



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO.268 OF 2017

THOMAS K'BAHATI

T/A K'BAHATI & CO. ADVOCATES.....ADVOCATE/RESPONDENT

-VS-

JANENDRA RAICHAND SHAH.....CLIENT/APPLICANT

RULING

1. This is a reference brought against the ruling on taxation by the Deputy Registrar delivered on 31st August 2018. The reference is brought by way of Chamber Summons application dated 1st October 2018 under the provisions of Rule 11 (1) and (2) of the Advocates Remuneration Order. The Client/Applicant prays:

- 1. THAT this Honourable Court be pleased to allow this reference against the decision on taxation of the Taxing Master Honourable D. Wasike made on 31st August, 2018;**
- 2. That ruling on taxation delivered by the Taxing Master on 28th April 2017 with respect to item 1 on instruction fees of the Applicant's Bill of Costs dated 23rd January 2017 be set aside;**
- 3. That Item 1 of the Applicant's Bill of Costs dated 23rd January 2017 be assessed by this Honourable Court in such other sums as may appear to be reasonable;**
- 4. That in the alternative, this Honourable Court remits item 1 of the Applicant's Bill of Costs dated 23rd January 2017 to another Taxing Officer for re-taxation;**
- 5. That the costs of and occasioned by this Reference be provided for.**

2. The application is made on the grounds:

- 1. That K'Bahati and Company Advocates took over conduct of the matter from the firm of Lumumba, Mumma and Kaluma Advocates in 2015 by a Notice of Change of Advocates dated 26/1/2015 and therefore was not justified to tax the Bill as from 8/9/2011, a time when the matter was still being handled by Lumumba Mumma and Kaluma Advocates.**
- 2. That the learned taxing master has misdirected himself in making an assessment of the item 1 of the Applicant's Bill of Costs which is so exorbitantly high so as to arrive at an error of principle with regard to item 1 of the Applicant's Bill of Costs.**
- 3. That the court failed to consider the amount already paid to the Applicant by the respondent therein.**
- 4. That the Bill was not taxed as per the scale since the provisions of the Advocate Remuneration Order of 2009 were not followed.**

3. The reference is further supported by the affidavit of Janendra Raichand Shah, the applicant sworn on 1st October 2018 in which he has annexed copies of the Bill of Costs dated 23rd January 2017, handwritten copy of the said ruling dated 10th February, 2017, and copy of the Notice of Change of advocate dated 26/1/2015 filed by K'Bahati & Company Advocates, taking over the conduct of the matter from the firm

of Lumumba, Mumma and Kaluma Advocates.

4. The reference is opposed by the respondent through grounds of opposition dated 16th May, 2019 on the following grounds:

1. **The application is frivolous, vexatious and a gross abuse of court process.**
2. **The application is incompetent, defective and unsustainable.**
3. **The application has remained unprosecuted since it was filed on 1st October, 2018, a demonstration of its frivolity and the abuse of the court process involved.**
4. **The application has no merit or substance.**
5. **The applicant has no evidence before the court and no discretion can be exercised in his favour for flaunting and disobeying court orders.**

5. The application was canvassed by way of written submissions. Counsel for the applicant listed two issues for determination by the court as follows:

- i. **Whether the learned Taxing Master misdirected herself in making an assessment of item 1 of the applicant's Bill of Costs.**
- ii. **Whether the respondent is entitled to full instruction fees.**

6. On the first issue as to whether the Taxing Master misdirected herself in assessing item 1 of bill of costs, counsel submitted that the respondent claimed instruction fees of Kshs.13,570, 500.00 on allegation that the subject matter of the suit property was valued at Kshs.500 million, an allegation it was submitted, that was not supported by any evidence. Counsel submitted that the taxing master did not rely on any valuation report when arriving at the instruction fees of Kshs.4,689,004.00. It was submitted that it is trite law that the value of the subject matter of suit property for the purposes of taxation ought to be determined from the pleadings, judgment or settlement. The applicant's counsel relied on the case of **David Mining –v- Rebecca Mining (2019) eKLR** where Odeny J. stated as follows:

“...counsel further submitted that in answering the question as to whether the Taxing Officer exercised or applied wrong principles in arriving at an award of Kshs. 100,000 in respect of the instruction fees, one must ask whether the instruction fee was correctly assessed, whether the value of the subject matter was ascertainable, and finally what step was to be taken by the Taxing Officer in order to ascertain the value of the subject matter. It was counsel's submission that they had presented the value of the subject matter to be Kshs.75,000,000.00 (Kenya shillings seventy five million). He also cited the case of **Mwangangi & Company Advocates –v Machakos County (2018)eKLR, Misc. Civil Application No.318 of 2016, where Nyamweya, J. cited the holding in **Joreth Limited –v- Kigano & Associates (2002)eKLR**, and reiterated as follows;**

“The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in the Joreth case as follows:

“We would at this stage point out that the value of the subject matter of a suit 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 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”

7. Counsel for the applicant submitted that it is evident that where the value of the subject matter is not ascertainable, the Taxing Master ought to use his discretion after taking certain factors into consideration. Counsel submitted that the figure relied on by the Taxing Master was plucked from the air and as such the same was not correctly assessed.

