



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1408 OF 1998

MARY WANGUI KARANJA..... 1ST PLAINTIFF

SALOME NJERI KARANJA.....2ND PLAINTIFF

- VERSUS -

JOSEPH NJENGA.....1ST DEFENDANT

JANE KAMAU.....2ND DEFENDANT

FRANCIS NDEGWA.....3RD DEFENDANT

RULING

1. Judgment in this matter was rendered in favour of the plaintiffs by Okwengu J (as she then was) on 22/6/2012. The plaintiffs subsequently brought a party and party bill of costs dated 11/2/2013. On 16/1/2018, the taxing officer of this court, Hon Barasa, taxed the bill of costs at Kshs 844,837. Subsequently, on 11/12/2018, the 3rd defendant, Francis Ndegwa (**the applicant**) brought a reference by way of chamber summons dated 9/12/2018. He sought the setting aside of the decision of the taxing officer. That reference is the subject of this ruling.

2. The reference was premised on the following grounds:

- a. The taxing master erred in fact and in law in assessing the 53 items aforesaid in the plaintiff's party and party bill of costs.**
- b. The taxing master used the wrong principles of law in assessing the appropriate fees due to the applicant under the items mentioned above.**
- c. The taxing master erred in law and in fact when she considered and gave weight to the plaintiff's submissions whereas she failed to appreciate the 3rd defendant's submissions on the 53 items abovementioned.**
- d. The reasoning of the taxing master in respect of the items not mentioned above was correct and sound in law and the Registrar ought to have applied the same principles in assessing the fees in respect of the 53 items aforesaid in the plaintiff's party and party bill of costs.**
- e. The honourable court has the power and jurisdiction to review the Ruling and to grant the orders sought**
- f. It will be expedient and in the interest of justice to grant the prayers sought herein.**

3. The plaintiffs opposed the reference on the following grounds:

- 1. The 3rd defendant/applicant has not disclosed any meritorious ground in support of the application to disturb the taxing officer's decision on taxation;**
- 2. The said application has been filed for the sole purpose of denying the plaintiffs access to taxed costs.**
- 3. The learned taxing officer considered all the relevant factors on arriving at her decision hence she did not err in principle**

4. The learned taxing officer's judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law which is not the case here.

4. The case of the applicant was that the taxing officer erred in law in assessing 53 items. He contended that the taxing officer used the wrong principles of law in assessing the appropriate fees due to the applicant under the contested items. Lastly, the applicant contended that the taxing officer erred in law and in fact when she considered and gave weight to the plaintiff's submissions whereas she failed to appreciate the 3rd defendant's submissions on the 53 contested items.

5. In submissions, counsel for the applicant itemized the following as the three issues falling for determination in the reference: (i) whether the taxing officer used the wrong principles of law in taxing the plaintiffs' party and party bill of costs in respect of the 53 items; (ii) whether the taxing officer erred in law and fact in assessing the 53 items; and (iii) whether the applicant is entitled to the reliefs sought.

6. On the first itemized issue, counsel submitted that the fees chargeable were provided under Schedule VI of the Advocates (Remuneration) (Amendment) Order 1997. He added that because the value of the subject matter could not be ascertained from the pleadings or judgment, the fees payable was a reasonable sum not less than Kshs 6,000. Counsel argued that this was a normal suit without any complex issues calling for special attention. He submitted that it was a misdirection on the part of the taxing officer to introduce the issues of inflationary trends and efforts employed by counsel as there was nothing on record to support that inference. Counsel argued that the sum of Kshs 500,000 assessed as instruction fees was not only unreasonable but unjust and manifestly excessive and indicative of the exercise of a wrong principle.

