



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

MISC. APPLICATION NO. 20 OF 2014

ALDOLFO GUSSINI & ANOTHER.....APPLICANTS

VERSUS

EMMANUEL CHARO TINGA.....RESPONDENT

RULING

1. The Application before me is dated 5th May, 2016 in which the Applicants are seeking for the orders:

a. That the honourable court be pleased to deem this application for reference against the Deputy Registrar's ruling dated 22nd April 2015, as duly filed within time or alternatively to extend/enlarge time to cover the delay in filing the said reference.

b. That the honourable court be pleased to vacate and set aside in its entirety the ruling of the Deputy Registrar Hon. L. Gicheha dated and delivered on the 22nd April 2016 taxing the advocate-client bill of costs dated 7th July 2014, at Kenya Shillings One Million, Ten Thousand, Four Hundred and Twenty Two (1,010,422) and refer the matter for fresh taxation before a taxing master.

c. That cost of this application be provided for.

2. The Application is premised on the grounds that the taxing officer misdirected herself on points of law and that the decision of the taxing officer was based on grounds that are both unclear, unreasonable and legally untenable in allowing the instruction fees at Kshs. 700,000/= and that the taxing officer acknowledged that the matter did not proceed to full hearing and failed to reduce the instruction fees by 75%.

3. The Applicant further averred that the taxing officer misdirected herself by awarding getting up fees contrary to the known principles applicable in taxation and that she took in consideration issues that she should not have.

4. The Applicant's advocate deponed that officer the resultant amount was baseless in law and against the principle that the award by the taxing officer ought not to be too high to amount to an injustice.

5. In response, the Respondent deponed that the impugned ruling was delivered on 22nd April 2014, two years before the current Application was filed; that the award of Kshs. 700,000/= as instruction fees was reasonable; that instruction fees is earned immediately a firm is instructed and that the award of getting up fees was lawful.

6. In his submissions, the Applicants' counsel submitted that in her ruling, the taxing officer acknowledged that the alleged value of the suit property was in dispute, that despite; the observation, the taxing officer proceeded to adopt a value of Kshs. 125,000,000/= for the suit land and that this value was never disclosed in the pleadings. Counsel submitted that even after arriving at a figure of Kshs. 700,000/=, the taxing officer failed to discount the sum awarded to 75%.
7. Because the matter was withdrawn before hearing, counsel submitted that the respondent is not entitled to getting up fees.
8. On the issue of the delay in filing the current Application, it was submitted by the Applicant's advocate that the decision of the taxing officer was not availed until on or about 25th April 2016 that upon receipt of the decision of the taxing master, this application was filed within 14 days and that the filing of the reference could not have been filed any time earlier.
9. In his submissions the Respondent's counsel submitted that the applicants are guilty of laches; that the Application has been filed two years after the delivery of the ruling and that this Application has been filed in contravention of the Advocate's Remuneration Order.
10. Counsel submitted that the award of Kshs. 700,000/= as instruction fees was reasonable; that the taxing officer rightfully took into account the complexity and importance of the subject matter and that the value of the subject matter was Kshs. 125,000,000/= which was ascertained by the Government valuer for purposes of stamp duty.
11. The Respondent's counsel submitted that getting up fees is always 1/3 of the instruction fees; that the award of Kshs. 233,300/= as getting up fees was justified and that it was immaterial if the matter proceeded for hearing.
12. The ruling in respect to the Respondent's bill of costs dated 7th July, 2014 was delivered by the taxing officer on 22nd April, 2015.
13. By way of a letter dated 28th April, 2015 and which was received by the registry on 29th April 2015, the Applicant's advocate requested for the reasons for the said decision pursuant to the provisions of Rule 11 (2) of the Advocates Remuneration Order.
14. The said letter did not elicit any response and the Applicant's advocate did two more letters dated 29th June, 2015 and 15th September, 2015 requesting for the reasons for the decision of the taxing officer. In the letter dated 15th September, 2015, the Deputy Registrar noted as follows:

“Advocate is advised to take a copy of the typed ruling upon payment of the requisite fees”.
15. The above note was made by the Deputy Registrar on 23rd September 2015. It is not clear whether the “note” that was made on the face of the Applicants' advocate's letter of 15th September, 2015 was ever brought to the attention of the said advocates.
16. Although the Applicants' advocate has admitted that it was not until on or about 25th April, 2016 that the decision of the taxing master was availed to them, I have not come across any evidence to that effect.
17. It is true that the jurisdiction of this court to challenge the decision of the taxing officer can only be invoked after the taxing officer has given reasons for her decision pursuant to paragraph 11 (2) of the Advocates Remuneration Order.
18. It is also true that pursuant to Rule 11 (4) of the Advocate's Remuneration Order, this court has the discretion to extend time within which to give notice of objection to the decision on taxation and to file a reference in respect of such taxation.

19. The Applicants' advocate has stated that the delay in filing this current Application was occasioned by the refusal of the taxing officer to give them the reasons for her decision. The evidence before this court shows that indeed the Applicants requested for the reasons of the decision of the taxing officer within 14 days and kept on asking for these reasons in subsequent letters.

20. Consequently, they cannot be blamed for filing the reference out of time. In the circumstances, I allow the Application in terms of prayer number 1.

21. From the Applicants' advocate's submissions, they are aggrieved with the decision of the taxing officer awarding the Respondent Kshs. 700,000/= as instruction fees and Kshs. 233,300/= as getting up fees.

