REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC. APPLICATION NO. 10 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF REMUNERATION ORDER

AND

IN THE MATTER OF THE TAXATION ADVOCATE AND CLIENT COSTS

BETWEEN

MANYONGE WANYAMA AND

ASSOCIATES ADVOCATES.....ADVOCATES/APPLICANTS

-VERSUS-

THE COUNTY GOVERNMENT OF NYERI.....1ST CLIENT/RESPONDENT

THE GOVERNOR NYERI COUNTY

GOVERNMENT.....2ND CLIENT/RESPONDENT

RULING

1. Before me is a Chamber Summons dated the 25th October 2019 and filed on the 30th October 2019 pursuant to the provisions of Section 44 of the Advocates Act , Paragraph 11 of the Advocates Remuneration Order, Section 3A of the Civil Procedure Act and all enabling provisions of the Law, where the Applicant seeks for orders that:-

i. That the honorable court be pleased to set aside the taxing officer's ruling delivered on 2nd October 2019 as it relates to the reasoning and determination of items 1, 2, 3-21 and 22-29 of the Applicant's bill of costs dated 16th July 2019.

ii.That the Certificate of Costs dated 22nd October 2019 be set aside.

iii.That this honorable Court be pleased to adjust the figures and reassess the fee due to the Applicant.

iv. That costs of this application be provided for.

2. The said application was supported by the grounds on its face and the Affidavit, sworn by Peter Manyonge Wanyama the Managing Partner of the Applicant/ Advocates herein, on the 25th October 2019

3. The Application was canvassed on the 22nd January 2020 wherein the Applicant/Counsel submitted while relying on the attachments to the Application and the authorities attached to their bill of costs dated 25th June, 2019 that the role of the court was not sitting as an appellate court. That the taxing master committed errors of principle while taxing the bill. That the taxing master at paragraph 4 stated that:

> *"The value of the subject matter cannot be determined in the pleadings therefore paragraph 1 (k) is applicable. I have considered that the suit involved defending a suit that involved two parcels of land and I therefore find Kshs.120,000/- reasonable for instruction fees".*

4. That one was left to speculate whether it was paragraph 1 of schedule 6 which did not exist. That Paragraph 6 of schedule 6 ran from a-j and there was no (k).

5. That it was an error in principle to consider a provision of law that did not exist while accessing a matter for taxation and therefore they were left to speculate on what principle of law the taxing master was drawing from while awarding fees.

6. That Taxation was a matter that is well laid down and is not mathematical exercise. That it was an issue of discretion exercised by a taxing master. The taxation of a non-existence law was therefore an error in principle.

7. That the taxing master did not clearly give the reasoning for how she had come up with a figure of Kshs.120,000/- considering her statement as follows:-

> *"I have considered that the suit involved defending a suit that involved two parcels of land and I therefore find Kshs.120,000/- reasonable for instruction fees".*

8. That the consideration there was that there were two parcels of land. That it was a principle of law that when a court is considering a case of such magnitude, there were issues to consider as was held in the case of **Joreth Limited vs Kigano and Associates (2002) 1 EA 92.**

9. That one of the factors to be considered was the importance of the matter, which was not considered. There were serious competing interests for the construction of stadium where his Excellency the President was involved in mediating to obtain land which was locked in a tussle. The stadium was to benefit the clients and community at large. This factor was not considered by the taxing master.

10. There was also the issue of complexity and importance of the matter and this was not an issue of just two parcels of land as discerned from the document. The matter had involved issues of the community's right to access the venue, historical matters etc.

11. The Applicant's complaint further was that the taxing master did not consider the size of the pleadings and the labour extended by the advocate. They referred the court to the case of **Pramchand Raichand Limited and Another vs Quarry services of East Africa Limited and 7 others (1972) E.A 162.** where the court had held that:

> *"A successful litigant ought to be fairly reimbursed for the costs he had had to incur".*

12. They also relied on the case of **Republic vs Minister of Agriculture & 2 Others ex-parte Samuel Muchiri W'Njuguna and 6 Others [2006] eKLR** to submit that the ruling of the taxing master was a mere formality and that they saw nothing in the said ruling that showed Judicial application in a prudent manner.

13. Counsel's further submission was that the figure calculated as being the tax costs did not add up, which was an error on the issue of principle.

