



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC MISC. NO. 47 OF 2018

AMBWERE T.S & ASSOCIATES.....APPLICANT

VERSUS

FRANK NYAMBU WAFUKWA & OTHERS.....RESPONDENTS

RULING

(Reference in the matter of taxation of an advocate/client bill of costs; applicant faulting the taxing master for failing to consider the value of the subject matter in taxing instruction fees; case being one for adverse possession where the value of the land was not disclosed in the pleadings; a valuation done in the course of taxation of fees; taxing master however not considering the valuation of the land when taxing fees; position of applicant that this was erroneous; cross-reference arguing that the value of the land ought not to be considered and that fees had been agreed and paid; no evidence of any agreement on fees; fees ought to have been based on the value of the subject matter; bill taxed afresh on the basis of the value of the subject matter)

1. The applicant is an advocate who has a dispute over the advocate/client fee payable. The applicant was engaged by the respondents to represent them in a case where the respondents sought orders that they have acquired title through the doctrine of adverse possession to the land parcel Mainland North/Section 1/413. Pursuant to the instructions, the applicant filed the suit Mombasa ELC No. 81 of 2016 (OS) wherein the respondents, being 37 in number, sought the orders of adverse possession. The suit was defended. Before the case could be heard, the respondents changed counsel, and thereafter the applicant filed his advocate/client bill for taxation listing 44 items. The first item was instruction fees where the applicant sought the sum of Kshs. 1,500,000/= and the second item was getting up fees, where he sought the sum of Kshs. 500,000/=. In total, he sought the sum of Kshs. 3, 539,558/= inclusive of VAT on items 1 and 2.
2. The bill was resisted with the respondents claiming that they had an agreement to pay the sum of Kshs. 285,000/= as legal fees, which they asserted they paid, and they annexed various receipts to support their allegations.
3. In the course of the taxation, the parties agreed to have the disputed property valued and this was done with the property being valued at Kshs. 26,200,000/=. The value of the suit property is therefore no longer disputed.
4. In presenting his bill for taxation, Mr. Ambwere submitted inter alia that the case involved 42 plaintiffs and was not a simple adverse possession claim. Mr. Chebukaka for the respondents, on the other hand, submitted inter alia that the suit property belonged to a third party and not the respondents. He submitted that the taxation should be on work done and not the value of the land. He pointed out that the case had yet to proceed for full trial. He opposed some items in the bill which he pointed out.
5. In taxing the bill, the Honourable Deputy Registrar, first held that there was no retainer agreement between the parties as there was none presented. She therefore did not accept the respondents' assertion that they had agreed on a fee of Kshs. 285,000/=. She however did not use the valuation report as a basis for calculating the fee payable to the applicant but instead reverted to the discretion granted under Schedule VI of the Advocates Remuneration Order which provides for a basic instruction fee of Kshs. 75,000/= if the suit is defended. She then considered the nature and amount of work done by the applicant, the number of plaintiffs involved, and the difficulties that the applicant may have encountered, and thought it fit to increase the basic instruction fees. She indeed proceeded to do so and arrived at the figure of Kshs. 500,000/=. She did not award item 2 (getting up fees) since the case was yet to proceed for trial.
6. Both the applicant and respondents were aggrieved by the taxation and have filed references to this court. On the part of the applicant, it is his view that the taxing master ought to have taxed his bill based on the value of the property, and from his application, it does appear that his only gripe is with the instruction fees. On the part of the respondents, I can see that in their cross-reference they oppose all items in the bill of costs. They aver that the taxing master erred in failing to consider that the suit had yet to proceed for hearing and was not a complex matter requiring great industry from counsel.
7. In arguing his reference, Mr. Ambwere reiterated that the taxing officer ought to have used the valuation report in taxing his instructions

defence or other denial of liability :-

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

<i>That value exceeds Kshs.</i>	<i>But does not exceed Kshs.</i>	<i>Kshs.</i>
-	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	20,000,000	1,000,000 plus an additional 2%.
Over 20,000,000	fees as for 20,000,000 plus an additional 1.5%.	

