



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 373 OF 2014**

**GACHIRI KARIUKI.....ADVOCATE/APPLICANT**

**VERSUS**

**VOI DEVELOPMENT COMPANY LIMITED.....CLIENT/RESPONDENT**

**RULING ON REFERENCE**

1. On the 14.3.2018 the taxing master of the court rendered a ruling by which the advocate/client's bill of costs dated 27.10.2017 was taxed in the sum of Kshs. 240,300.58 with the sum of Kshs. 1,960,629 being taxed off.
2. The decision aggrieved the advocate who then challenged the same by filing the chamber summons dated 14/3/2018 seeking that the order on taxation be set aside or varied and the taxation be ordered conducted a fresh before another taxing master. The reasons put forth to fault the taxing master were that there was an error in determining the value of the subject matter and failure to appreciate that the dispute in which the advocate rendered services was a complex one. In the two affidavits filed, affidavit in support and further affidavit sworn by the advocate, he did exhibit not only the valuation report commission by the client and rendering the property value at Kshs. 92,000 but also a certificate of costs rendered between the litigants in the matter in which the legal services were given. That certificate of costs show that party and party costs were taxed in the sum of Kshs. 1,832,056 on 15.6.2012.
3. Pursuant to the directions of the taxing master, on taxation, issued on the 20.3.2017 the advocate filed written submissions on the 11.4.2017 while the client respondent did so on the 15.3.2017.
4. The application for reference was resisted by the client pursuant to a replying affidavit sworn by one Eliud Timothy Mwamunga, a director of the respondent, on 8.5.2020. That affidavit admitted retainer by the client to the advocate it however being contended that the advocate did not handle the suit to conclusion. He then exhibited the plaint in the suit as well as a decree to show that the prayers in the suit and the decree issued were essentially declarations as to a title of the property and an award of general damages in to sum of Kshs. 500,000/=. To the client the value of the property sued upon was Kshs. 400,000 and there was no basis to fault the finding by the taxing officer that the value was Kshs. 550,000. He equally admitted that the suit had been concluded and party and party costs had been taxed but done so as undefended.
5. From the affidavits filed and the submissions rendered it was clear before the trial court that there was retainer, that the suit had been concluded, decree issued and costs had been taxed between party and party.
6. The material so availed show that party and party costs were taxed in the sum of Kshs. 1,832,056.40. There was no allegation that the said certificate had been challenged pursuant to Rule 11 of the Advocate Remuneration Rules. That certificate had thus become final and remains a valid judicial determination on the question of quantum of costs between the two defendants at the primary suit.
7. In those circumstances it was not open for the advocate to file an itemized bill of costs claiming instructions fees and detailing all the services rendered from initiation of the suit to conclusion. Such acts flew on the face of the law as stipulated under the advocates and the subsidiary legislation made thereunder.
8. The suit giving rise to the taxation was in the High court hence the bill was due for consideration under schedule 6 of the Advocate Remuneration Order. Paragraph B of the said order stipulates

**“ADVOCATE AND CLIENT COSTS**

**As between advocate and client the minimum fee shall be-;**

a.....

b. the fees ordered by the court increased by 50%

c. ....”

9. My interpretation of this provision is that once party and party costs are ascertained and ordered by the court, either by way of taxation or agreement, there is no room for an advocate to file an itemized bill of costs. The rationale for that restriction is evidently intended to avoid prospects of the court being exposed to by rendering itself in a conflicting manner on basic and usual items in a bill of costs like instructions fees and attendance fees.

10. In the circumstances of this matter and the evidence availed to the taxing master, I do find that there is were clear errors committed by the taxing master.

11. The first error is on the value of the subject matter. This could not have been limited to the purchase price nor was the purchase price Kshs. 400,000 as contended by the client. The value in terms of schedule 6 paragraph A 1(b) had been settled by the judgment as extracted in the decree. It was the value of it property at the time of the litigation and judgment and not when the sale agreement had been drawn and executed. Over and above the value of the property, the court equally awarded general damages in the sum of Kshs. 500,000/=. In those circumstances, it was erroneous and contrary to taxing master to base the instructions fee on the purchase price. For that error I do find that the decree cannot be upheld but must be set aside.

12. More compelling is the fact that the law under the Remuneration Order, limits, binds and constrains the ascertainment of advocate-client fees to be grounded on the costs between party and party. When it was revealed to the taxing master that party and party costs had been ascertained, the taxing master ought to have not gone the full length of taxing the bill afresh. In doing so he has now created a scenario of having two instructions fees in the same litigation. That is most undesirable.

13. In fact the most and only thing the trial court ought to have done was to apply Paragraph B of Schedule 6 to The Remuneration Order and determined the quantum of costs due to an advocate from the client. That was to this court merely arithmetic and would work out as follows:-

$$1,832,056.40 + 1,832,056 \times \frac{1}{2}$$

$$= 1,832,056.40 + 916,028.20$$

$$= 2,748,048.6$$

14. That is the sum due as taxed costs to the advocate/applicant for which reason I do set aside and vary the order on taxation and the ensuing certificate of costs issued by the taxing officer and in the place of the sum of Kshs. 240,300.58, ordered by the taxing officer, I substitute the sum of Kshs. 2,748,048.60.

15. Being a matter initiated by a bill of costs on which I do not expect another bill to be filed to ascertain the costs of the proceedings in this reference, I do award to the advocate the costs of these proceedings which I assess at Kshs 15, 000/=

16. It is so ordered.

**Dated, signed and delivered online by MS TEAMS, this 4th day of December 2020**

**P.J.O OTIENO**

**JUDGE**