7. Counsel for the applicant similarly faulted the taxing officer's assessment of the other 51 items listed in the reference, contending that the assessment was not only unreasonable but also excessive as to justify treating the same as indicative of the exercise of a wrong principle. Counsel adopted the applicant's earlier submissions before the taxing officer

8. On the second framed issue, counsel submitted that the taxing officer erred in assessing the 53 items because she introduced the issues of inflationary trends and the effort employed by counsel in the prosecution of the suit. It was contended that there was nothing placed before the taxing officer to demonstrate the effort employed by counsel for the plaintiffs in the prosecution of the case, and at any rate, costs for court attendances were specifically catered for in the bill. Counsel argued that the taxing officer should not have considered the issue of efforts employed and the length of time in assessing instruction fees. Counsel for the applicant further faulted the taxing officer for allowing sums in respect of items 4 to 112(b) as drawn without giving reasons to justify the awards. Relying on the decision in **Kyalo Mbabu t/a Kyalo & Associates v Jacob Juma [2015]**, among other authorities, counsel urged the court to allow the application.

9. In response, counsel for the plaintiffs submitted that the costs being challenged covered both the main suit by the plaintiffs and the dismissed counter-claim by the 1st and 3rd defendants. Counsel contended that the costs of a counterclaim were distinct from the costs of the main suit. It was submitted that the taxing officer had correctly stated that the awarded costs related to two suits; the main suit and the counter-claim. Counsel for the plaintiffs contended that the taxing officer did not err in allowing Kshs 500,000 as instruction fees because the said figure covered the main suit and the counter-claim, and was a fair reimbursement of the costs incurred by the plaintiffs in prosecuting their suit and also in defending the counter-claim.

10. Counsel for the plaintiffs further submitted that the taxing officer paid proper attention to the principles set out in **Joreth v Kigano & Associates [2002] 1 EA 92**; **Premchand Rainchand Limited another v Quarry Services of East Africa Limited & others [1972] EA 162**; and **First American Bank of Kenya v Shah & Others [2002] 1EA 64**. Counsel contended that, considering the principles applicable in taxation of costs, the sum of Kshs 500,000 awarded as instruction fees was reasonable and this court should not interfere with the award.

11. Lastly, counsel for the plaintiffs submitted that all the contested items were rightly adjudicated upon by the taxing officer and there was no basis for interfering with the taxing officer's decision. Counsel urged the court to dismiss the reference.

12. I have considered the reference together with the supporting affidavit and the applicant's submissions. I have also considered the grounds of opposition together with the plaintiffs' submissions. Similarly, I have considered the framework in the Advocates Remuneration Orders and the jurisprudential principles upon which a superior court exercises jurisdiction to interfere with the taxing officer's decision under Rule 11 of the Advocates Remuneration Order. Two questions fall for determination in this reference. The first question is whether the applicant has satisfied the criteria upon which a judge of a superior court exercises jurisdiction to set aside a decision of the taxing officer in relation to an award (*quantum*) in the bill of costs. The second question relates to the availability and appropriateness of the orders sought by the applicant. I will make brief pronouncements on the two questions in the order in which they are itemized.

13. There is common ground that the bill of costs giving rise to the impugned decision fell for taxation under Schedule VI of the Advocates (Remuneration) (Amendment) Order 1997 and Schedule VI of the Advocates (Remuneration) (Amendment) Order 2006. There is also common ground that the monetary value of the subject matter was not determinable from the pleadings and judgment in the suit. The subject matter of the suit was Land Reference Number 11595 measuring about 36.5 acres, situated in Muguga, Kabete. The plaintiffs in the suit contended that the defendants had trespassed onto 11.5 acres within the said parcel. They sought the following verbatim orders against the defendants:

a. An order of permanent injunction restraining the defendants by themselves, their servants or agents, or otherwise howsoever from entering, remaining on, or continuing in occupation of the said dairy farm.

b. General damages.

c. Such other relief as this honourable court may deem fit to grant

d. Costs of the suit.

