



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1282 OF 2015 (OS)**

**SCHOLAR WAMBUI WAINAINA.....PLAINTIFF**

**=VERSUS=**

**NDOHO MARKET STALLS LIMITED.....DEFENDANT**

**RULING**

1. Gacheru J rendered a Judgment in this suit on 3/10/2016. She awarded the plaintiff costs of the suit. Subsequently, on 25/9/2018, the taxing officer of this court, Hon I N Barasa, taxed the plaintiff's party and party bill of costs dated 23/9/2017 at Kshs 425,030. Aggrieved by the decision of the taxing officer, on 2/10/2018, the defendant filed a notice of objection, objecting to the decision of the taxing officer in general.

2. Subsequently, on 19/2/2019, the defendant brought a reference through a chamber summons dated 13/2/2019, seeking the setting aside of the taxing officer's decision. The reference was supported by an affidavit sworn on 13/2/2019 by the defendant's advocate, Mr David M Mereka. The grounds upon which the reference was premised were that:

***i. In taxing item 1 of the bill of costs, the taxing officer erred in law and in principle by failing to appreciate the true nature of the instructions given to the advocates by the client;***

***ii. The taxing officer erred in law and in principle in applying the wrong schedule and/or scale to tax the bill of costs and failing to apply the provisions of Schedule VI of the Advocates (Remuneration) (Amendment) Order 2014 under the paragraph relating to "other matters";***

***iii. Without prejudice, even if the taxing officer used the proper scale, she arbitrarily and without any legal backing added Kshs 62,000 to the scale fees relating to instruction fees;***

***iv. The taxing officer failed to consider relevant factors, including the interest of the parties, the general conduct of the proceedings, and the directions of the Deputy Registrar;***

***v. The taxing officer erred in law and principle by applying the wrong schedule and/or figure in determining the getting up fees;***

***vi. The taxing officer erred in law and principle in failing to take into consideration defendant's written submissions.***

3. The plaintiff opposed the reference through a replying affidavit sworn on 25/10/2019 by her advocate, Mr Dennis Muriithi. He deposed that there was no error in the taxing officer's assessment of instruction fees. He added that the sum of Kshs 255,000 awarded as instruction fees was arrived at after consideration of relevant factors, including the value of the subject matter. He further deposed that the taxing officer properly exercised discretion in increasing the instruction fees. Counsel added that there was no error on part of the taxing officer.

4. The reference was canvassed through written submissions. Counsel for the defendant/applicant filed written submissions dated 13/2/2020. Counsel submitted that the taxing officer's finding that the value of the subject matter was Kshs 4,650,000 was erroneous because purchase price was not the subject matter. It was contended that the taxing officer was obligated to identify the contested issues, and based on that, identify the subject matter of the suit. Counsel argued that since the subject matter was not ascertainable in terms of money, the applicable schedule was Schedule 6(1) (j) of the Advocates (Remuneration) Order. It was contended that the taxing officer had used the wrong schedule in assessing instruction fees.

5. Counsel further submitted that the taxing officer exercised her discretion irrationally by awarding the plaintiff instruction fees higher than the scale fees. It was contended that the taxing officer failed to specifically and cogently demonstrate any elements justifying the increase.

Further, counsel faulted the taxing officer for taking into account the time that had passed since the parties entered into the agreement for sale, contending that this was an irrelevant factor which unduly influenced the taxing officer's decision. Counsel added that the material suit was a simple originating summons canvassed through affidavit evidence and written submissions and therefore there was no basis for increasing instruction fees. Relying on the decisions in (i) **Zephania Ngaria Agwenye v Moses Lutomia Washidi & Another [2015] eKLR**; (ii) **Joreth Limited v Kigano & Associates [2002] eKLR**; (iii) **Belgo Holdings Limited v Robert Kotch Otach & Another [2019] eKLR**; (iv) **First America Bank of Kenya Limited v Gulab P Shah & 2 Others [2002] 1 EA**; (v) **Republic v Minister of Agriculture & 2 Others Ex parte Samuel Muchiri W'Njuguna & Others (2006) eKLR** and (vi) **Kyalo Mbobu t/a Kyalo & Associates Advocate v Jacob Juma [2015] eKLR**, counsel for the defendant urged the court to allow the reference.