22. The applicable principles in taxing a Bill of Cost by the taxing officer were set out in the cases of **First American Bank of Kenya-VS- Shah & Others [2000] 1 EA 64 and Joreth Limited -VS- Kigano & Associates, Civil Appeal No. 66 of 1999 [2000], 1EA 92.**

23. Those principles are:

a. That the court cannot interfere with the taxing officer's decision 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 inference that it was based on an error of principle;

b. It would be an error of principle to take into account irrelevant 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 of the trial Judge.

In Republic -VS- Ministry of Agriculture & 2 Others, Ex-parte Muchiri W. Njuguna & 6 Others [2006] eKLR, the court held as follows:

“However, it cannot be gainsaid that where the amount is high the issue is likely to be very important for the purpose of the parties.....”

24. In the suit that was filed by the Applicants, they alleged that they are proprietors of land known as L.R No. 945; that the said land is situated in Watamu coast line abutting the Indian Ocean and that the Defendant had commenced construction of a wall across the suit land.

25. In the Complaint, the Applicants claimed for a declaration that they are the owner of the suit land and for a mandatory injunction directing the Defendant to demolish the wall. After the Defendant filed its Defence, several Applications were filed and Rulings made by the court.

26. In one of the many Applications, the Respondent's advocate sought for dismissal of the suit. However, on 15th February, 2011, the parties entered into a consent in which they agreed to file their list of documents and witness statements within 90 days and then fix the matter for hearing.

27. In the Defence, the Respondent denied the averments in the Complaint and stated that his property is Kilifi/Jimba/1246 and not L.R. No. 945. The Defendant denied being involved in any fraudulent dealings in respect to L.R. No. 945 or Kilifi/Jimbe/1126.

28. While the suit was pending, the Applicants filed an amended Complaint to bring on board other parties. This was after it transpired that the suit property had been sold to an entity known as Love Island Beach Resort Limited by the Respondent, which in turn sold it to Kidzizi Properties Limited.

29. While responding to the Applicants' application for injunction dated 19th December, 2012, the Respondent annexed a copy of the Stamp Duty declaration form showing that he had sold parcel of land

number Kilifi/Jimba/1126 for Kshs. 125,000,000/=.

30. The record states that after the Application for the amendment of the Plaintiff was allowed, the matter came up on several occasions before the Deputy Registrar to confirm if the same was ready for hearing.

31. The Applicants then filed a Notice of Withdrawal of the suit dated 16th June, 2014 which was adopted by the court on 26th March, 2015.

32. While assessing the instruction fees, the taxing officer held as follows:

“In this case the value of the property is disputed by the Respondent. What they are submitting as actual value may not be the sale price paid by the Respondents. Therefore a valuation report may be more appropriate. For this reason it is left to court to assess the instructions. Considering the property land had a sale price of Kshs. 125 million it means that the brief was enormously important to the plaintiff as well as the defendants.”

33. It is obvious that the taxing officer did not award the instructions based on the value of the suit property notwithstanding a copy of the stamp duty forms showing that the suit land is valued at Kshs. 125,000,000/=.

34. The award of the instruction fees was awarded based on the complexity of the matter and the importance of the matter to both the Applicant and the Respondent. The figure of Kshs. 125,000,000/= was only used by the taxing officer to show the importance of the matter in line with the authority of **Republic –VS- Ministry of Agriculture & Others Ex-parte, Muchiri W’njuguna & 6 Others [2006] eKLR.**

35. I therefore do not see the error of principle that the learned taxing officer committed when she arrived at a figure of Kshs. 700,000/= as the payable instruction fees.

36. Indeed, as I have shown above both the Plaintiff and the Defendant’s advocate were so much involved in the dispute considering the proximity of the suit land to the Indian Ocean, which by all accounts, is a prime area for development. The figure of Kshs. 700,000/= as instruction fees was therefore not unreasonable in the circumstances.

37. As I have already stated, before the Applicants were allowed by the court to amend their Plaintiff, the suit was ready for hearing.

38. Just to show that the matter was ready for hearing and that the parties were entitled to getting up fees, the court while allowing the Applicants’ Application for adjournment on 19th March, 2012 stated as follows:

“Matter adjourned, no further adjournment. For that reason let suit be fully prosecuted within 18 months or stand dismissed for want of prosecution.”

39. Having prepared the matter for hearing more than once, the Respondent was entitled to getting up fees after the Applicants withdrew the suit. Under schedule VI of the Advocate’s Remuneration Order, getting up fees is chargeable once the case has been confirmed for hearing. This does not mean that the case must have actually proceeded for hearing, especially in a situation where the Plaintiff withdraws his suit.

40. Indeed, schedule VI (2) (ii) provides that the taxing officer only needs to be satisfied that the case has been prepared for trial, and can award getting up fees even where the case is not heard. That is what happened in the instant case.

41. In the circumstances, I am satisfied that the taxing officer did not err when she awarded the Respondent Kshs. 233,300/= being a $\frac{1}{3}$ of Kshs. 700,000/= as getting up fees.

42. Having defended the matter, the Respondent was entitled to the full instructions fees and not to 75% of the fees as submitted by the Applicant's counsel.

43. For those reasons, I dismiss the Applicants Application dated 5th May, 2016 with no order as to costs.

DATED AND SIGNED IN MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED IN MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE