



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL MISC. APPLICATION NO. 55 OF 2019

ELIJAH IRERI t/a IRERI & COMPANY ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

RULING

1. The applicant herein filed the instant application on 01.07.2020 and wherein he seeks for orders that; the costs allowed by the Deputy Registrar of this court, Ms. J. Ndeng'eri on taxation of the Advocate's Bill of costs dated 17.07.2019 on the 12.03.2020 be set aside in its entirety; that in the alternative, items 1-16 of the bill to be reviewed and taxed off or remitted with appropriate directions to a taxing officer as the court shall deem fit for reconsideration; and that the costs of the application be provided for.

2. The application is premised on the grounds on its face and further supported by the affidavit by the applicant herein.

3. The applicant's case is that the learned taxing master erred in principle as she arrived at a decision which is contrary to the applicable law and that the taxing officer misapprehended and misapplied the law in regards to item number one of the bill of costs on instruction's fees. Further that, the taxing officer failed to exercise her power and discretion given to her by the Advocates Remuneration Order in arriving at the value of the subject matter of the suit. Basically, the applicant attacked the award by the taxing master as being too low in regards to item one (instruction fees).

4. The respondent opposed the application by way of grounds of opposition and wherein it was deposed that the instant application is misconceived, bad in law, an abuse of the court process and does not properly invoke the jurisdiction of this Honourable Court as it seeks to set aside the decision of the taxing master in its entirety. Further that the application is incompetent as it does not comply with Rule 11(1) of the Advocates Remuneration Order, 2009. Further that the taxing master's discretion was judiciously exercised and in consonance with the legal principles set out in the case of **Joreth Ltd –vs- Kigano & Associates (2002) 1 EA 92 (CAK)** and **First American Bank of Kenya – vs- Shah (2002) 1 EA 92**.

5. The application is further opposed by a replying affidavit sworn on 21.09.2020 and wherein the deponent deposed that the application is fatally defective both in form and in substance as it raises several contentious issues of fact without any affidavit in support of the same. Further that the application had been filed contrary to Rule 11 of the Advocates Remuneration Rules. Further that the applicant proceeded with the suit the subject of the bill without instructions and as such, he cannot be left to enrich himself unjustly from actions of fraud.

6. Directions were taken that the application be canvassed by way of written submissions with the applicant having been granted leave to file a supplementary affidavit.

7. The applicant in his further affidavit deposed that the reasons as to why the reference was not filed within time is due to the fact that after the ruling was delivered on 12.03.2020, courts were closed due to Covid- 19 pandemic outbreak. The applicant further deposed that the Deputy Registrar erred in principle as the Bill of Cost ought to have been assessed based on the complexity of the matter, the nature and importance to the public, whether a novel point of law raised, the responsibility and the skill of the counsel. Further that the applicant acted within the scope of instructions given by the respondent. Essentially, the applicant denied the contents of the replying affidavit and deposed that the learned Deputy Registrar failed to consider the various factors determining instructions fees which included but not limited to the importance of the matter; the general conduct of the case; the nature of the case; and the time taken for its dispatch. For these reasons, the instructions fee was too low and the other items of the bill of costs as the Deputy Registrar did not exercise her discretion by increasing the fees and failed to diligently tax the said bill.

8. The applicant further filed his written submissions and wherein he reiterated the fact that the Deputy Registrar failed to take into account the colossal amount demanded by the plaintiff from the arbitral award and further take into consideration the complexity of the matter and the time spent negotiating to have the matter settled. Reliance was made on the case of **Jeremiah Muku –vs- Methodist Church in Kenya**

trustees registered & another (2015) eKLR. As such, the Deputy Registrar failed to accurately discharge her mandate bestowed upon her to diligently tax the bill and award the applicant reasonable fees based on the legal services rendered by the applicant to the respondent. It was further submitted that the Deputy Registrar erred in principle in reducing the instructions fees to Kshs. 91,350/- without taking into account the amount of work, the subject matter of the suit as well as the prevailing economic condition which is important.

9. Reliance was placed on the case of **Joreth Limited –vs- Kigano Associates (2002) EA 92** and also **Paul Imison & another –vs- Jodad Instructions Investment Ltd (2014) eKLR** as to the factors to be considered in determining the instruction fees. That the Deputy Registrar failed to take into account the value of the subject matter which was stated in the application even though the claim was for arbitration award. Further that the Deputy Registrar failed to exercise her discretion judiciously in not increasing the amount in items 2-13 by 50% as provided for in part B of Schedule 6 of the ARO. Further that the taxing officer failed to take into account that the applicant was attending court from Nairobi while taxing items 4 and 11. The award of item 13 was also challenged. Further that the decision by the taxing officer disclosed errors in principle and hence a candidate for interference by this court. It was further submitted that the applicant had explained the reasons for the delay in filing the application herein (Covid-19) and which reasons this court ought to take into consideration.

10. The respondent filed its written submissions and wherein it was reiterated that the application herein is incompetent as the applicant did not seek reasons from the taxing master before filing the reference. Further that the said reasons were never attached to the application herein and neither did the applicant demonstrate in his application that he requested for the reasons from the Deputy Registrar. Reliance was made on the case of **Charles Nyaga Njeru –vs- Independent Electoral & Boundaries Commission and another (2015) eKLR** and paragraph 11 of the Advocates Remuneration Order. It was submitted that a reference cannot be heard in a vacuum without reasons from the taxing master. Reliance was further made on the case of **Evans Thiga Gaturu, Advocate –vs- Kenya Commercial Bank (2012) eKLR** and **Muriu Mungai & Co. Advocates –vs- New Kenya Co-operative Creameries Ltd Nairobi (2012) eKLR.**

11. Further that the application is incompetent as the principal prayer sought is vague and non-compliant with paragraph 11 of the Advocates Remuneration Order as prayer 1 of the application seeks to have the taxation in so far as it relates to the entire bill of costs set aside yet paragraph 11 of ARO is clear that an applicant must indicate the items he objects in the bill. Reliance was made on the case of **Charles Nyaga Njeru –vs- Independent Electoral & Boundaries Commission and another (supra).** The respondent further submitted that the taxing master's decision cannot be impugned merely based on the issue of quantum but rather on the error of principle and further that the value of the subject matter is not on itself conclusive as to the complexity of a case. It was further submitted that the application amounts to an appeal for the reasons that it seeks to set aside all the items in the bill as opposed to items 1 and 2 which he seems to have issues with. As such, the application is an abuse of the court process.

