



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 74 OF 2015**

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA**

**AND IN THE MATTER OF AN ADVOCATE – CLIENT BILL OF COSTS**

***BETWEEN***

**MUEMA KITULU**

**T/A MUEMA KITULU & CO. ADVOCATES.....APPLICANT**

***AND***

**COUNTY GOVERNMENT OF KITUI.....RESPONDENT**

**RULING**

1. By a Chamber Summons dated 19<sup>th</sup> January 2016, the Applicant herein sought for orders *inter alia* that this court be pleased to set aside, review or substitute the taxing masters decision in **HC Misc. No. 74 of 2015** issued on 3/11/2015; that the costs be in the cause.

2. The Application is supported by the affidavit of the Applicant sworn on even date and further on the following grounds namely:-

(a) *The Applicant herein had filed an Advocate/Client Bill of Costs before the Honourable court dated the 14<sup>th</sup> April, 2015 wherein he had sought a sum of Kshs.66,458,942/70 as costs arising from legal services provided in H.C Petition No. 168 of 2011 – Solomon Mulwa Mulyunga & others =VS=County Council of Kitui and 9 others.*

(b) *H.C. Petition 168 of 2011 was filed over a dispute concerning prospecting rights issued to the other Defendants by the Client/Respondent over land occupied by the Petitioners.*

(c) *The dispute therefore amounted to rights over land and the intentions of the Applicant who was to restrain the Client/Respondent issuing any prospecting rights to the other Defendants to mine minerals in the vast suit area.*

(d) *On the 3/11/2015 the Taxing Master awarded the Applicant Kshs.771,189/= out of the sum of Kshs.66, 458,942/= claimed in the Advocate/Client Bill of Costs.*

(e) *The Applicant being dissatisfied with the award of costs made on 3/11/2015 wishes to object to the sum awarded as instruction fee and urges this Honourable court to set aside and substitute the said award to that pleaded in the Applicant/advocates Client bill of costs.*

(f) *The Application herein is brought in the interest of justice and fairness.*

3. The Applicant's case is that the brief that had been assigned to his law firm by the client entailed a constitutional reference which sought conservatory orders over the vast land mass located within Kitui County which the client held in trust. It was his contention that the issues raised were weighty and fairly complex and that the Taxing Master should have considered the complexity in arriving at the instruction fee which should have been pegged on the value of the land and due to that failure a lower award was arrived at by the Taxing Master.

4. The Application was opposed by the Respondent whose learned Counsel filed grounds of opposition as well as replying affidavit both dated 7/6/2017 which raised the following issues:-

(a) *That there is no legal basis for interfering with the taxing officer's decision as regards the Advocates instruction fees.*

(b) *The taxing officer considered all the salient issues of the case in arriving at the decision being challenged.*

(c) *The amount awarded by the Taxing officer as instruction fees was not only generous but sufficient under the circumstances of the case.*

(d) *The taxing officer award in this matter should be upheld and confirmed.*

(e) *The application for review should be dismissed.*

5. Learned counsels for the parties herein agreed to canvass the Application by way of written submissions.

#### **Applicant's submissions**

It was submitted for the Applicant that the Constitutional Petition raised complex legal issues regarding the right of the County Government over an un - adjudicated land whose title is vested in the Client/Respondent *vis – a vis* the rights of persons residing on the land. The issue also touched on mining law as well as wildlife conservation. It was further submitted that the pleadings were voluminous and thus the matter was complex in nature and that the value of the land ran into billions of shillings which the Applicant placed a modest value of Kshs.100,000/= per acre.

It was submitted that the Applicant could not attach any documentary evidence to prove value of the land as he was restricted by Rule 69 of Advocates Remuneration Order. It was therefore incumbent upon the taxing officer to call for documentary evidence to establish the missing information on the value of the property as provided for under Rule 13 A of the Advocates Remuneration Order. Learned Counsel sought reliance in the case of **JORETH LIMITED =VS= KIGANO & ASSOCIATES C.A NO. 66 OF 1999 [2002] EA 92** where it was held that the value of the subject matter for purposes of taxation of bill of costs ought to be determined from the pleadings, judgement or settlement.

It was submitted that the taxing officer failed to invoke statutory powers conferred by Rule 13A if she was in doubt about the subject matter or value thereof. It was finally submitted that it would be a travesty of justice if extraneous consideration are applied while taxing Advocate/Client Bill of Costs and that the award of Kshs.771,189/= is grossly inadequate and warrants the setting aside of the same and the taxing officer be directed to tax the bill again or substitute the award with the amount claimed in the bill of costs.

#### **Respondent's submissions**

It was submitted that the Applicant seeks to impose a value on land from the bar contrary to the precedent established in **JORETH LIMITED =VS= KIGANO & ASSOCIATES C.A. NO.66 OF 1999 [2002] I EA 92** as quoted by this court in **Muema Kitulu = Vs= County Government of Kitui – HCC Misc. Application No.27 of 2015 (Machakos)**.

It was also submitted that the subject matter of the case was not the value of the land but the alleged rights of the Petitioners which they sought declarations for. The estimated valuation of the land has no basis as no valuation had been done and again the issues in the petition were plainly simple.

It was submitted that the taxing officer's award was not only sufficient but generous under the circumstances. It was not the property that was in dispute and the taxing officer properly exercised her discretion in assessing the instruction fees which was reasonable. It was finally submitted that the Applicant is attempting to introduce new evidence at this stage which evidence was never placed before the Deputy Registrar and this should be expunged from the record. The Application should be dismissed with costs.