8. In answering the question as to whether the respondent was entitled to full instruction fees, the applicant's counsel submitted the matter giving rise to the taxation was instituted in 2009 and the applicant was then represented by the firm of Lumumba, Mumma and Kaluma Advocates. That the firm of K'Bahati & Company Advocates only came on record vide the notice of change of advocate dated 26/1/15 and therefore was not justified to tax the bill as from 8/9/11. Further, counsel pointed out that the matter is currently being handled by the firm of Muturi Gakuo & Kibara Advocates and is yet to be concluded. Counsel submitted that the respondent is only entitled to be paid for the work he did and relied on the case of **Kenyasi & Associates –v- Salama Beach Hotel Ltd & 4 Others (2014) eKLR** where Angote J stated as follows:

“I am in agreement with the reasoning and the award by the taxing officer. Instruction fees are only paid to an advocate in respect to the work done. Having not drawn the plaint in Malindi HCCC NO. 118 of 2009, the Applicant is not entitled to the instruction fees in respect to the suit. As was held in the case of **First American Bank of Kenya –v- Shah & Another (2002)1 EA 64, an advocate becomes entitled to full instruction fees to defend a suit the moment a defence is filed and the subsequent progress of the matter is not relevant. The same reasoning applies to the filing of a plaint. The advocate who draws a plaint is the one entitled to the full instruction fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done.”**

9. The respondent faulted the application as being defective for seeking a reference against a purported decision of “Taxing Master Honourable D. Wasike made on 31st August 2018,” while there is no such decision in the matter. The respondent submitted that the court can only grant what has been sought and therefore the court has no jurisdiction to deal with the reference since it does not address the instant matter, adding that the court cannot amend the reference to address the proper matter. That the only option is for the court to dismiss the reference for being defective.

10. The respondent further submitted that the applicant has no audience before the court and that even if he had, no discretion of the court can be exercised in his favour in the matter. It is the respondent’s contention that the applicant has not complied with the order to deposit half (1/2) of the costs as ordered by the court 17th September, 2018, and which was a pre-condition for him filing the reference and enjoying the stay of execution. The respondent’s submission is that the applicant has chosen which of the court orders to obey, and has chosen to follow through those that are in his favour and interest, while flouting and disobeying those he deems to be inconvenient to him. The respondent submitted that in more than ten months, the applicant has not shown any effort to comply with the court order and did not even apply to enlarge time if he found the 14 days period granted very short. The respondent’s contended it is difficult to see how the applicant expects the court to determine the reference when it has disregarded the orders of the same court which allowed him to file the reference out of time. The respondent further contended that the applicant is not serious with the application and the reference was only set for hearing because the respondent’s application dated 3rd October, 2018 had been fixed for hearing. The respondent submitted that the application was not only frivolous and an abuse of the court process, but was meant to obstruct the respondent from prosecuting their application. It is therefore the respondent’s submission that the application lacks merit and should be dismissed with costs.

11. I have considered the application, the submissions made and the cited authorities. The respondent argued that the reference is defective because it is against a decision made by a different Taxing Master and citing a wrong date. The respondent argued that there is no such decision in this matter. The application however, refers to the Bill of Costs dated 23rd January, 2017.

12. I would wish to state that our jurisprudence and decisional law no longer countenances the kind of technical and formalist justice as submitted by the respondent. Article 159 (2) (d) of the constitution provides that courts can no longer deploy technicalities as the basis for their decisions. That sub-article provides as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

a) Justice shall be done to all irrespective of status;

b) Justice shall not be delayed;

c) Alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

d) Justice shall be administered without undue regard to procedural technicalities.”

13. In the case of **Kenya Ports Authority-v- Kenya Power & Lighting Co. Ltd (2012) eKLR**, Mwongo J defined a technicality thus:

“Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive right under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from non-existent or wrong statute when the context is clear as to the statute intended.”

14. Borrowing from the above I would simply state that citing the name of a different Taxing Officer and a different date when the Bill of Costs in dispute is clear amount to a procedural technicality. That in my view cannot be a basis to dismiss the reference as argued by the respondent. I need not say more about this argument by the respondent.

15. The reference filed herein is seeking the court’s intervention on the issue of item 1 in respect of instruction fees for the respondent. The applicant is contesting the instruction fees that was awarded by the Taxing Officer. The Bill that was taxed arose from civil case No. 233 of 2009 which was yet to be concluded.

16. The circumstances under which this court interferes with the taxing officer’s exercise of discretion are now well known. In the case of **First American Bank of Kenya –v- Shah & Others HCCC No. 2255 of 2000 (2002)1EA**, these principles were stated as: i) That the court cannot interfere with the taxing officer’s decision on the 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 or 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 decisions 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 discretionally; v) the taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it; vi) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; vii) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such search is not necessarily indicative of the complexity of the matter as it may well be indicate of the advocate’s unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against

the adversary.

17. Further, it has been held that the court should interfere with the decision of the taxing officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the taxing officer or even the Judge on appeal'; the costs should not be allowed to rise to such level. It has also been held that the instruction fees ought to take into account the amount of work done by the advocate.

18. In this case the taxing officer while addressing his mind to the facts he was entitled to take into account in deciding the instruction fees, based his decision on the value of the subject matter from the pleadings, yet the respondent is not the one who initiated the suit and therefore could not claim the full instruction fees. As already stated, instruction fees is only paid to an advocate in respect of work done. Having not drawn the plaint in HCCC NO. 233 of 2009, the respondent was not entitled to the instruction fees in respect of the suit. The advocate who draws the plaint is the one entitled to the full instructions fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done. In this case, it is not disputed that the respondent came into the matter on 28th January 2015. Indeed a Notice of Change of Advocates dated 26th January, 2015 was filed by the respondent on 28th January, 2015. The respondent is therefore entitled to work done from 28th January 2015 onwards.

19. For this reason I agree that the reference ought to be and is hereby allowed. In the result, the Bill of Costs dated 23rd January, 2017 is remitted for taxation before any other Deputy Registrar to tax item 1 of the said bill in accordance with the provisions of the Advocates Remuneration Order and taking into account the guidelines set out in the said Order.

Each party to bear their own costs.

20. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 30th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE