



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 83 OF 2015

IN THE MATTER OF PARTY AND PARTY BILL OF COSTS

**LABH SINGH HARMAN SINGH LIMITED
APPLICANT**

AND

**THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA1ST
RESPONDENT**

**THE PRINCIPAL REGISTRAR OF TITLES2ND
RESPONDENT**

**DENANCY INVESTMENTS LIMITED.....3RD
RESPONDENT**

RULING OF THE COURT

1. The Chamber Summons application before the court is dated and filed herein on **7th March, 2016** by the applicant under **paragraph 11(2)** of the **Advocates (Remuneration) Order, Order 9 rule 9** of the **Civil Procedure Rules**. The applicant prays for the following orders;

- a. That the court be pleased to set aside the Taxing Officers decision made on **4th June, 2015**.
- b. That the 3rd respondent’s Bill of Costs be struck out for being filed by a stranger in the suit and/or being filed in the wrong suit.
- c. That in the alternative, the 3rd respondent’s Bill of Costs dated 24th April, 2015 be submitted for taxation before a different Taxing Master and the Applicant be given the chance to respond to the Bill.
- d. That the costs of this application be awarded to the applicant.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Daniel Mwonga Maundu** sworn on **7th March, 2015**.

3. That applicant’s case is that he is fully aware as has been communicated to him by his advocates on record that on **4th June, 2015**, the Taxing Officer proceeded to tax the 3rd respondent’s Party and Party Bill of Costs dated **24th April, 2015** ex-parte at a colossal sum of Kshs. 1,564,155/=. The applicant then

instructed their advocate to file an application staying execution of the Certificate of Taxation and setting aside of the said order. The same was done vide a Notice of Motion application **dated 17th June, 2015** under Certificate of Urgency seeking stay of execution of the Certificate of Taxation and praying that the order issued on 4th June, 2015 be set aside. The said application was heard and on **17th September, 2015**, the Deputy Registrar delivered a ruling striking out the said application on grounds that she did not have jurisdiction to set aside the Taxing Officer's order of **4th June, 2015**. She indicated that the application ought to have been heard and determined by a judge. The applicant then sought leave of court in the High Court to file a reference out of time, which leave was granted on 12th February, 2016. The applicant then wrote to the Taxing officer requesting for reasons of the taxation. The Taxing officer vide a letter dated 22nd February, 2016, provided the said reasons. However, the applicant was not satisfied with the reasons stated therein. The Taxing Officer had indicated that the reason she taxed the Bill as drawn was because it had been drawn to scale and had not been opposed. This reason did not satisfy the applicant. The Taxing Officer did not indicate how she arrived at the decision that the Bill of Costs had been drawn to scale whereas the Bill of Costs itself does not show which scale or schedule it was under. The Taxing Officer also did not indicate how she arrived at the decision that the Bill of Costs has been drawn to scale without confirming how item 1 on the instruction fees had been arrived at and whether indeed the alleged parcel of land being L.R. NO. 12751/595 I.R.NO. 45482 was valued at Kshs. 20,000,000/= as indicated in the Bill. The Applicant states that it therefore cannot be correct for the Taxing Officer to say the Bill of Costs was drawn to scale. Further, the Taxing Officer has failed to explain how she concluded that items 2-35 of the Bill of Costs and disbursement were properly drawn to scale without confirming the existence of the alleged particulars, court attendances and documents together with the court filing receipts on the issue of disbursements. The Applicant states that the Taxing Officer failed to explain why she proceeded to tax the 3rd respondent's Bill of Costs knowing very well that it was a Party and Party Bill of Costs relating to Machakos High Court Petition No. 210 of 2010 and failed to direct the same to be filed in the parent file as is provided under the law and is the usual practice when dealing with Party and Party Bill of Costs. The applicant's case is that their advocate failed to attend court for taxation on 4th June, 2015 for reasons that on the same day his sister in law who had been terminally ill passed on. The said situation was beyond his control and the same ought not be visited on the applicant who is now being condemned to pay costs of Kshs. 1,564,155/= without being heard. In any event, failure to file an objection to the Bill of Costs is not a ground for the Taxing Officer to disregard due process and confirm the Bill of Costs is accurate before awarding costs.

4. The applicant's case is that since the Bill of Costs was taxed at a colossal sum of Kshs. 1,564,155/= which is not supported by any known provision under the law, it is in the interest of justice that the Certificate of Taxation of costs dated 10th June, 2015 be set aside and the 3rd respondent's Bill of Costs be struck out or alternatively be submitted before a different Taxing Officer for taxation.