14. There is also common ground that the 1st and 3rd defendants brought a counter-claim in the suit, seeking the following verbatim orders against the plaintiffs:

i. Declaratory judgment that where 11.5 acres of land is situated has never been Government Land in accordance with the definition of Government Land under the Government Lands Act, Cap 280, Section 2.

ii. The Commissioner of Lands had no constitutional land right over 11.5 acres and the purported amalgamation of 11.5 acres with LR.7842/1 to make LR.11595 was illegal and null and void and ab initio.

iii. That the Commissioner of Lands and the Registrar of Titles be ordered to cancel the title granted in regard to L.R 11595 and register LR 7842/1 in the name of the plaintiffs without the 11.5 acres which should be registered in the name of Gititu Nyarugumu Farmers appointed representatives or individuals.

iv. Costs of this suit and counter-claim be granted to the 1st and 3rd defendants.

v. Any other relief which this honourable court may find justified.

15. There is no dispute that the impugned award in respect of instruction fees and in respect of all the other items related to both the main suit and the counter-claim.

16. The Advocates Remuneration Order contains the legal framework upon which the taxing officer exercises discretion in the taxation of a bill of costs. The jurisprudential principles upon which the discretion to tax instruction fees in a suit where the value of the subject matter cannot be determined from the pleadings or judgment in the suit is exercised was articulated by the **Court of Appeal** in the case of **Joreth Limited v Kigano & Associate [2002] eKLR** in the following terms:

“Where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances. In this instance, the taxing master had followed this course and had not erred in doing so.”

17. Similarly, the principles upon which a judge of this court may interfere with the decision of the taxing officer in relation to disputes of quantum are well settled. Not too long ago, the Court of Appeal articulated these principles in **Peter Muthoka & another v Ochieng & 3 Others [2019] eKLR** in the following words:

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion is to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision through discretionary may properly be interfered with”

18. The Court of Appeal had occasion to summarize the two sets of principles applicable to the exercise of jurisdiction by both the taxing officers and the judges of the superior courts 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 if 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. The criteria which the taxing officer employed while taxing the material bill of costs is set out at pages 2 to 4 of the impugned ruling. It reads thus:

“I have carefully perused the bill of costs, the court record as well as the submissions by the parties on record. In assessing costs, the Remuneration Order is the guiding law. The ARO sets out the fee to be charged as an instruction fee in respect of all suits. The fees for the other services are also provided for in the said schedule.

On instruction fees, the basis on which to assess the same is settled in law. The principles guiding the assessment of an instruction fee are the care and labour required, the number and length of papers to be perused, the nature and importance of the matter to the parties, the amount or value of the subject matter involved, the interest of the parties, the complexity of the matter, and all other circumstances as may be fair and reasonable. In a case in which the value is unascertainable from the pleadings, the taxing officer has the discretion to determine the instruction fee. Of importance, is that an instruction fee

is a static item, charged once only and is not affected or determined by the stage that the suit has reached. The instruction fee is assessed on the value of the subject matter as contained in the pleadings on record, the judgment or settlement of the matter. (see the Court of Appeal case of Joreth Limited v Kigano & Associates; CA No 66 of 1999).

In the case of Premchand Raichand Limited and Another v Quarry Services of East Africa Limited & Another [1972] EA 162 the court held:

- a. Costs should not be allowed to rise to such level as to limit access of the courts to the wealthy only;
- b. A successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- c. The general level of remuneration of advocates must be such as to attract recruits to the profession;
- d. So far as practicable there should be consistency made in the award made.

I have set out the authorities above to show the principles guiding the assessment of instruction fees. I am conscious of the fact that this is a party and party bill of costs, which will no doubt have a bearing on the advocate – client fees. The present suit was filed in the year 1998, 19 years ago, at the time of taxation. It is true that the ARO provides for a reasonable amount but not less than Kshs 6,000/- for suits such as these where the value cannot be determined from the pleadings. I have taken into account the interest of the parties, the fact that there was a counterclaim in the suit, essentially, two suits in one, the numerous court appearances evident on the court record, the effort employed by counsel in the prosecution of the suit and the length of time it had taken to prosecute and conclude the suit, specifically taking into account inflationary trends. I am persuaded that the Kshs 500,000/- sought as instruction fee by the plaintiff is fair and reasonable. I tax item 1 as drawn. I also tax the getting up fees as drawn.