6. The plaintiff filed written submissions dated 24/2/2020. Firstly, the plaintiff's counsel argued that the reference was fatally incompetent because it was filed outside the prescribed time, and was filed without leave of the court. Relying on the decision in **Twiga Motors Limited v Hon Dalmas Otieno Anyango [2015] eKLR** and **Amuga & Co Advocates v Joyce Nzisa & 4 Others [2015] 2015 eKLR**, counsel urged the court to strike out the reference.

7. Regarding the contention that the taxing officer failed to take into account the true nature of instructions given by the client, counsel argued that the contention was irrelevant because the material bill of costs was not an advocate/client bill of costs.

8. On the allegation that the taxing officer had failed to use the correct schedule, counsel for the plaintiff submitted that the cause of action was the defendant's breach of a sale agreement for an apartment whose purchase price was Kshs 4,650,000; and because a copy of the material sale agreement had been attached to the affidavit in support of the originating summons, the taxing officer correctly ascertained the value of the subject matter from the sale agreement.

9. Counsel for the plaintiff further submitted that the taxing officer clearly indicated the reasons why she exercised her discretion to add a sum of Kshs 62,000 to the minimum instruction fee of Kshs 193,000. Counsel added that the factors itemized by the taxing officer were matters that the Remuneration Order allowed. Counsel argued that, in the absence of any error in principle, this court has no basis for interfering with the discretion of the taxing officer.

10. Counsel for the plaintiff added that the defendant had failed to specify the material factors which the taxing officer had allegedly failed to consider. Lastly, it was submitted that the taxing officer had properly considered the defendant's submissions. Counsel for the plaintiff urged the court to dismiss the reference.

11. I have considered the reference together with the response thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence.

12. Before I outline the key issues in this reference, I will dispose one point which the plaintiff raised in the opening paragraphs of his written submissions. The point relates to the defendant's failure to exhibit evidence to show that they sought the taxing officer's reasons within 14 days in tandem with the requirements of Rule 11 of the Advocates (Remuneration) Order. This issue was only raised in the plaintiff's written submissions dated 27/2/2020. The defendant (applicant) had already filed their written submissions on 14/2/2020. Although the plaintiff filed a replying affidavit to the reference, she never raised the issue. I note from the record that in annexure "DMM3", the defendant made reference to a letter dated 27/9/2018 through which they had requested for the taxing officer's reasons. Because the plaintiff did not raise this issue at the appropriate time, it would be improper to admit the issue or rest my decision on the issue at this point. I take this view because the defendant was not granted the opportunity to bring evidential response to the issue. I therefore decline to admit that issue as one of the key issues falling for determination in this reference.

13. Having considered the reference together with the response thereto, two key issues fall for determination in the reference. The first issue is whether the taxing officer used a wrong schedule in her taxation of the material bill of costs. The second issue is whether the taxing officer erred in principle in her taxation of the material bill of costs. I will make brief pronouncements on the two issues in the above order.

14. The taxing officer taxed the material bill of costs under paragraph 1(b) of Schedule VI of the Advocates (Remuneration) (Amendment) Order 2014. The defendant contends that the value of the subject matter was not ascertainable from the pleadings, and therefore, the taxing officer should have used paragraph 1 (j) of Schedule VI. The defendant's case is that the taxing officer erroneously considered the purchase price of the apartment as the subject matter yet this was not the case.