14. That the Court's role was not to re-tax the bill, but if an error of principle had been made, then the bill ought to be returned to the taxing master for re-taxation. They relied on the case of **Kipkorir Kiptoo & Kiara Advocates vs Deposite Protection Fund Board [2005] 1KLR 528** where the court held that;

> *"If a Judge on reference from a taxing officer finds the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of the taxing officer. The judge however has discretion to deal with the matter himself if the justice of the case so requires".*

15. Counsel then submitted sought for their Chamber Summons to be allowed and the bill of costs be re-mitted to the taxing master for re-assessment.

16. In opposition of the said Application, Counsel for the Respondent submitted while relying on their grounds of opposition dated 18th November, 2019 and a list of authorities dated 21st November, 2019 that the Applicant had taken issues with items No. 1-12 and 23-29.

17. That vide her ruling, the taxing master at paragraph 4-10 had dealt with item 1, 2 and items 5, 13 and 18 in paragraph 6 of her ruling, whereas items 9 – 11 and item 29 were dealt with in paragraph 9, wherein she had stated that the rest of the items are drawn to scale.

18. That by the Applicant referring to items 3-21 and 22-29, in their Chamber Summons, they were being economical with the truth and in the process misleading the Court because the ruling spoke for itself. That there was no justification in making a reference on items No. 3, 4-21 when the taxing master drew them to scale. That the same situation was applicable to item No's 22-28 which had also been drawn to scale. There was nothing therefore to challenge.

19. That the present Chamber Summons was a situation where the Applicant was making a reference for the sake of making it whereas they had known that they had drawn their items wrongly and were now seeking for a higher figure which they could not get.

20. That on item No. 1, whereas the Court had been informed that there had been an error of principle, what the Applicant was not telling the Court was that on their own bill of costs they did not state what was complex or what research was done and neither had they indicated that due to the above factors, the president had to intervene. It was the Respondent's submission that these were strenuous matters that had not been placed before the taxing master who only dealt with what was placed before her and the issues of law. That there was no justification in the figure of Kshs.4,000,000/-.

21. Their further submission was that the Court had been referred to a non-existent paragraph being 1 (K). That in schedule (6) six, there was an additional paragraph and a heading after "J" reading **"other matters"**

> *"To sue or defend in any case not provided for above; such sum as may be reasonable but not less than —*
>
> *(i) If undefended* *45,000*
>
> *(ii) If defended* *75,000*

22. That this paragraph dealt with matters not provided for.

23. It was their submission that the suit which the Applicant defended, fell under the said paragraph because the value of subject matter could not be determined in the pleadings.

24. That since it was a defended suit, the minimum provided for was Kshs.75,000/-.That $^{1}/_{2}$ of Kshs.75,000/- ,because it was an Advocate-client suit, translated to Kshs.32,500/-

25. That by the taxing master awarding Kshs.120,000/- as instruction fees without adding ½, was extremely generous and she had exercised her discretion correctly. That the matter did not proceed to hearing.

26. That schedule 6 paragraph 1 dealt with matters that did not go to full hearing, the figure of Kshs.120,000/- was fair and reasonable. The same applied to item No. 2 which was unmerited but they did not have any quarrel. That the proviso under the sub heading of "fees for getting up or preparing for trial" provides that:

> *'no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;*

27. The case had not been confirmed for hearing but was settled before confirmation.

28. The Respondent referred to item 5, 13 and 18 where attending registry was provided for in schedule 6 paragraph 7(b) at Kshs.500/- which was what was taxed.

29. That in reference to item 9 and 11 which was fee for attending meetings with the County Government, the same is not provided for and the taxing master stated as such.

30. That in consideration of item No. 29 which was "To all petty disbursements", the same was not provided for although the taxing master was generous and awarded Kshs.10,000/-. No receipts had been annexed to the bill of cost to prove that a sum of Kshs.50,000/- was spent in those disbursement contrary to the provisions of paragraph 74 of Advocates Remuneration order which provides as follows:-

> *"Subject to paragraph 74A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer."*

31. The respondent relied on the case of **Joreth Limited vs Kigano and Associates [2002] I EA 92** where the learned Judges stated that:

> *"On the face of it, this is a completely wrong method of assessing the instruction fee and we are unable to agree with the learned Judge. We will have more to say about a judge assessing instruction fee later on in this judgment. We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case)*

32. That in as far as item No. 9 and 11 were concerned, the Respondents relied on the case of **Gathiga Mwangi & Co Advocates vs Jane Mumbi Kiano CA Civil Application No. 179 of 2013 (unreported)** wherein they sought that the Application be dismissed with costs.

