REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

REFERENCE CAUSE NO. 2 OF 2020

AND

IN THE MATTER OF MISC. CIVIL APP NO.74 OF 2019

AND

IN THE MATTER OF HIGH COURT SUCCESSION ACT NO. 37 OF 2016

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

DAVID CHERUIYOT.....1ST APPLICANT/OBJECTOR

FRANCIS KIPKIRUI SANG.....2ND APPLICANT/OBJECTOR

VERSUS

W.K NGENOH T/A W.K LESSAN & CO. ADVOCATES.....RESPONDENT

RULING

1. The Applicant filed this reference from the ruling on Advocate Client Bill of Costs dated 31/10/2019 taxed on 7/5/2020 at Kshs.872,828/=

2. The Applicant is seeking for orders that the bill of costs be set aside and the same to be re-taxed before a different master.

3. The grounds for seeking to set aside the bill of costs are as

follows;

(i) THAT the Learned Taxing Master erred in law and in principle in taking into account the value of the subject matter declared in the P & A. 5 form in the Succession Cause which was disputed.

(ii) THAT the Learned Taxing Master did not take into account the provisions of Section 45 of the Advocates Act that there was an implied agreement on implied agreement on payment of costs.

(iii) THAT the Learned Taxing Master failed to take into account section 45 (5) of the Advocates Act to the effect that the Respondent was negligent and had caused undue delay in prosecuting the matter by stalling it for 5 years and was therefore not entitled to a full fee.

(iv) THAT the learned Taxing Master erred in by taking into account irrelevant factors and applying unjust principles.

(v) THAT the learned Taxing Master erred in law and principle by failing to interrogate further and to ascertain whether the Applicant had already paid and further he failed to consider that each case is decided on its own merits.

4. The Respondent filed a Replying Affidavit dated 24/6/2020 to the Application dated 8/6/2020 in which he deposed that there is inordinate delay in filing this Application and further that the Taxing Master acted judiciously and was so lenient to the extent of taxing off to the time of 571,200/=.

5. The Respondent further stated that at no time did he enter into an agreement with the Applicant on the issue of fees but that they had unanimously agreed that the Applicant deposits some cash for opening the file.

6. The Respondent further stated that the Advocates Remuneration Order is clear that matters of fees are not subject to bargain and further that the verdict of Taxing Master is compliant with the law and further if any deposit was paid it is subject to deduction upon production of receipts.

7. The parties filed written submissions which I have duly considered. I find that the Taxing Master relied on the figure of 45,000,000 as the value of the subject matter.

8. In the case of **JORETH LTD V KIGANO AND ASSOCIATES (2002)1 EA pg 92** the Court stated as follows;

> **"where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction for and in doing so, the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances"**

9. The Taxing Master obtained the value of the estate from the pleadings and that was his basis for determining the instruction fee. The Respondent had stated in the bill of costs that the value of the subject matter was 98,000,000 but the Taxing master relied on the P&A.5 Form filed by the Respondent.

10. I am satisfied that the taxing officer applied the correct principles and relied on the pleadings to ascertain the value of the subject matter.

11. The Applicant did not file submissions in the bill of costs or contest the value of the estate before the Taxing master and he has no basis for raising the said issue in this reference.

12. There is no reason advanced why the Applicant did not file submissions or oppose the bill of costs.

13. In the case of **Johnson Kibunja Njoka & another v Joseph Njuguna & 2 others [2017] eKLR** the Court stated as follows:

> **"The tests to be applied by a taxing officer and by a Judge on a reference in making a deduction or addition if he is of the opinion that a bill of costs is manifestly excessive or manifestly inadequate is the reasonableness attaching thereto. It is not for this court to substitute what I consider to be proper figure for that allowed by the taxing officer unless in my view the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate (see Rongan Kamper V. Grosvenor, 1989 KLR 362)."**

14. In the case of **Arthur V. Nyeri Electricity Undertaking, [1961 E.A.497** the court held at page 492 as follows;

> **"where there has been an error in principle the court will interfere. But questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases."**

15. I find that there is no basis for setting aside the award by the Taxing officer.

16. I dismiss the reference with orders that each party to bear its own costs of the same.

Delivered, dated and signed at Kericho this 6th day of November, 2020.

A. N. ONGERI

JUDGE