12. I have considered the application herein and the response thereto and the respondent's submissions and it is my considered view that the main issue for determination is whether the application is merited.

13. However, I note that the respondent has raised a very pertinent issue as to the competence of the application, for reasons that the reasons of the taxing master were never attached to the application nor was there prove that the same had been requested for.

14. Paragraph 11 Rules (1) and (2) of the Advocates Remuneration Order and which I believe are relevant in this case provides that:-

"(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 this objection.

15. What the above provisions mean is that before a person can object to the decision of the taxing master, he ought to give notice in writing to the taxing officer of the items of taxation which he objects. The taxing officer is then required to forthwith record and forward to the objector the reasons for his decision. The objector has discretion to file his reference within 14 days.

16. I have perused the record herein and I agree with the respondent that the applicant herein did not seek for the reasons of the decision from the taxing officer. He further did not attach the reasons by the taxing officer to the application. There was no evidence in that respect. As such, it is clear that the applicant did not comply with the requirements of Paragraph 11 Rule 1.

17. Despite him having sought leave to file the reference out of time and which leave was granted by Muchemi J vide the orders of 23.06.2021, the said leave was limited to filing the reference out of time. He never sought leave to comply with the requirement for seeking reasons as contemplated under paragraph 11 Rule 4 of the ARO. In my view failure to seek reasons from the taxing officer and/or to attach the said reasons renders the application defective.

18. I am alive to the decisions of superior courts to the effect that lack of the taxing officer's reasons will not make the reference incompetent more so where the reasons appears on the face of the decision of the taxing master. **Odunga J**, in **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR**, held that

“It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the

very reason for preferring a reference”.

(See also Kinyua Muyaa & Co. Advocates vs Kenya Ports Authority Oensin Scheme & 8 others [2017] eKLR and In Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5.

19. A copy of the taxing officer’s ruling has not been attached to the reference or submissions filed nor has he availed the impugned bill of costs. However, I have been able to peruse the said ruling which is on record. From the same, it is clear that the same does not contain reasons on its face. The items which the taxing officer seems to have given reasons thereof are items 1 and disbursement items. I say so having noted that the applicant seeks setting aside of the costs allowed by the Deputy Registrar in its entirety and in alternative, Items 1-13 of the bill be reviewed and taxed off. It therefore means that the only items which this court can deal with are Item 1 and the disbursements. Items 2-13 cannot be considered by this court.

20. In relation to item 1 and disbursements, it is trite that this court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In Republic –vs- Ministry of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna [2006] eKLR, Ojwang J. (Retired) stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer’s decision 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 inference that it was based on an error of principle.”

21. In the case of Kipkorir, Tito & Kiara Advocates -vs- Deposit Protection Fund Board [2005] eKLR the Court of Appeal observed;

“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.”

22. In the instant case, Union Technology Kenya Limited sued the County Government of Embu for breach of contract and wherein they sought compensation for costs of project and loss of revenue and interests thereof. The amount claimed as per the plaint was Kshs. 103,464,000/=.

23. Schedule VI of the Advocates Remuneration Order 2009, is the relevant provision in this regard. The said Schedule VI of the Order is divided into two sections; Part A which provides for party and party costs, while Part B deals with Advocate and client costs. As such, Schedule VI, prescribes how instruction fees for both party and party and advocate and client are to be assessed with Part A setting out different parameters for arriving at party and party costs.

24. Where the value of the subject matter is discernible and determinable from the pleadings, the taxing master is not permitted to use his discretion to assess instruction’s fees. It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provisions above. (See Peter Muthoka & another -vs- Ochieng & 3 others [2019] eKLR).

25. **Schedule VI Part B** makes it patently clear that instruction fees for advocate and client costs will be one-half of the party and party costs prescribed, or as ordered by a court or agreed upon by the parties. However, a clear reading of Part B shows that in order to ascertain the client’s advocate bill of costs, the taxing officer must first determine the party and party bill of costs then increase the same by a half.

26. In the instant case, the amount claimed was straight-forward. Looking at what the schedule provides, it is clear that the taxing officer did not apply the Schedule properly. The amount arrived at was erroneous and ought to be reviewed as it was based on a wrong principle. The bill ought to be returned for reconsideration by the taxing master.

27. As for the disbursements, it is my view that the taxing officer applied the correct legal principles. It is trite that disbursements must be proved by evidence. The applicant herein did not annex any evidence as to the said disbursements. In other words, the applicant herein did not show how the decision by the taxing officer in relation to disbursements was based on an error of principle, or the fees awarded was manifestly excessive as to justify interference by this court.

28. It is my considered view therefore that the reference partially succeeds to the extent that item 1 needs to be reconsidered and taxed afresh. There having been no reasons provided by the applicant and the taxing officer’s ruling being short of reasons in relation to items 2-13, the said items cannot be interfered with in the circumstances and the reference herein fails in that respect. The applicant having been partially successful, I order that each of the parties to bear their own costs.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent