



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 261 OF 2013(OS)**

**PETER NJOROGЕ GATUA AND 351 OTHERS.....PLAINTIFFS**

**-VERSUS-**

**WILLMAC CATTLE FARM LIMITED.....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated the 19<sup>th</sup> September 2019 and filed on the 20<sup>th</sup> September 2019 in which the Applicant herein seeks for the Court to set aside its orders issued on the 30<sup>th</sup> August 2019 so as to enable it conduct fresh taxation of the Bill of costs dated the 13<sup>th</sup> August 2019, based on the actual value of the subject matter.
2. The said Application is supported by the grounds on its face and the Affidavit, sworn by M/S Joel Kimutai Bosek Advocates herein, on the 19<sup>th</sup> October 2019.
3. The Application was canvassed by way of written submissions wherein only the Applicant filed their submissions, and despite there having been service effected upon the Respondent herein, he neither filed his response nor written submissions.
4. The Applicant submitted that he had been diligently acting for the Defendant herein wherein parties had agreed that legal fees would be paid upon the sale of the suit property being IR No. 20902(IR No. 66639)
5. That the Defendant had later sold the suit land secretly using another Advocate but had failed to either pay the agreed legal fees to the Applicant or provide any instructions regarding the ongoing suit.
6. It was based on the said turn of events that the Applicant had sought to cease acting for the Defendant vide an Application dated the 2<sup>nd</sup> July 2019 whereon the Application was allowed as unopposed.
7. Following the said events, the Applicant had filed his bill of cost dated the 13<sup>th</sup> July 2019 with the intention of having his legal fee settled. The Bill of Taxation as well as the Notice of Taxation were duly served wherein no objection or response was filed. There was also no appearance by the Respondent on the 21<sup>st</sup> August 2019 when the matter came up for taxation. A ruling had subsequently been delivered on the 30<sup>th</sup> August 2019 wherein the Bill had been taxed from an amount of Ksh 2,255,205/= to Ksh 258,975/=
8. The Applicant faulted the Taxing Master for failing to consider the value of the suit property, which had been ascertained, while taxing the bill of costs and as such, the Applicant was prejudiced as the amount taxed failed to satisfy the professional fees as envisaged in schedule 6 (b) of the Advocates Remuneration Order.
9. The Applicant's submission was that the Taxing Master did not reflect the value of the property, the complexity of the matter, the amount and time that the Applicant had put in, in the representation of the Defendant and neither was there disclosure of the provisions of the Advocates Remuneration Order that had informed the decision to tax the bill of costs in the manner it had been taxed.
10. Reliance was placed on the decided cases in **Republic vs Minister for Agricultural & 2 Others ex-parte Samuel Nuchiri W'njugun (sic) and in the case of Joreth vs Kigano & Another EA 92.**

**Determination.**

11. I have considered the Application, the submissions, as well as the Authorities herein cited by the Applicant. The issue for determination is whether the Taxing Master committed any errors of principle while taxing the Bill of Costs.

12. The often cited case of **First American Bank of Kenya vs. Shah & 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 reaffirmed 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."

13. 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 so as to lead to an injustice, see **Premchand's case** (supra)

14. The Applicant contends that the taxing master ought to have considered the instruction fee in Item 1 in regard to the value of the property, the complexity of the matter, the amount and time that the Applicant had put in in the representation of the Defendant and therefore the instruction fee ought to have been taxed at Ksh 2,179,005/=

15. I have considered the Originating Summons filed by the Plaintiffs who sought to be registered as proprietors of LR No 20902 situated in South East of Nanyuki in Laikipia District in place of the Defendant through the doctrine of orders of adverse possession.

16. In the case of **Joreth Limited (supra)**, 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.

17. Schedule 6 paragraph 1(j) (ii) of the Advocates Remuneration Order provides that in matters not complex or opposed, the instructions fees should be Kshs. 45,000/= and in matters complex and opposed it should be Kshs. 100,000/=.

18. In this case, it is clear from the record that the Applicant came on record on the 13<sup>th</sup> October 2016 wherein after, he had filed a 2 (two) paged Replying Affidavit to the Originating Summons opposing the same. There was nothing to show that the matter was complex.

19. 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. Indeed the matter did not proceed for hearing, after the filing of the Replying Affidavit.

20. The Applicant failed to demonstrate that the calculation of instruction fees based on value of the subject matter was erroneous and was not based on any discretionary powers vested on the Taxing Master, hence there was nothing to show that the amount allowed by the Taxing Master on the instruction fees was inadequate and not within the scale fees.

21. In the case of **Paul. K. Ssemogerere & Another vs. Attorney General - Civil Application No.5 of 2001 [2003] UGSC 8** the Supreme Court of Uganda sitting at Mengo held as follows:

*"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."*

22. I am not satisfied that I ought to interfere with the Taxing Master's award, the decision having not been based on an error of principle and the fee awarded not having been manifestly excessive or low so as to justify interference.

23. In the result I find no merit in the Application dated the 13<sup>th</sup> August 2019 and proceed to dismiss the same with no cost.

**Dated and delivered at Nyeri this 22<sup>nd</sup> day of May 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**