16. In our case the value is Kshs. 26,200,000/=. We therefore first must get the fees for Kshs. 20,000,000/= which is the fees for Kshs. 1,000,000/= (Kshs. 120,000/-) plus an additional 2% for what is charged between Kshs. 1,000,000/= and Kshs. 20,000,000(Kshs. 19,000,000/- X 2% = 380,000). You then need to add 1.5% on the additional figures above Kshs. 20,000,000/= (Kshs. 6,200,000/= x 1.5% = 93,000/-). The total amount due as instruction fees was therefore Kshs. 120,000/- + Kshs. 380,000/- + Kshs. 93,000/- = 593,000/-. This is of course party and party costs and in respect of advocate-client fees, this needs to be increased by ½ following Part B of Schedule 6, thus the sum of Kshs. 296,500/-. If you add Kshs. 593,000/- to Kshs. 296,500/- you get Kshs. 889,500/=-.

17. A court may, apart from the value of the subject matter, also consider other issues, and this is contained in the proviso to Schedule 6 (1) which inter alia states as follows :-

Provided that:

(i) the taxing officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances;

18. The purpose of the proviso is to ensure that the advocate is adequately remunerated for the work done, for it may happen that the dispute involves subject matter of small value, yet involve complex issues of law and/or fact or there are other circumstances which need extra industry from the advocate. The court is therefore allowed to use the proviso to increase fees but reason for this must clearly be stated.

19. In our case, I am not persuaded to use the proviso. The case was one of adverse possession which is not in the course of things a complex matter. The case may have involved a large number of parties but it has not been demonstrated to me that there was an overly extra burden on the advocate merely because the numbers involved were big. I do not therefore think that the applicant is entitled to anything more than what is prescribed as instruction fees based on the value of the subject matter and I will therefore leave it at Kshs. 889,500/-. This amount of Kshs. 889,500/= is of course subject to VAT at 16% (Kshs. 142,320/-) and must also be reduced by what the respondents had paid. I have gone through the receipts and calculated the amount that the respondents had paid. The receipts are as follows :-

8/3/2016 – Kshs. 20,000/= (Receipt No. 554)

17/3/2016- Kshs. 30,000/= (Receipt No. 561)

29/3/2016 – Kshs. 30,000/= (Receipt No. 563)

5/4/2016 – Kshs. 10,000/= (Receipt No. 566)

13/4/2016- Kshs. 20,000/= (Receipt No. 568)

28/4/2016 – Kshs. 40,000/= (Receipt No. 572)

14/6/2016 – Kshs. 30,000/= (Receipt No. 579)

23/2/ 2018 – Kshs. 20,000/= (Receipt No. 755)

(NB: there is a repetition of this receipt)

10/4/2018 – Kshs. 35,000/= (Receipt No. 713)

TOTAL – Kshs, 235,000/=.

20. The amount of Kshs. 235,000/= is therefore what the respondents had paid and not Kshs. 275,000/- recorded by the taxing officer.

21. The other items, as I have stated, were not contested before me.

22. I therefore proceed to vary the decision of the taxing master as noted above only on the instruction fees. The taxation on the other items remains and is not disturbed and that includes the refusal to award any getting up fees, which I think was justified, as the case had not proceeded for hearing and it was not demonstrated that the applicant had otherwise prepared for hearing.

23. In respect of the costs before me, in my discretion I will award the sum of Kshs. 10,000/= to the applicant payable by the respondents. Counsel also submitted that he is the one who paid the sum of Kshs. 60,000/= in respect of the valuation report before the taxing officer. Subject to a receipt being tabled, he can also have this sum as against the respondents.

24. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of February, 2020.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr Wesonga holding brief for Mr Ambwere for the applicant.

Mr Chebukaka for the respondents.

Court Assistant; David Koitamet.