REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

E.L.C NO 58 OF 2017

KWENA ATOGO.....PLAINTIFF

VERSUS

FRANCIS OKUMU AMBOYE.....1ST DEFENDANT

CLEOPHAS CHESA OKUBASU.....2ND DEFENDANT

BONFACE KUYADI OUMA.....3RD DEFENDANT

MARY ACHIENG.....4TH DEFENDANT

JANEROSSY LWABIA.....5TH DEFENDANT

FRANCIS OKUMU NYANGWESO.....6TH DEFENDANT

RULING

1. I am called upon to determine the application dated 1st July, 2019 brought here by way of a Summons in Chambers by the applicant- **KWENA ATONGO**. It is expressed to be brought under Rule 11 of the Advocates Remuneration Order. The application is against the respondents- **FRANCIS OKUMU AMBOYE**, **CLEOPHAS CHESA OKUBASU**, **BONFACE KUYADI OUMA**, **MARY ACHIENG**, **JANE ROSSY LWABIA**, **FRANCIS OKUMU NYANGWESO** and **FRANCISCA AUMA MAKOKHA**.

2. The parties are the disputants in the suit herein, with the applicant being the plaintiff while the respondents are the defendants. The dispute between the parties related to Land parcel **NO MALACHI/ELUKONGO/46**. The suit was compromised via a consent entered by counsel on both sides on 10th March, 2016. It is a compromise that did not entirely please the applicant, particularly on the issue of costs. He contested the consent vide an application dated 6th June, 2016 and lost.

3. When the applicant lost, the respondents came up with a bill of costs which, in substance, is not only about the application but the whole suit as well. That Bill of Costs was dated 19th December, 2018, and was filed in court on 9th January, 2019. It was taxed by the lower court to the tune of 89,310/=. The substance of the bill and the manner in which it was handled aggrieved the applicant and impelled him to file the application now under consideration.

4. The applicant is asking for the following in the application under consideration:

> *1. That the execution of the decision made in taxation herein on 6/3/2019, an application for execution, and warrants of attachment, or Notice to Show Cause why the applicant should not be arrested in respect of such execution be stayed pending the determination of the application.*
>
> *2. The decision made by the taxing officer on 6/3/2019 in taxation of the respondents bill of costs dated 9/12/2018 herein be set aside or varied.*
>
> *3. Costs of the application/reference be provided for.*
>
> *4. That any other order be made as the court may deem fit.*

5. The applicant's dissatisfaction is captured well in both the grounds upon which the application is anchored and the supporting affidavit that came with the application. The taxing officer was faulted for not giving the applicant an opportunity to be heard; for failing to understand that the ruling made by the Court on 11th December, 2018 awarding costs applied to the application itself and not to the whole suit; and for

failing to appreciate the items 1 to 10 in the bill of costs related to costs in the main suit, which the respondents were not entitled to. It was the applicants position that the taxing officer favoured the respondents and failed to have proper regard to law and/or natural justice. All the concerns were further amplified in the applicant's supporting affidavit.

6. The respondents responded vide grounds of opposition filed on 8th April, 2019. They averred that the application is misconceived, bad in law and an abuse of the court process. They further stated that stay of execution cannot be granted in respect of execution to recover costs.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 4th June, 2019. He submitted, interalia, that costs of the suit were never awarded to the respondents. The court ordered each party to bear its own costs. Yet the taxation being challenged proceeded on the basis that the applicant was to pay costs of the suit. The only costs, applicant further submitted, that were to be paid related to the application dated 6th June, 2016 which the court heard and dismissed on 11th December, 2018. And even for that application, instruction fee should be 3000/= and a further 1400/= for each of the four (4) days that the advocate is shown to have attended the court for the application. Simple calculation would therefore take total sum to Kshs. 8600. The applicant urged the court to allow his application.

