



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 272 OF 2016

DOUGHLAS MWANGI MUTERU.....PLAINTIFF

VERSUS

VICTORIA MERE DZILLA.....DEFENDANT

GRACE MUKAMI.....OBJECTOR

RULING

1. By an Originating Summons dated 10th October 2016, Douglas Mwangi Muteru, (the Applicant) sought to be registered as the owner of a Portion of land measuring 96.0 Square Metres comprised in all that parcel of land known as CR 24754 also known as Plot No. MN/III/2195 Mtwapa by virtue of adverse possession.

2. Having considered the claim for adverse possession vis-à-vis a response and a Preliminary Objection filed herein on 26th October 2016 by Victoria Mere Dzilla (the Respondent), this Court did find on March 2017 that the claim had no merit and proceeded to strike out the Originating Summons with costs to the Respondent.

3. It is apparent that the Respondent subsequently filed for taxation a Party and Party Bill of Costs dated 21st March 2018 seeking the sum of Kshs 419,599/- as the costs due. That Bill of Costs was on 7th May 2018 taxed as drawn by the Honourable J.N Wandia, Deputy Registrar, Malindi.

4. Aggrieved by the said taxation the Applicant by way of Reference filed the Chamber Summons application presently before me dated 24th May 2018 faulting the taxation and urging the Court to consider and assess the fees payable to the Respondent. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds stated therein as follows:-

i. That the Learned Taxing Officer erred in (law) and in fact by declining to tax the said bill as per the law by holding the bill dated 21st March 2017 and upholding it as drawn.

ii. That the Learned Taxing Officer erred in law and in fact by holding and awarding a sum of Kshs 250,000/- as instructions fees yet the value of the disputed parcel of land was Kshs 700,000/- as clearly evidenced by exhibits filed thereon.

iii. That the Learned Taxing Officer erred in law and in fact by awarding a sum of Kshs 1,100/- for drawing a Memorandum of Appearance dated 21/10/2016; and

iv. That the taxation herein was a gross misdirection in law.

5. The application is however opposed. In a Replying Affidavit sworn and filed herein by Shitakha Tom Ambwere Advocate on record for the Respondent, he avers that the Deputy Registrar taxed the cost based on the law and scale as such she could not be faulted.

6. The Respondent further avers that the suit property that the Applicant wanted to acquire by adverse possession was valued at Kshs 8,000,000/- in the year 2010 and that taking into account the passage of time, inflation and development on the property, the price has currently gone up to Kshs 15,000,000/-.

7. I have considered the Reference as well as the response thereto. It is now well-settled that a Judge of this Court can only interfere with the decision of the Taxing Master where there has been an error in principle but should not do so on questions solely of quantum as that is the domain of the Taxing Master.

8. As was stated in *First American Bank of Kenya –vs- Shah and Others (2002)1EA 64*, the Court cannot interfere with the Taxing Master’s decision 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. The Court further stated that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

9. From the material placed before me, it is apparent that when the Applicant learnt of the Certificate of Taxation issued on 7th May 2018, his Advocate on record wrote a letter dated 9th May 2018 to the Deputy Registrar of this Court objecting to the entire taxation and requesting to be furnished with the reasons for the decisions. While the said letter was received in Court on the same day, there does not appear to have been a response thereto.

10. From the record, it is however apparent that the matter had been pending for taxation for quite some time. While the Applicant contends that the Bill of Costs had not been served upon himself and that he was unaware that it was coming up for taxation, it was clear to me that he had had notice thereof. Twice-on 15th May 2017 and on 13th July 2017, his Advocates on record-Mwaniki Gitahi & Partners Advocates had been served with hearing notices indicating that the matter was due in Court for taxation, first on 26th June 2017 and subsequently on 17th July 2017.

11. On both occasions the said Advocates received the Notices in protest asserting that the dates were inconvenient and they did not therefore attend Court. Similarly on 28th July 2017, they were served for the taxation on 21st August 2017 and it was received under protest. It is on that day that the Respondent having filed an Affidavit of Service, urged the Court to tax the Bill as drawn. The Court then fixed the matter for Ruling on 22nd September 2017.

12. It would appear that the Ruling was however not ready on the given date. On 27th April 2018, the Court gave a brief two paragraph Ruling apparently in the absence of both parties as follows:-

Ruling

“The Ruling arises from a party and party bill of costs dated 21st March 2017.

Having gone through the said bill of costs and the file herein, I find that it is drawn to scale. I allow it as drawn.”

13. As it is, the Ruling by the Learned Taxing Master does not offer much by way of explanation on the reasons why the items were taxed as such. According to the Respondent, the suit property that the Plaintiff wanted to acquire is presently valued at Kshs 15,000,000/- given that it was valued at Kshs 8,000,000/- in the year 2010 and taking into account such factors as inflation and development of the same.

14. Neither the alleged valuation done in 2010 nor any evidence of the alleged inflation was however provided by the Respondent. From the Applicant’s Supplementary Affidavit, as filed herein on 12th March 2019, it is clear that there was another dispute involving the two parties and the same parcel of land in *Mombasa ELC No. 270 of 2016*. The documents produced in that Court clearly show that the Respondent who was the Plaintiff in the said matter had put the value of the land at Kshs 650,000/-. It is also noteworthy that the suit herein was struck out at a very early stage.

15. Arising from the foregoing and given that it is not certain how the Learned Taxing Master arrived at the figures indicated in the Certificate of Taxation, I think there is merit in the Reference as filed.

16. In the circumstances herein I do hereby set aside the decision of the Taxing Master and hereby remit the file to the Taxing Master for re-assessment.

17. Each Party shall bear their own costs in regard to this Reference.

Dated, signed and delivered at Malindi this 28th day of February, 2020.

J.O. OLOLA

JUDGE