



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MISC. APPLICATION NO. 556 OF 2016**

**MAJANJA LUSENO & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**DHIRAJLAL V. PATANI..... RESPONDENT**

**RULING**

The application dated 2<sup>nd</sup> June, 2021 can be traced to the ruling of the taxing master delivered on 13<sup>th</sup> May, 2021. The respondent who filed the application objects to the decision of the taxing master on the item of instruction fees. The affidavit of the respondent sworn on 2<sup>nd</sup> June, 2021 supports the application.

Counsel for the respondent/objector submitted that the taxing master did not take into account the value of the subject matter and the pleadings of the parties. The subject matter was valued at Kshs.100million. The property was divided among four people and the respondent’s share was only Kshs.20million. Had the taxing master used Kshs.20 million as the amount the advocate was instructed to recover, the instruction fees would have been low. Counsel further contend that the taxing master did not take into account the fact that two other previous advocates had been paid Kshs.1.3 million. The applicant/Advocate was paid Kshs.2,066,135. The dispute was settled by consent and the property was shared equally among four (4) people. Only one advocate was given instructions to sue. The applicant herein came into the matter at its tail end and could not have asked for instruction fees.

The application is vehemently opposed. It was submitted that the parent file involved a dispute between joint owners that was compromised by a consent. According to the consent, the reserve price of the property in dispute was Kshs.100 million. The consent related to the entire property. The sum of Kshs.100 million was not divided into four. The taxing master did not have to tax the bills in piece meal.

It was further submitted that Rule 62(a) of the Remuneration Order does not apply to an advocate/client bill of costs as held in the case of **MACHIRA & CO. ADVOCATES –V- ARTHR K. MAGUGU & ANOTHER (2012) eKLR**. The bill of costs was raised in relation to the work done. The court of Appeal also dealt with the dispute and only held that there was no agreement on fees. This led to the filing of the bill of costs.

**Analysis and determination**

Prayer one of the application herein states as follows:-

**“THAT the Respondent objects to the decision of the taxing officer delivered on 13/5/2021 taxing the item of instruction fees.”**

The core of the dispute therefore is the instruction fee. The bill of costs date 21<sup>st</sup> October, 2016 had instruction fees at Kshs.1,364,500. The specific item reads as follows at items one and two:-

22/4/2009	To instructions to act for the defendant in an extremely contentious matter involving the registered owners of all those properties being LR Numbers 200/2632 and 209/4355 whereon there is an improvement erected thereon known as Garden Chambers. The instructions having been to in two fold arising within the same suit wherein the suit property was to be sold for a purchase price of Kshs. 100,000,000.00 and wherein the conditions of the same was to be settled by the court. To looking at the matter the nature of the same. The complexity of the same and the amount of time spent on the matter. Instructions fees based on the value of the properties being the subject matter which is Kshs. 100,000,000.00
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			1.364,500.00
22/4/2009	2	To getting up fees	454, 850.00

The client's position is that the advocate was instructed in 2009 after a consent had already been recorded in 2009. Already the sale transaction of the property that was in dispute was being handled by the firm of P.K. Njoroge. The sale was completed by 20<sup>th</sup> May, 2009 long before the advocate was instructed. According to the applicant, he only instructed the advocate to protect his claim for Kshs.20 million.

The advocate filed an application dated 6<sup>th</sup> May, 2009 seeking to come on record for the client in place of the firm of J. Harrison Kinyanjui & Co. Advocates. The application was supported by the affidavit of the client/objector. Paragraphs 2,3 and 5 of the said affidavit states as follows:-

1. THAT I have appointed the Firm of Messrs Majanja Luseno & Company Advocates to handle the conveyance relating to the suit property and in fact such instructions are being effected.
2. THAT similarly I wish to have the said Firm act on my behalf in this matter which is so connected to the said conveyance and hence my plea to be allowed to avail my constitutional right to counsel.
3. THAT the Interested Parties have un-procedurally taken possession of the development on the suit properties and I have been denied access to my office and rent from the Tenants is now being paid to the Tribunal hence the urgency.”

The principles applicable in determining instructions fees were stated in the case of **PREMCHAND RAICHAND LTD-V- QUARRY SERVICES OF EAST AFRICA LTD [1972] E.A, 162** where it was stated:-

- "(a) That costs should not be allowed to rise to a level as to confine access to justice to the wealthy.
- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- (d) so far as practicable there should be consistency in the award made and
- (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

The Advocate’s submissions before the taxing master at paragraphs 6 and 7 states as follows:-

**“6. The claim in the suit before the High court Civil Division was a dispute between the client, beneficiaries and interested parties with regards to ownership of properties L. R. Nos. 209/2632 and 209/4355 known as Garden Chambers and pursuant to a consent the suit was eventually compromised to have the property sold under supervision of the court at a purchase price of Kshs. 100,000,000.00. (emphasis added)**

**7. The second limb of instructions involved contested accounts in respect of rent received by the client who was the property manager of the suit in the total sum of Kshs, 45,892,091.00.” (emphasis added)**

The client’s main contention is that his instructions were limited to the recovery of Kshs.20million and therefore the taxing master ought to have used that sum as the value of the subject after. The dispute also involved the issue as to whether legal fees had been agreed upon. Justice L. Njuguna delivered her judgment on 10<sup>th</sup> March, 2016 holding that there was no agreement in respect of the fees that was to be charged. That finding was upheld by the court of Appeal in Civil Appeal No. 238 of 2016 in a Judgment delivered on 20<sup>th</sup> September, 2019.

