



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 67 OF 2015

SHELLA SHEIKH

M/S SHELLA SHEIKH & ASSOCIATES.....APPLICANT/ADVOCATE

=VERSUS=

PENTECOSTAL ASSEMBLIES OF CANADA.....RESPONDENT/CLIENT

RULING

The matter for determination is the applicant's chamber summons dated **19th February 2015**, brought under **Rule 11(2) of the Advocates (Remuneration) Order 2009**. The applicant **M/s Sheila Sheikh & Associates** has sought for these orders.

- a. That the Honourable Court be pleased to set aside the Ruling on taxation of Hon. E K Makori (DR) delivered on 6th February 2015, in the matter of the taxation of the Advocate /Client bill of costs.***
- b. That the Court be pleased to refer the applicant's Advocate's /Client Bill of costs dated 30th May 2014 for fresh taxation before a different taxing master.***
- c. Costs of this reference be provided for.***

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of **Shella Sheikh**. These grounds are:-

- i. The applicant/Advocate is dissatisfied with the taxation of Hon. E K Makori (DR) particularly on item 1 & 2 of the Advocate /Client Bill of costs dated 30th may 2014.***
- ii. That the learned taxing master, Hon. E K Makori (DR) committed an error in principle in taxing off the sum of Kshs.25,440,500/= on item 1 & 2 of the Advocate/Client Bill of costs and awarding an aggregate sum of Kshs.1000,000/= on the said items contrary to the requirements set out under schedule V part II paragraph of the Advocates remuneration order 2009 .***
- iii. That the learned taxing master Hon. E K Makori (DR) committed a gross error in principle in disregarding the value of the subject matter being one of the most important consideration in establishing the instructions fees due to the applicant in accordance with schedule V part II paragraph I of the Advocates (Remuneration) Order 2009.***
- iv. The learned taxing master Hon. E K Makori (DR) failed to apply well laid down principles of***

taxation hence awarding a grossly low sum to the applicants advocate

In her supporting Affidavit, the applicant ***Sheila Sheikh*** averred that she is an advocate of the High Court of Kenya and she filed her Advocate/Client Bill of Costs dated ***30th May 2012***, for purposes of taxation arising from instructions given to her Law Firm by the Respondent herein which instructions comprised of amalgamation and change of use of the Respondent's parcels of land known as ***LR No. 7972 and 7973*** which was annexure ***SS1***. She further averred that Advocate / Client Bill of costs came for taxation before Hon. E K Makori (Deputy Registrar) and parties did put in written submissions. Further on ***6th February 2015*** , Hon. E K Makori delivered a Ruling in which he awarded the applicant /Advocate an aggregate sum of ***Kshs.2,228,661 /=-*** and taxed off ***Kshs. 25,440,500/=-*** . She further averred that she was dissatisfied with the entire Ruling and she filed a Notice of objection to the taxation and thereafter this Reference. It was her contention that in awarding ***Kshs.1000,000/=-*** to the applicant on item 1 & 2, the ***Deputy Registrar, Hon. E.K Makori*** committed serious errors in law as he failed to apply his mind to the provisions of schedule V part II paragraph I of the Advocates (Remuneration order 2009)

Further that the Deputy Registrar committed serious errors of principle by disregarding the value of the subject matter of the amalgamated parcels of land hence the award of ***Kshs.1000,000/=-*** was grossly low in the circumstances . She also averred that the Hon. Deputy Registrar erred a falling to exercise his discretion and power under Rule 13 A. She also contended that the Hon. Deputy Registrar erred in failing to assess instruction fees based on the value of the subject matter and also misdirected himself in not appreciating the value of the subject matter as per the valuation report produced by the applicant/Advocate. Further that the Deputy Registrar erred in failing to apply all the principles of taxation and held that the matter held by the applicant was not complex. She also contended that the Deputy Registrar erred in failing to take into account the totality of the work done by the applicant/Advocate and also failed to take into consideration , the submissions and authorities of the applicant/advocate in assessing instructions fees under item 1 and 2 respectively.

It was her contention that had the Deputy Registrar applied his mind to the totality of the work done, provisions of schedule V part II paragraph 1 of the Advocate (Remuneration) Order 2009 together with well settled principles of taxation, he would have arrived at a fair assessment of instructions fees under items 1 & 2 of the Advocate/Client Bill of costs. She further contended that it is in the interest of justice that the Advocate/Client Bill of Costs dated ***30th May 2014***, be referred to a different taxing officer with proper guidelines on assessment of instruction fees. She therefore urged the court to allow her Reference.

