds that the land which is the subject matter of this application is manifestly large and that the instruction fees of **Kshs. 75 000/=** awarded by the **Taxing Master** is extremely low, compared to the subject matter of the land and the complex issues raised in Murang'a ELC 86 of 2018.

Based on the above, the Court holds and finds that the Applicant has demonstrated that the instant Application meets the principles of setting aside the decision of the **Taxing Master**. To this end, the Court finds the **Chambers Summons Application** dated **2<sup>nd</sup> July 2021**, is **merited** and the same is allowed in terms of Prayers **1 and 2**.

## **2. Who shall bear costs of this application?**

This Court has discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. The Court herein finds no special circumstances in this case and therefore the Applicant being the successful party is entitled to the costs of the application.

In the end, the Court finds that the **Chamber Summons Application** dated **20<sup>th</sup> July 2021**, is merited and the same is allowed entirely in terms of prayers No. **1 & 2** and the said **Bill of Costs** is remitted back to the **Taxing Master** for fresh taxation taking into account the complex issues raised in **Murang'a ELC No. 86 of 2018**.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF DECEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**DELIVERED ONLINE**

**IN THE PRESENCE OF;**

**KUIYAKI - COURT ASSISTANT**

**MR. THUO FOR THE APPLICANT**

**NO APPEARANCE FOR THE RESPONDENTS**

**L. GACHERU**

**JUDGE**