



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC APP NO. 9 OF 2015

Philiph Muchiri Mugo.....Applicant

versus

Mbeu Kithakwa.....Respondent

RULING

By an application dated 29th August 2016, **Philiph Muchiri Mugo** (hereinafter referred to as the applicant) seeks an order to set aside the taxation of the bill of costs dated 22nd May 2015 on grounds that he is dissatisfied with the whole amount and secondly the taxing officers reasons are inadequate and general given after one year since the reasons were requested.

The application is opposed on grounds that the same lacks merits, its misconceived and an abuse of the court process and that the same is a waste of time. The respondent maintains that the bill was not taxed *ex parte* as alleged.

On 15th August 2016, the Deputy Registrar pursuant my ruling dated 14th March 2016 gave reasons under Rule **11** of the Advocates (Remuneration Order) 2014 Schedule 6. Having received the reasons, the applicant states that he is dissatisfied with the same and asks this court to set aside the taxation.

The record shows that the Respondent filed a party and party bill of costs dated 22nd May 2015 and that the same came up for taxation before the taxing master on 3rd July 2015, both parties were heard and a ruling on taxation delivered.

Having considered the opposing positions advanced by both parties, and having carefully the record, I find that the issues for determination are namely:- (a) *Whether the Taxing Master took into consideration the principles of taxation;* and (b) *Whether the Taxing Master exercised his discretion judiciously;*

It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision.[\[1\]](#) This means that:-

" . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.[\[2\]](#)

The above dictum was reaffirmed by the Supreme Court of South Africa[\[3\]](#) and was also approved and followed by the Namibian Supreme Court.[\[4\]](#) There is therefore no apparent reason why this Court should

adopt a different approach to review the taxation before me or apply a different test for interference with decision of the taxing master. In what follows, therefore, the enquiry will be directed towards establishing whether the taxing master was clearly wrong to the extent that there are sufficient grounds for the court to interfere with the said decision.

In all taxations it is important to keep in mind the one overarching general principle applicable to all awards of party and party costs.^[5] This principle was put in the following terms by Innes CJ in *Texas Co. (S.A.) Ltd. v Cape Town Municipality*: -^[6]

"Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation ..."

The principles applicable are aimed at affording the party who has been awarded an order for costs full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been made.^[7] The taxing master shall on every taxation allow such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred them, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over caution, negligence or mistake or costs which are not provided for under the remuneration order.

The above principle(s) underscore that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds. The taxing master is also enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. This he does in the following terms, namely, he shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant.

The principles of taxation were set out by the Court of Appeal's in *Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Ors.*^[8] *inter alia* as follows:-

- i. that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;*
- tii. hat a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;*
- iii. that so far as practicable there should be consistency in the awards made;*
- iv. the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;*

The ultimate question raised by the applicants application for review of taxation is therefore whether the taxing master struck this equitable balance correctly in the light of all the circumstances of this particular case.

The dispute giving rise to the bills of costs the subject of this ruling began as a miscellaneous application filed on 24th February 2015 in which the applicant herein sought orders *inter alia* that police do provide security during the burial of a one Mugo Kithakwa on a parcel of land that the applicant stated belonged to the deceased, and which parcel of land had been the subject of previous litigation. The application was opposed on grounds *inter alia* that the it was *res judicata* and in a ruling rendered on 15th May 2015 the Hon. Justice Ngaah struck off the said application with costs.

The Respondent herein, being the successful party in the said application filed a party and party bill of costs on 22nd May 2015 claiming a total sum of **Ksh. 170,140/=**. In the said bill, the Respondent claimed instruction fees of **Ksh. 140,000/=** based on the value of of the land which was stated to be **Ksh.**

2,000,000/=.

The Applicant herein filed his objection to the said bill and argued that under schedule 6 Rules 1 (b) and (a), the instruction fees is 75% of Ksh. 45,000/= which translates to Ksh. 33,750/=, that he had no objection to items 2, 3, 4, 5, 6, 7, 14 & 14 in the said bill which translated to Ksh. 4,700/=, that he opposed items 8, 9 & 12 stating that Ksh. 1,100/= ought to be taxed off from each of the said items. He had no objection to item 10. He opposed items 11 & 13 in their entirety and asked that they ought to be taxed off. His total tabulation was Ksh. 47,340/= (even though at the hearing of this application I asked him his proposed amount and he proposed Ksh. 10,000/= but after I posed the same question again he proposed Ksh. 21,000/=, curiously lesser than what he proposed at the time of taxation).

The scope of a review in the application before me requires this court be satisfied that the taxing Master was clearly wrong before interfering with his decision.^[9] The law prescribes that a court can award costs to successful litigant. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the taxing master and is an exercise of judicial power guided by the applicable principles.