5. The application is opposed by the respondent vide a Replying Affidavit sworn by **Sharifow Abdi Rashid** on **7th September, 2016**. The deponent states that he is the director of the respondent, having been authorized and tasked with the handling of the case from the beginning by his co-director, and he is well conversant with the facts of the case and that he is competent to swear this affidavit. The respondent's case is that the affidavit of the applicant is sheer hearsay and that the Taxing Master acted lawfully as there is no provision that debars a Taxing Officer from taxing a Bill of Costs in the absence of any party. Furthermore the applicant was duly served but failed to attend court without any reasonable excuse. The Supporting Affidavit has not demonstrated that the sum of Kshs. 1,564,155/= is colossal in the circumstances of the case. The respondent's case is that the applicant in their original case had claimed that they bought the suit property at a sum of Kshs. 15,000,000/=, but in their own fresh suit filed against the same parties herein, they have stated that the value of the suit property is Kshs. 150,000,000/=. The respondent in the original pleadings had stated that they bought the property at a sum of Kshs. 20,000,000/=. The respondent's case is that the Taxing Officer was therefore properly directed having had with her the original file being Petition No. 210 of 2010, which is in the Registry in the court. The respondent's case is that the reference filed herein does not meet the threshold of **Order 11** of the **Advocates Remuneration Order** and therefore ought to be struck out with costs and the money held by the bank through the Bank Guarantee be released forthwith to the respondent's advocates **Ms Agina & Associates advocates**.

6. Parties made oral submissions in court which I have considered. In my view the issue for determination is;

i. Whether or not the Taxing Officer “taxed” the Bill of Costs dated 24th April, 2015.

7. A taxation is a process whereby the Taxing Officer interrogates the values charged on every aspect of an item, and where necessary, makes remarks on how the final sum is arrived at. A taxation is meant to be a fair, frank and just process regardless of whether or not all the parties are in attendance. Even if a party is not in attendance, it should be clear to that party how the final sum was arrived at. I have looked at what transpired in court on **4th June, 2015** when the said Bill was taxed. On that day **Mr. Musau**, holding brief for **Mr. Ario** for the applicant, and in the absence of the respondent, informed the court that the said Bill of Costs was unopposed and he submitted that the same be allowed as prayed.

8. In response the Taxing Officer stated as follows;

“The Bill of Costs dated 24th April, 2015 is hereby allowed as prayed. The same having been duly served on the firm of Okongo Wandago Advocates on 26th May, 2015. It is unopposed. I hereby allow the same as prayed”

9. I am not saying that the learned Taxing Officer could not summarily allow the application. What I am saying is that a taxation is a process. Whether it is opposed or not, and whether the respondent is in court or not, the Taxing Officer is obligated to consider each and every item, and to tax each item separately by ensuring it is taxed per scale. The absence of a respondent to a taxing process does not mean that the applicant can get its Bill taxed as drawn without any comment from the Taxing Master. Indeed, the reason why the Taxing Master is normally required to give reasons for arriving at a particular sum is based on the expectation that the Taxing Master interrogated the Bill of Costs, and weighed each against the scale, and stated her finding. I have looked at the Bill of Costs under reference. There is neither a mark nor a remark. The Taxing Master does not show the scale used to arriving at the sum of Shs. 1,564,155=. It can only be inferred that the Bill of Costs was drawn to perfection. However, perfection is hardly the case in contested matters. In fact in this particular instance, the parties have not even agreed on the value of the subject matter. There is also no indication from the court record that the Taxing Master called the original file being **Machakos High Court Petition No. 201 of 2010** to guide the Taxing Master on the value of the subject matter.

10. Mr. Agina for the respondent submitted that the grounds put forth by the applicant for setting aside a taxation do not apply in this case, and that the absence of a counsel, or non attendance by counsel to taxation is no ground for setting the same aside. However, non attendance to any judicial proceedings is a good ground to set aside proceedings if the non attendance is justified. Be that as it may, the finding of this court is that taxation did not take place. The Taxing Master merely allowed the Bill of Costs as taxed without interrogating any one of the 41 items in the Bill. Given that the sum involved is a lot, justice would demand that the Taxing Officer provided a basis for arriving at the taxed sum, and even showing that the Taxing Master tried to evaluate the value of the subject matter from the record rather than from what the Taxing Master was told in the Bill. Granted that the Taxing Master was right to tax the Bill as drawn since it was not opposed, prudence demanded due interrogation of the various items, so that even if one party is not present during taxation, they can see that actual taxation took place and that acceptable reasons were provided for the product of taxation.

11. I have also considered the submissions that the Bill of Costs was filed by a stranger. However, there is no evidence that the Bill of Costs was filed by a stranger, in the suit or being filed in a wrong suit, and these allegations were not proved and are dismissed.

12. In the end, I allow the application in the following terms;

a. The Taxing Officer’s decision made on **4th June, 2015** is hereby set aside as are all consequential orders thereto.

b. Since there are no allegation of impartiality against the Taxing Master, the said Bill of Costs shall be taxed afresh by the same Taxing officer who made the orders of **4th June, 2015** and the applicant is hereby allowed to respond to the Bill.

c. Costs of this application shall be borne by parties equally.

13. Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

M/S Ameyo for Applicant

Mr. Omondi holding brief for Agina for Respondent

Court Assistant - Mr. Munyao