The Respondent opposed the said reference and filed its grounds of objection on 4th March 2015. These grounds are:-

- i. The application has no merit , it is an abuse of the court process. It is waste of courts precious time and therefore it ought to be dismissed with costs.***
- ii. That Hon. E K Makori's Ruling on taxation is well reasoned and should not be disturbed.***
- iii. The real value of the subject property as alleged by the applicant was not at all presented to the court so as to give rise to the complaint that the Hon. Deputy Registrar disregarded the value of the subject of the Bill of Costs.***
- iv. No case of complexity was advanced before the Deputy Registrar to warrant a complaint that the court erred in holding that the matter was not complex.***
- v. The Court has not been shown the extra work done not covered in the sum to warrant the complaint of the court failing to take into consideration the totality of the work done by the advocate.***
- vi. That to refer the bill back for taxation by a different Deputy Registrar would be an abuse of the Court process and a waste of courts time and therefore this reference should fail with costs to***

the Respondent.

The Court directed that the Reference be canvassed by way of written submissions. The applicant filed their submissions on **12th June 2015**, and urged the court to allow the application. The applicant relied on various decided cases among them **Muriu Mungai & Co. Advocate Vs New Kenya Co-operative Creameries Ltd 2008 elkr** where the court held that:-

“.....The applicant’s contention that the valuation report should not have formed the basis of the taxation is without any merit. The taxation officer had the right to call for further information to assist him assess the value of the subject matter for the purposes of calculating the instructions fees. The reliance on the Tysons Report made after the instructions were given to the advocate was therefore quite in order”.

The applicant also relied on the case of **Ochieng Onyango Kibet & Ohaga Advocates Vs Adopt a Light Ltd , Milimani HCC Misc Case No. 729 of 2006** where the court held that:-

“The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in reliance on the material presented before Court. The taxing master must consider the case and labour required in the matter, the nature, or importance of the matter. More so, the amount or value of the subject matter involved in assessing an amount commensurate to the work undertaken , it is of fundamental importance to consider the value of the subject matter, and when the subject matter is unknown, the court is empowered to make what is available as a point of refence”.

The Respondent on their part filed their submissions on **30th July 2015**, and urged the court to dismiss the applicants’ reference. They further submitted that the Deputy Registrar did assert himself by affirming that he did not see the use if the valuation Report of 2013 against the instructions of 2008. To them, the case of **Muriu Mungai & Co. Vs New KCC Ltd (2008)** does not apply herein.

The Respondent further relied on the applicant’s authority in the case of **Behen and Okero Vs Plan African Insurance Company** , where the Court held that :-

“ It does not matter whether the instructions given were fully completed to the satisfaction of the client or does it matter whether the work was partially or fully satisfied, the essential yardstick is whether the instructions was property and sufficiently given”.

The applicant file their supplementary submissions and reiterated that the Deputy Registrar committed error of principle and relied on the case of **First American Bank of Kenya Vs Shah & Others Nairobi (Milimani) HCCC No. 2255 of 2000,** where the court held that:-

“ It would be an error in principle to take into account irrelevant factors or to omit to consider relevant factors...”.

The Court has now considered the instant application and the grounds set on the face of the application and the facts deposed in the affidavit in support of the same. The court has also considered the grounds of objection filed by the Respondent against the application and the written submissions together with the referred authorities. The Court has also considered the relevant provisions of law. It is not in doubt that Hon. E K Makori , Deputy Registrar ,taxed the Advocates /Client Bill of Costs filed in Court and delivered a Ruling and reasons for taxation on 5th February 2015 . In the filed Advocate/Client Bill of Costs, the applicant had demanded for ***Kshs.50,889,565/84.***

However, after the taxation, the taxed bill was arrived at ***Kshs.2, 228,661/=*** by the taxing master therefore taxed off ***Ksh.25,440,500/=*** on items No.1 & 2 of the said Advocate/Client Bill of costs. The applicant has sought for setting aside of the said Ruling of ***5th February 2015***, by Hon. E K Makori the taxing master.

It is well settled that the principles for setting aside or interfering with the taxing master's discretion are well set out. These principles are set out in the case of **First American Bank of Kenya Vs Shah & Others (2002) EA 64** , where the court held that;*-the court cannot interfere with the taxing officers decisions 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 and that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.*

The applicant has asked the court to interfere with the taxing masters decisions on taxation. Has the applicant met the laid down principles for such interference?.