33. In rejoinder Counsel for the Applicant submitted that although the Respondent's Counsel had referred the court to paragraph 'K, there was no such paragraph. That on the issue of complexity, their submissions at paragraph 1, 3 and 4 was clear wherein they had stated that the issue was complex but that the taxing master did not consider the same.

34. On the issue of getting up fee, that the same had been selectively argued, because from the record, they had filed responses wherein they had appeared to argue applications for injunctions, which was part of trial.

35. That on the issue of the matter not proceeding to trial, the same was not addressed by the taxing master. That getting up fees was charged upon receiving instruction and proceeding to defend the matter. That they were challenging the ruling based on breach of principles and adequate application of discretion.

Determination

36. Vide the Applicant's Chamber Summons dated the 25th October 2019, the Applicant seeks to set aside the decision of the taxing master, R. Kefa the Deputy. Registrar, dated 2nd October 2019. The said Application is supported by the grounds on its face as well as an Affidavit, sworn by Peter Manyonge Wanyama the Managing Partner of the Applicant/ Advocates herein, on the 25th October 2019

37. The Applicant's grounds are based on the following:

i. That the taxing master erred in principle by citing paragraph 1(k) in the advocates remuneration order while awarding instructions fees, which paragraph did not exist.

ii. That she failed to appreciate that the proceedings raised complex issues.

iii. That she failed to address herself on the fact that the suit involved two parcels of land being Thegenge/Karia/732 and Thegenge/Karia/733.

iv. That the taxing master failed to give weight to the settled principles of the law in considering the quantum pertaining to item No. 1 of the Bill of costs.

v. That the taxing officer erred in holding that Kshs.120,000/- was reasonable as instruction fees without ascribing to it any justifiable and reasonable grounds and erroneously stating that only nominal professional fees was payable.

vi.That the Taxing Officer failed to provide reasoning and awards for taxation of each item of the Bill of Costs to the extent that it is only a matter of speculation on the total amounts awarded, considering that some items of the bill were not taxed and the ones that were taxed, save for items 1 and 2, the sum taxed is not known.

vii. That the Taxing Master was tentative, speculative and utterly disengaged in the taxation of the bill to the extent that the taxation of the bill was a miscarriage of justice as a denial of the advocate of the fruits of his immense labour.

viii. That the Taxing Master erred in law and principle in failing to properly tax attendances to court and further taxing the Advocate's Bill to the ordinary sale instead of the Higher Scale.

ix. That the Taxing Officer applied wrongly (if at all), the principles of taxation laid in the case of **JORETH LIMITED VS KIGANO & ANOTHER (2002) 1 E.A.92,** a case replied by the Applicant's and Respondent's Counsel. In that case the Court of Appeal set out the following factors to be considered in determining an instruction fee:

a) The importance of the matter,

b) General conduct of the case,

c) The nature of the case,

d) Time taken for its dispatch,

e) The impact of the case on the parties

x. That the Taxing Master erred in principle and in law by arriving at an erroneous decision of the taxation for reason of her failure to give due and proper consideration to the relevant factors of the case including but not limited to:

a) Nature and importance of the matter giving rise to taxation,

b) Complexity and importance of the matter,

c) Size of the pleadings,

d) Labour, due diligence, responsibility and hard work undertaken by the advocate,

xi. That the Taxing Officer failed to consider the complexity, nature, importance, difficulty and urgency of the case.

xii. That the Taxing Master adopted a simplistic approach to the taxation of the Bill of Cost and failed to consider the pleadings to understand the nature of the matter.

xiii. That the Taxing Master failed to take into account the nature and importance of the matter to the Applicant and the Respondents in the suit. The Applicant exerted a significant amount of effort towards prosecution of the matter.

xiv. That the Taxing Master failed to recognize the complexity of the matter that necessitated exceptional dispatch on the part of the advocate and thus failed to provide reasonable fees for exceptional dispatch.

xv. That the Taxing Master failed to consider the nature of the pecuniary interests involved and the variegated interested of various parties in the suit and the fact that the size of the dispute property was *944,000,000 (16,000,000 per acre *59 acres)* acres.

xvi. That the Taxing Master failed to take into account the general conduct of the proceedings which clearly indicate the complexity, importance and urgency of the matter.

xvii. That the learned Taxing Master mechanically applied the Advocates Remuneration Order thus trivializing the industrious work of the Advocate.