20. One of the grounds upon which the applicant challenges the decision of the taxing officer is that she used the wrong principles of law in taxing the 53 contested items. The applicant particularly faults the taxing officer for taking into account inflationary trends and efforts employed by counsel. I have on my part set out verbatim the criteria which the taxing officer employed. It is apparent from the above verbatim criteria that the taxing officer paid due regard to the legal framework in the Advocates (Remuneration) Order and the guiding principles as spelt out in among other decisions, Joreth Limited v Kigano & Associates [2002] eKLR and Premchand Rainchand Limited & another v Quarry service of East Africa Limited & Another [1972] EA 162. Secondly, the general conduct of the matter is one of the relevant factors to be considered by the taxing officer when assessing instruction fees (see Joreth Limited v Kigano & Associates [2002] eKLR). The taxing officer did not therefore, in my view, err when she considered the effort employed by counsel in the prosecution of the suit. Professional effort is part of the general conduct of the matter which is a relevant factor when carrying out taxation. General conduct of the matter is supposed to be discerned by the taxing officer from the record before her. The taxing officer in her ruling confirmed that she had perused the record before her.

21. Similarly, I do not agree with the applicant in his contention that the taxing officer erred when she took into account inflation trends. I say so because, although instruction fees is a static figure, the instruction themselves are often implemented over a period of time. In the present dispute, the taxing officer observed that the suit was filed in 1998 and rendering of professional services through prosecution of the suit took 19 years. The instructions were therefore implemented over a period of 19 years. In my view, there was no error of principle in the taxing officer taking into account inflation trends in relation to instruction fees relating to professional services rendered over a period of close to two decades.

22. Even if I were to find that the taxing officer should not have taken into account the two challenged factors, I do not think the figure of Kshs 500,000 awarded as instruction fees in the circumstances of this suit was manifestly high as to warrant an inference of error of principle or to form a proper basis for interfering with the decision of the taxing officer on item number 1 (one). I say so because the dispute in this suit related to some 11.5 acres of land situated in Kabete. Besides the main suit, the instruction fees covered the counterclaim. From the prayers in the counter-claim, and from the record before me, it is apparent that the 1st and 3rd defendants raised critical constitutional issues in their counter-claim. The taxing officer considered the factor of the counterclaim in her decision. I do not therefore think the sum of Kshs 500,000 was inordinately high to warrant interference by this court.

23. I have similarly considered the applicant's grievance against the awards in relation to the 51 other contested items. His contention is that the taxing officer allowed the said items as drawn yet the figures were excessive. The applicant adopted his written submissions presented before the taxing officer to advance his case on this grievance. I have looked at the written submissions dated 11/9/2014 alongside the impugned ruling of the taxing officer. The applicant is challenging *quantum*. The taxing officer taxed off items that were drawn outside the scale fees. She allowed the items which were drawn to scale. The applicant has not told this court which item went beyond which scale. Two Remuneration Orders were applicable to the material bill of costs. As stated by the **Court of Appeal** in the case of **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR**, matters of quantum properly belong to the taxing officer. Unless there is evidence of error of principle, a judge should not enter that arena. I will therefore refrain from entering the arena of *quantum* in the absence of proper evidence of error of principle.

24. In light of the foregoing, it is my finding that the applicant has not satisfied the criteria upon which a superior court exercises jurisdiction to set aside a decision of the taxing officer in relation to an award in a bill of costs. It therefore follows that the orders sought by the applicant are not available. Consequently, the chamber summons dated 9/12/2018 fails and is dismissed. The plaintiffs shall have costs of the chamber summons.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Kimondo Mubea for the Applicant

June Nafula - Court Clerk