The ruling of the taxing master dated 13<sup>th</sup> May, 2021 partly reads as follows on the issue of instruction fees:-

**“The bill of costs arises from Milimani HCCC NO. 2250 OF 2007 where the Applicant was instructed by the Respondent to represent him in the said suit.**

**I have carefully read and considered the both parties written submissions and list of Authorities on record, I have also gone through the court files, that is; the current file, HCCC 2250 of 2007 and HCCC 508 of 2010, the Applicant’s bill of costs dated 21 October 2016 and the supporting documents. The applicable law is schedule VI of the Advocate (Remuneration) (Amendment) Order, 2009.**

**The Respondent is not opposed to some of the items in the bill which will be allowed as prayed. I will only deal with the disputed items.**

**On item 1 being instruction fees, the Applicant has charged Kshs. 1,364,500/-. I have considered both parties’ respective submissions. It is trite law that the instruction fees is calculated from the value of the subject matter which is discerned from pleadings, judgment or settlement between parties. The value of the subject matter can be deduced from consent adopted as an order of the court on 20<sup>th</sup> May 2008. The same is the sum of Kshs. 100,000,000/- being the reserve price of the premises known as L.R. NO. 209/2632 and L.R No. 209/4355 which the parties consented to. I will therefore take that as value of the subject matter. The Applicant has admitted in his bill and his submissions that he received instructions to represent the Respondent on 22/04/2009, so the applicable law is Schedule 2009 Remuneration Order. Using schedule VI of the 2009 Remuneration Order, the instruction fees will be as follows;**

First 1,000,000/	-Kshs. 77,000/-
Then 19,000,000/- x 1.5%	-Kshs. 285,000/-

Then 80,000,000/- x 1.25% - Kshs. 1,000,000/-

**Total -Kshs. 1,362,000/-**

**The matter was straight forward where the Applicant was instructed by the Respondent to take over a matter which had already been filed. When Applicant took over the matter, he filed 2 applications and subsequently parties entered into a consent and settled the matter fully before it proceeded for hearing. Taking all those factors into consideration and being guided by the principles set out in the case of Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999 [20021 1 EA 92, I find no justification of increasing the instruction fees. I will therefore tax item 1 at Kshs. 1,362,000/-as provided for under the law. I tax off Kshs. 2,500/.”**

The pleadings in the primary suit have not been annexed by any of the parties. There is no document by the client indicating that his instructions was limited to Kshs.20 million only. The consent that was adopted as an order of the court of 29<sup>th</sup> May, 2008 indicate that upon the sale of the property, the sale proceeds were to be distributed equally among the four (4) owners. The client in his sworn affidavit of 6<sup>th</sup> May, 2009 in support of the advocate’s application to come on record indicate that he had been denied access to his offices and rent was being paid to the Tribunal hence the urgency.

It is evident that the advocate’s statement that apart from the main dispute on the property, there was also an issue dealing with rent that had been paid to the client is not without merit. However, this contention is not reflected in item one (1) of the Bill of costs.

As indicated hereinabove, the only dispute is on the issue of instruction fees. The client opted to give instructions to three different advocates. The instructions to the advocate in this dispute were not in writing neither were the fees agreed upon. The taxing master was aware as per her ruling that the client had previously been served by other advocates. The record does not show any split of instructions whereby the advocate was to only pursue the issue of the client’s share of Kshs.20million and not deal with any other issue such as payment of rent.

The responsibility of taxing advocate’s costs resides with the taxing master. The High Court can only interfere in certain cases. In the case of **CHIRIATTI –V- KAHLILI & OTHERS (1999) KLR 66**, the court held:-

**“The court is entitled to interfere with the order of the Taxing Officer only if the court is satisfied that the award of the taxing officer is so high or so low as to amount to injustice to one party.”**

Given the circumstances and facts of the case, I am satisfied that the Taxing officer was alive to the fact that the client had engaged other advocates before. The Taxing Master also dealt with the issue of the value of the subject matter. There is no evidence that the advocate was retained for purposes of recovering Kshs.20 million only. It is true that by the time the advocate came on board the consent had already been entered into but the advocate did more than recovering the client’s share from the sale proceeds. He was entitled to instruction fees based on the subject matter as opposed to what the client was entitled to.

I do find that the reference lacks merit and the application dated 2<sup>nd</sup> June, 2021 is hereby dismissed with costs.

**DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2021**

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**S. CHITEMBWE**

**JUDGE**