8. The respondents' submissions are in essence a partial concession of some of the allegations made by the applicant. But the respondents proceeded to submit, interalia, that their application to transfer this suit from the lower court to this one is a suit in its own right, which would attract its own costs. The respondents seemed to suggest that the costs of the suit awarded were for that application to transfer and not this suit itself. That would seem to imply that the amount awarded as costs of the suit were justified. The other costs according to the respondents related to the application that was dismissed by this court. For that application, respondents submitted that instruction fees was 5000/= and costs for each of the four (4) attendances by the counsel was 3000/= all making a total of 17,000/=.

9. The bill of costs itself was said to attract its own costs, with court fees for its filing and the taxation notice that followed put at 375 and 75/= respectively, while service of taxation notice on two occasions, attestation of the affidavit of service, and court fees for filing affidavit of service were put at 4200/=, 400/= and 150/= respectively. The respondents put the cumulative total when all was considered at Kshs. 22,200/=.

10. For this application itself, the respondents suggested that each side should bear its own costs.

11. I have considered the application, the response made, rival submissions, and the antecedents related to the suit as shown in the records.

12. The respondents would have the court believe that the figures in the bill of costs taxed as relating to the suit refer not to this suit itself but to the application made earlier to transfer this matter to this court from the lower court. To the respondents, that application, filed as a miscellaneous matter, amounts to a suit and the costs referred to related to it. To this court, the respondents are merely trying to make an unconvincing attempt at ingenuity. An application for transfer is essentially an intermediate or interlocutory step made to move the suit from one forum to another. It is normally a simple application and it cannot attract the kind of instruction fee awarded in the bill of costs now being impugned. It would be a pure case of unjust enrichment if the court endorses the hefty sum of 49,000/= awarded as instruction fee for a simple application of that nature.

13. Besides, if it was a separate miscellaneous matter independently and singly filed, its bill of costs should have been in the file relating to it, not this file. But if filed in this file, it can not be treated as a suit. It can only be seen and treated as an application in the suit. The respondents can not therefore be heard or entertained to say they filed a suit (the application for transfer) in another suit (this whole matter itself). Whichever way one looks at it, the respondents are simply trying to be ingenious or too clever by half when they argue that a simple application for transfer is a suit. And even if it were, it cannot, by any stretch of logic, commonsense, or imagination, attract the hefty award of 49,000/= granted as instruction fee in the taxed bill of costs.

14. The averments made by the applicant resonate more with what appears to be the truth namely: That the taxed amounts starting with the instruction fee shown as item one (1) all the way to item ten (10) were for the entire suit itself, yet the compromise regarding the settlement shows clearly that the respondent was not condemned to pay any costs of the suit.

15. It seems clear to me that the applicant's averments concerning denial of the right of hearing are without rebuttal from the respondents. The respondents response to the application was terse or brief and its substance was too general to be treated as responding to specific facts. It seems clear that on the issue of taxation, the applicant is justified to feel that he was treated in a rather cavalier manner. He was ultimately slapped with a hefty bill for payment yet, his participation or input had been overlooked or neglected.

16. The submissions of the respondents themselves seem to make concessions to the applicant but thereafter proceed on a decidedly un-accomodating manner, in the end even coming up with a re-formulated bill complete with suggested figures and final total, which the applicant and the court should presumably accept. Needless to say, the suggested figures and total are again without the applicant's input.

17. In my view, the whole exercise of taxation as carried out was unfair to the applicant since he was not heard and because also the exercise went beyond or outside the limits of what should have been considered. Some of the costs awarded appear to be exaggerated, erroneous, and/or presumptuous. The whole exercise of taxation appear to have been fundamentally flawed.

18. It is for these reasons that I find the applicant's application meritorious. I therefore allow the application in terms of prayer 2. The taxation done is set aside. Let it be done again in the proper way. The applicant is also awarded the costs of the application.

Dated and signed at Kericho this 10th day of March, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 10th day of March, 2020.

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A. OMOLLO

JUDGE