6. I have considered the Applicant's Application together with the rival affidavits as well as the submissions and authorities cited. It is noted that the Applicant herein in his Advocate/Client Bill of Costs had presented a claim for the sum of Kshs.66,458,942/70 which was taxed by the taxing officer to a net sum of Kshs.771,189/= only. The bulk of the money which he had hoped would sail through was on item No.1 being Instruction fees billed at Kshs.37,550,000/= which was taxed by the taxing officer to the sum of Kshs. 250,000/=. The taxing master indeed gave her reasons vide her ruling dated 3/11/2015 whereby she pointed out that the value of the subject matter could not be determined from the pleadings and that according to schedule VI 1(c) of the Advocates Remuneration Order, the sum was pegged at Kshs.6,300/=. She however indicated that the matter involved a petition for conservatory orders where the value of the subject matter had not been pleaded and was thus of the view that the sum of Kshs.250,000/= was reasonable under Item No.1 on the bill.

7. The Applicant herein has maintained that he did not get value for his labour rendered to the client since the amounts awarded in regard to the instruction fees is a pittance yet the matter was complex and which involved a huge tract of land within Kitui County where there were competing interests by the parties involved. Indeed it is a settled principle of law that a higher court is not entitled to interfere with an award of a lower court and in this case a taxation merely because in its opinion the amount awarded by the taxing officer is high or low unless the same was based on an error of principle (see the case of **CONSTRUCTION PETROLEUM ENGINEERING (EA) LTD =VS= UGANDA SUGAR FACTORY [1970] EA 14**).

8. I have perused the Constitutional Petition Number 168 of 2011 where the Applicant had represented the Respondents and note that the value of the subject matter was not disclosed. The bill of costs only brought out the approximate value of the land mass which the learned counsel herein put a modest value of Kshs.100,000/= per acre for a parcel of land measuring over 30,000 acres. Indeed no valuation report was availed in the petition and none was presented to the taxing officer. As the value of the property had not been pleaded in the pleadings, the taxing officer's hands were thus circumscribed and only proceeded to tax the bill on the basis that the same involved a constitutional petition where conservatory orders had been granted and several declarations sought. This court had handled a similar matter in **Machakos High Court Civil Application Number 27 of 2015 Muema Kitulu =Vs= County Government of Kitui** where it held that the taxing master had exercised her discretion in taxing the Advocates instruction fees. This court had been guided by the authority in **JORETH LIMITED =VS= KIGANO & ASSOCIATES – C.A. NO. 66 OF 1999 [2002] EA 92** in which the court held as follows:-

*“The value of the subject matter for purposes of taxation of a bill of costs sought is to be determined from the pleadings, judgment or settlement. However where the same is not so ascertainable, the taxing master is entitled to use his discretion to assess such instruction fee as he considered just taking into account amongst other matters; the nature and importance of the cause, the general conduct of the proceedings, any directions by the trial judge and all other relevant circumstances.”*

9. I have perused the ruling of the taxing officer dated 3/11/2015, and I find that she duly exercised her discretion as she pointed out that the subject matter had been a constitutional petition which sought for conservatory order plus other declarations. The said petition did not disclose the value of the land but only brought out the diverse interests and rights of the parties in that dispute and as such I find the taxing officer worked on what was available to her and she could not go out of her way in search of a valuation over the property yet none had been pleaded in the pleadings.

10. The Applicant has urged this court to overturn the award of the taxing officer and call for a fresh taxation or in the alternative allow the bill on instruction fees as claimed. It is noted that the Applicant herein has filed a bundle of the pleadings and documents that had been filed in the **Petition Number 168 of 2011**. However the Applicant has not presented a certified copy of the court proceedings and rulings if any so as to establish how the case had been managed and which would then assist the Taxing Officer or this court to establish whether or not the matter was that complex as alluded to by the Applicant. In the absence of the proceedings, I find it is difficult to gauge the complexity of the matter. However what comes out clearly is that the matter involved a constitutional petition where the Petitioners sought for conservatory orders as well as some declaration which must have been canvassed by way of written submissions as is often the practice and therefore there was nothing like calling witnesses to testify. The Taxing Officer considered the submissions of the parties during the taxation of the bill and came up with the sum of Kshs.250,000/= as reasonable for item on instruction fees. I find the Taxing Officer properly exercised her mind and arrived at a reasonable award and therefore I see no reason to interfere with the same. As the matter did not involve a dispute over property such as land, the Applicant's submissions that if a proper valuation was to be undertaken the value would be higher to appear to be way off the mark because the property had not been valued and pleaded and no valuation report was availed which could then have enabled the Taxing Master to rely on. The Taxing Master could not, of her own volition undertake a valuation enquiry when no such issue had been pleaded. I am satisfied that the award made by the taxing officer was reasonable in the circumstances of the case.

11. In view of the foregoing observations, it is the finding of this court that one Applicant's Application dated 19/1/2016 lacks merit. The same is dismissed. Bearing in mind that the issue involves Advocate and client who might wish to continue with the said relationship, I order that each party to bear their own costs.

Orders accordingly.

Dated and delivered at **Machakos** this **6<sup>th</sup>** day of **June, 2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Ngugi for Mbindyo for the Applicant

Naswa for Mwalimu for Respondent

Josephine – Court Assistant