In *McCullough Estate v. Ayer*^[10] the Alberta Court of Appeal identified **two reasons** for the existence of “costs”. At paragraph 29:-

"Costs exist primarily for two reasons. First, to take some of the burden off victors, ensure that not all victories are pyrrhic [won at excessive cost], and so to encourage those who are right to persevere. And, second, to deter those who are wrong."

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,^[11] the Supreme Court of Canada “discussed the policy objectives underlying the modern approach to costs” which dovetails nicely with the above quote of the Alberta Court of Appeal:-

"Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs."

When contemplating any issue or question related to the recoverable costs of litigation three underlying principles of costs have to be considered; (a) Indemnification: has any loss or expense been incurred? (b) Costs belong to the litigant. (c) Discretion of the Court: has the Court addressed its mind to the issue of costs?

Guidance can be obtained from the decision in the Canadian case of *Reese v. Alberta*^[12] McDonald J. sets out the **general principles** applicable to awarding costs, at page 44:

"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice.,the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of feesplus reasonable disbursements...."

"When the case is of considerable magnitude and complexity, the practice...contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by the Schedule....."

In principle, costs on a party and party scale are awarded, having regard to such factors as:- **(a)** the difficulty and complexity of the issues; **(b)** the length of the trial; **(c)** value of the subject matter and **(d)** other factors which may affect the fairness of an award of costs. I take the view that the law obligates the taxing master to take into account the above principles

I find nothing in the taxation ruling to demonstrate that the taxing master took into account the above principles. In particular there is nothing to show that the matter before the court was complex. Also, it is not clear how the value of the alleged property was determined. Further, the application before the court is clear. It had nothing to do with the value of the land. It sought police protection during the burial. The burial had nothing to do with the value of the land. The instruction fees was based on the presumed value of the land which to me is not clear how it was ascertained nor am I convinced that this was the correct subject matter. The value of the land was not the basis of the dispute before the court. I reiterate was before the court touched on clear orders seeking police protection during a burial. The value of the burial which was the subject matter cannot have been Ksh. 2,000,000/=.

In *Joreth Ltd v Kigano & Assoc.* [13] the Court of Appeal observed 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, judgement 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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

I find that the calculation of instruction fees based on the alleged value of the land which was not the subject matter of the application is erroneous and is not based on any discretionary powers vested on the taxing master. Secondly when it comes to instruction fees, as stated above there is discretionary power to take into account the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit for the registrar to award a reasonable fee. In the present case, it is beyond argument that the subject matter of the suit was not properly ascertained by the court, hence the amount allowed by the taxing master on the instruction fees was excessive.

As stated above, the applicant had proposed a total figure of **Ksh. 47,340/=** as herein above tabulated which to me is not only within the scale fees but is reasonable taking into account the nature of the dispute before the court, the court attendances, the period the case took and more important guided by the principles of taxation enumerated earlier in this Ruling. Having proposed the said sum, the applicant is estopped from offering a lesser sum as he purported to at the hearing of the application before me.

Accordingly, I allow the application dated 29th August 2016 and order as follows:-

a. That the taxation made on 7th August 2015 by the taxing master taxing the bill of costs dated 22nd May 2015 at **Ksh. 69,990/=** and the consequential certificate of costs issued on 11nd August 2015 be and is hereby set aside.

b. That the Respondents party and party bill of costs dated 22nd May 2015 be and is hereby taxed at **Ksh. 47, 340/=**.

c. That no orders as to costs.

Orders accordingly

Dated at **Nyeri** this **15th** day of **November** 2016

John M. Mativo

Judge

Delivered at Nyeri this 15th day of **November** 2016

Hon. Justice Jairus Ngaah

Judge

[1]Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111.

[2]Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others 1984 (3) SA 15 (A) at 18F C G.

See also the discussion by Botha J in Noel Lancaster Sands (Pty.) Ltd. v Theron and Others 1975 (2) SA 280 (T) at 282D C 283D for a discussion of the nature and limits of the judicial function in this context.

[3] In JD van Niekerk en Genote Ing v Administrateur, Transvaal 1994 (1) SA 595 (A).

[4]In Hameva and Another v Minister of Home Affairs, Namibia, 1997 (2) SA 756 (NmSC).

[5] Kriegler J in The president of The Republic of South Africa & Others vs Gauteng Lions Rugby Union & Others, Case CCT 16/98 Decided on : 22 November 2001

[6]1926 AD 467 at 488.

[7] Ibid note 5

[8] {1972}EA 162

[9] (See: Ocean Commodities Inc v Standard Bank of SA Ltd [1984] ZASCA 2; 1984 (3) SA 15 (A) at 18E-G)

[10] [1998] A.J. No. 111; 212 A.R. 74; 22 E.T.R. (2d) 29

[11] [2003] 3 S.C.R. 371, at para. 26 [as quoted in Orkin's *The Law of Costs* (2 e., 29 rel. August 2010) 1 nd th 01]

[12] {1993} 5 A.L.R. (3rd) 40

[13] Civil Appeal No. 66 of 1999 (unreported).