15. I have considered the above argument. The suit giving rise to the bill of costs was an originating summons in which the plaintiff sought orders of specific performance of a land sale contract relating to an apartment. Annexed to the originating summons and forming part of the pleadings in the suit was a supporting affidavit. Annexed to the supporting affidavit as an exhibit was a land sale agreement dated 21/4/2011 in which the purchase price of the apartment was contained in Clause 3. Secondly, it is clear from the originating summons that the orders sought related to specific performance of the contract; and the subject matter of the contract was the apartment. In light of these, I do not agree with the applicant that the value of the subject matter was unascertainable from the pleadings. Pleadings in a suit initiated through an originating summons include both the originating summons itself and the affidavit in support of the originating summons. In the present case, the subject matter of the suit was the apartment, and the value of the apartment was the agreed purchase price as contained in the sale agreement. Having found that the value of the subject matter was ascertainable, I find that the taxing officer properly taxed the bill of costs under paragraph 1 (b) of Schedule VI.

16. The second issue is whether the taxing officer erred in principle in her taxation of the material bill of costs. The defendant contends that the taxing officer increased the scale fees in respect of instruction fees by Kshs 62,000 without any lawful basis. I have looked at the impugned part of the taxing officer's ruling. It reads thus:

***"I have considered the time that has passed since the parties entered into the agreement for sale, the period it has taken to determine the suit, the pleadings, and the documents on record as well as the court attendances. I exercise my discretion and increase the instruction fees to Kshs 255,000"***

17. Were all the factors itemized in the quoted excerpt of the ruling relevant? My answer to the above question is in the negative.. This was a party and party bill of costs in which the taxing officer was invited to assess reasonable costs incurred by the plaintiff through the initiation and prosecution of the suit. The purpose of an award of costs is to reasonably reimburse the successful party costs incurred in initiating and prosecuting a suit. Costs of a suit do not serve to compensate the successful party against inconveniences or breach suffered prior to the initiation of the suit. Put differently, costs are not general damages. It was therefore a misdirection of principle for the taxing officer to base her decision to increase the scale fees from Kshs 193,000 to Kshs 255,000 on the time that had passed since the parties entered into the agreement for sale. This, in my view, was an irrelevant factor which should not have influenced the taxing officer's decision to increase instruction fees from Kshs 193,000 to Kshs 255,000.

18. The principles upon which the taxing officer exercises the discretionary jurisdiction when taxing a bill of costs, and the principles upon which a judge of the superior court exercises jurisdiction to review the discretionary decision of the taxing officer, were outlined by the Court of Appeal in the case of **First American Bank of Kenya v Shah & Others [2002] 1 EA 64** in the following words:

*“...I find that on the authorities, the court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle... Of course it would be an error of principle to take into account relevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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 effect on the assessment.”*

19. In light of the foregoing, and considering that the defendant did not submit on the other items in the bill of costs, I will allow the reference in relation to instruction fees (item 1) by setting aside the increment of Kshs 62,000 which the taxing officer erroneously awarded on the wrong principle. Because this item together with the corresponding getting up fees are the only two items affected, I do not think there is a proper basis for returning the bill of costs to the taxing officer. To do so would only serve to clog the court's diary. I will in my disposal orders set aside the two affected awards and dispose this matter without referring it back to the taxing officer.

#### **Disposal Orders**

20. In light of the above findings, the defendant's reference dated 13/2/2019 partially succeeds in the following terms:

*a) The taxing officer's award of Kshs 255,000 in relation to item Number 1 (instruction fees) of the bill of costs dated 23/9/2017 is set aside and is replaced with a sum of Kshs 193,000.*

*b) The taxing officer's award of Kshs 85,000 in relation to item 80 (getting up fees) is set aside and is replaced with a sum of Kshs 64,333.*

*c) The rest of the items shall remain as taxed by the taxing officer*

*d) The certificate of costs dated 5/12/2018 is recalled and set aside and a fresh certificate of costs is to be issued in tandem with the disposal orders in this ruling.*

*e) Because the error giving rise to this reference was caused by the taxing officer, each party shall bear their respective costs of the reference.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF JUNE 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr David Mereka for the Defendant/Applicant

Ms Njiru for the Plaintiff/Respondent

June Nafula - Court Clerk