The issues for determination are:-

a) Whether or not the Deputy Registrar committed an error in principle in taxing off Kshs.25,440,500/= on items 1 & 2 of the Advocates/Clients Bill of Costs .

b) Whether the Deputy Registrar failed to exercise his discretion and power under Rule 13 A of the Advocates Remuneration Order 2009.

The applicant submitted that the taxation was done under schedule V part II paragraph 1 which provides that:-

“such fees for instructions , as having regard to the care and labour required , the number and the length of papers to be perused , the nature or importance of the matter , the amount or value of the subject matter involved , the interest of parties , the complexity of the subject matter and all other circumstances of the case may be fair and reasonable, but so that due allowance shall be given in the instruction fees for other charges raised under this schedule”.

The bone of contention herein is that in taxing off ***Kshs,25,440,500/=*** from items 1 & 2 of the applicant's Bill of Costs the taxing master failed to take into account the value of the subject matter as per the valuation report prepared by Amazon Valuers Ltd on ***17th October 2013.***

It is instructive to note that the alleged instructions to the applicant were given in the year 2008. It is also evident that the applicant had served the Respondent with another bill of costs on ***16th July 2012,*** for ***Kshs.12, 500,000/=***. That was before the valuation report was prepared.

The valuation report was prepared in the year 2013 and no evidence that the Respondent was involved in the said preparation of the same. Was the valuation report prepared for the purpose of the taxation? I have seen the reasoning given by the taxing officer on why he declined to consider the valuation report. The said reasoning is sound and I find no reason to fault it. It is also evident that by the time the applicant was instructed, amalgamation and change of user had been approved. I concur with the taxing master that the valuation report would not assist the court to reach a fair assessment of the instruction fees. Since by the year 2008, amalgamation had been done, the taxing officer was correct in not considering the value of the subject matter. The applicant dealt with the finalization of the change of user which had been approved by the Commissioner of Lands vide a letter dated ***16th September 2008,*** and obtaining the new title deeds for LR ***No.7972 & 7973*** and that was not a complex matter and I would concur with the taxing master use of discretion in combining item Nos.1 and 2 . Given that the nature of the work that the applicant was to carry on needed not involve the value of the subject matter the court finds that the findings and holding on **Muriu Muigai and Co. Advocates Vs New KCC Ltd (2009)** do not apply herein. There is therefore no evidence of error of principle to warrant interference of the Deputy Registrar's discretion.

On whether the Taxing master (Deputy Registrar) failed to exercise his discretion as provided by Section 13A of the Advocates (Remuneration) Order 2009, the court finds that the Deputy Registrar did exercise his discretion judiciously. Section 13A provides that:-

“For the purpose of any proceedings before him, the taxing officer shall have power and

authority to summon and examine witnesses administer Oaths to direct the production of books, papers and documents and to direct and adopt all such proceedings as may be necessary for the determination of any matter in dispute before him”.

The applicant submitted that the Deputy Registrar failed to take into consideration relevant facts particularly the amount or value of the subject matter herein, despite a valuation Report being produced herein.

The Deputy Registrar gave reasons as to why he failed to consider the Valuation Report. The said explanation is sound and since the issue of the value of the subject matter was not one of the consideration that bound the Deputy Registrar in assessment of the bill of costs he needed not to call any evidence to arrive at the valuation of the property.

Having considered the instant application and the ruling being contested herein which was delivered by ***Hon. E K Makori*** , Deputy Registrar on ***6th February 2015***, the Court finds that there was no sound reason advanced by the applicant to warrant this court interfere with the taxing master’s decision on the said taxation. There was no evidence of any error of principle and taking into account the work the applicant was engaged to undertake for the Respondent, this court cannot infer that the taxation herein was manifestly low based on an error of principle.

For the above reasons, the Court finds that the applicant’s Chamber Summons dated ***19th February 2015***, is not merited. The same is dismissed entirely with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered this ***16th*** day of ***September,2016***.

L.GACHERU

JUDGE

In the presence of

M/s Kosgey holding brief Mr Odiek for the Applicant/Advocates

Mrs Oloo for the Respondent/Client

Court Clerk :

L.GACHERU

JUDGE

COURT:

Ruling read in open court in the presence of the above advocates.

L.GACHERU

JUDGE