38. The issue for determination herein is whether the taxing officer had committed any errors of principle while taxing the bill of costs.

39. The often cited case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64** sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the taxing officer's exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in ***Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and another [1972] E.A 162 and Arthur vs Nyeri Electricity Undertaking [1961] E.A 492***. The said principles were also re-affirmed by the Court of Appeal in ***Joreth Limited vs Kigano and Associates*** **[2002] 1 E.A 92**. These principles include

i. *that the court cannot interfere with the taxing officer's discretion on taxation 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 interference that it was based on an error of principle;*

ii. *it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;*

iii. *if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;*

iv. *it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."*

40. From the above, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation *unless* there is a clear error of principle or the sums awarded are either *manifestly* high or low as to lead to an injustice, see ***Premchand's*** **case** (supra)

41. The Applicant contends that the taxing master ought to have considered the instruction fee in Item 1 in regard to two parcels of land and that the matter that involved interpretation and analysis of a complex issue and therefore the instruction fee ought to have been taxed at Ksh 4,000, 000/=

42. I have considered the plaint annexed in the Respondent's response, where the 1st and 2nd Defendants herein were sued for trespass and breach of the Plaintiff's right to own and enjoy property. Being the registered proprietor of parcels No. Thegenge/Karia/732 and Thegenge/Karia/733, the Plaintiff thus sought for a permanent injunction against the Defendants and their agents ,servants or anybody acting on their behalf from entering, occupying, working on, remaining on, encroaching and/or interfering in any manner whatsoever with the Plaintiff's quiet and peaceful occupation of the suit properties.

43. In the case of **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99,** the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, *taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.*

44. Schedule 6 paragraph 1(j) (ii) of the Act provides that in matters not complex and opposed the instructions fees should be Kshs. 45,000.00 and in matters complex and opposed it should be Kshs. 100,000.00. In this case, it is clear from the record that the application was opposed. However there was nothing to show that the matter was complex. **The nature of the forensic responsibility placed upon counsel in terms of the considerable amount of industry that was time-consuming, the large volumes of documentation that had to be classified, assessed and simplified, and the details of such initiative by counsel which ought to have been specifically indicated** were not **specified cogently and with conviction** nor placed before the taxing master**.** In my view, the *responsibility entrusted to counsel* in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field.

45. The Applicant has failed to demonstrate that the calculation of instruction fees based on an undisclosed value of the subject matter was erroneous and was not based on any discretionary powers vested on the taxing master, hence there is nothing to show that the amount allowed by the taxing master on the instruction fees was inadequate and not within the scale fees.

46. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001 [unreported]** the Court held:

> *"In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference."*

47. That since it was a defended suit, the taxing master held that:

> *"The value of the subject matter cannot be determined in the pleadings therefore paragraph 1 (k) (sic) is applicable. I have considered that the suit involved defending a suit that involved two parcels of land and I therefore find Kshs.120,000/- reasonable for instruction fees".*

48. I note that the taxing master quoted the wrong provision of the law, a provision that did not exist but that could have been a typographical error which did not go to the crux of the matter. Moreover the said glitch is curable under the provisions of Article 159 (2)(d) of the Constitution. The taxing master used her discretion to award Kshs.120,000/- as instruction fees and I cannot fault her.

49. On item No 2 , which is the getting up fee, the same was taxed at Ksh 40,000/= as per paragraph 2 of the schedule, That the proviso under the sub heading of "fees for getting up or preparing for trial" provides that:

> *In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:*
>
> *Provided that —*
>
> *i)……..*
>
> ii) *no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned……..*

50. There is no compelling reason to justify any interference on this item either as in the instant case the matter did not proceed for hearing and therefore the getting up fee being $^1/_3$ of the instruction fee, was in order.

51. With respect to the rest of the items 3-29, the Applicant having no issues with the same since they had been drawn to scale I am not satisfied that I ought to interfere with the awards, the decisions having not been based on an error of principle, or the fee awarded not having been manifestly excessive or low as to justify interference.

52. In the result I find no merit in this reference and proceed to dismiss the same with cost.

Dated and delivered at Nyeri this 5th day of March 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE