



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 452 OF 2014

LUKA WAGANA.....1st PLAINTIFF

GODFREY MAINA MWANGI.....2nd PLAINTIFF

JAMES WANGUO KANYI.....3rd PLAINTIFF

-VERSUS-

CHARLES ALEXANDER KIAI.....1st DEFENDANT

JOHN CIIRA GATHOGO.....2nd DEFENDANT

RULING

1. Before me for determination is an Application by way of Notice of Motion under Order 45 Rule 1 and 2 of the Civil Procedure Rules dated the 4th November 2019 in which the 1st Defendant herein seeks that the Court set aside the Taxing Master's ruling delivered on the 9th October 2019 and reinstates the items taxed off in the Applicant's Bill of Costs dated the 28th May 2019 and the 1st Defendant's Bill of Costs dated 10th July 2019. The said Application is supported by the grounds on its face and the Affidavit, sworn by the 1st Defendant on the 28th October 2019.

2. The second Application brought through a Chamber Summons pursuant to Rule 11(2) of the Advocates (Remuneration) Order (1986) is dated the 22nd November 2019 in which the Plaintiffs seek for the Court to tax of the items objected to, in their letter to the Taxing Master dated the 16th October 2019, from the 1st Defendant's Bill of cost dated the 28th March 2019. The Application is supported by the grounds thereto.

3. Owing to the Covid-19 pandemic, the Court had reversed its earlier direction directing that the Applications be heard orally to them being canvassed by way of written submissions. The 1st Defendant in support of his Application dated the 4th November 2019 filed his submissions to the effect that pursuant to the Taxing Master's Ruling delivered on 9th October 2019, he had on the 28th October 2019, filed his notice to the Registrar objecting to the Taxation of his Bill of Costs dated 28th May 2019 which Notice had been made after 13 days of the delivery of the ruling. His submission was that the said Notice had been filed without unreasonable delay.

4. That the Taxing Master while awarding costs to the 1st Defendant, had relied on the Plaintiffs submissions dated 19th September 2019 which the submissions had never been served upon the 1st Defendant thereby denying him an opportunity to reply to the same.

5. That he had not been made aware of the items objected to by the Plaintiffs in their alleged letter to the Taxing Master dated 16th October 2019 objecting to the Bill of Costs dated 23rd March 2019 because such a Bill of Cost did not exist.

6. That there had been no commission of an error in principle to the Bill of Costs dated the 28th May 2019 and therefore the items 1-14 and 17-18, 20, 27, 29, 30-34, 36, 39 and 40 that were taxed of being reinstated.

7. The 1st Defendant's further submission was that the Plaintiff's Application dated the 22nd November 2019 was filed with unclean hands so as to undermine his Application dated the 4th November 2019 and as such, the said Application should be disallowed and dismissed in favour of his Application dated the 4th November 2019.

8. The Plaintiff's submission in response was that the 1st Defendant's affidavit did not challenge the basis upon which the learned Taxing

Master rejected the items he had complained about. That the present suit by the plaintiff had been filed on the 18th day of December 2008 and had the 1st Defendant believed that he was entitled to costs to items No. 1-14, 17 and 18, as sought out in paragraph 4 of his affidavit, then he should have moved the Court to claim the said costs, which this Court had no jurisdiction to grant. They submitted that the Taxing Master was therefore right to tax them of.

9. The plaintiff objected to items 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 to 44 and submitted that upon the Taxing Master considering their submissions he had taxed of items 20 29 33 35 36 and 39 but had allowed items the 15, 16, 19, 21, to 28, 30, 31, 32 to 34 37 and 40 to 44 on the basis that they were drawn on scale.

10. The Plaintiffs further raised an objection to the effect that the 1st Defendant had used the wrong provisions of the law being Order 45 Rule 1 and 2 of the Civil Procedure Rules to institute his reference to have the Taxing Master's decision reviewed instead of the provided for provisions under the Advocates (Remuneration) Order. That to this effect, the Courthad been stripped off jurisdiction to hear and review the decision of the Taxing Master.

11. The Plaintiffs submitted that the jurisdiction of the Court as is stated in Rule 2 of the Advocates' Remuneration order was on Appeal rather than on Review. Reliance was placed on the decided case in **Hasham Kara vs Abdul Mohamed Hussein Kaamali [1946-47]Vol XXII KLR.**

12. That the 1st Defendant's failure to comply with the provisions of Rule 2 (i) of the Advocates Remuneration Order proved that he was improperly before the Court. That his Application did not amount to a reference on taxation from the learned Taxing Master's ruling dated the 9th October 2019 and therefore the same should be struck out with costs.

13. In reference to the Application dated 22nd in November 2019, the Plaintiffs' submission was that in compliance with Rule 2(i) of the Advocates Remuneration Order, they had raised a Notice of Objection to the decision of the learned Taxing master on the 16th October 2019 stating that they were aggrieved with the Taxing Master's decision on items No; 15, 16, 17, 21, 22, 23, 26, 27, 28, 30, 31, 32 35, 37 40 41 and 44 for supposedly having been drawn to scale.

14. That the Taxing Master had generalized the reasons for taxing the said items without particularizing thereason for each item and/or identifying the scale she hadreferred to and/or how it had been covered by the provisions of the Advocates' Remuneration Order.

15. That had the Taxing Masterconsidered the provisions of Rule 74A of the Advocates Remuneration Order and taken into account that the 1st Defendant's Bill of Costs was not the same as one that was based on an Advocates' party to party costs and further, the requirement that disbursements issued be receipted or vouchers thereof produced, then she would not have allowed those items. That the said failure amounted to an error of principle and the Court could therefore interfered with her discretion on the said items. The Plaintiffs sought that their Chamber Summons be allowed with costs.

Determination.

16. I have considered the Applications, the submissions, as well as the Authorities herein cited by the parties. I find the issues arising for determination in the Application dated the 4th November 2019 as follows:-

- i. Whether the Applicationis competent before this Court.
- ii. What orders should this Courtmake.

17. On the first issue as to whether the Application herein as filed by the 1st Defendantis competent before the Court, I find that Paragraph 11 of the Advocates Remuneration Order provides that:

Where a party is aggrieved by the decision of a Taxing Master, he is required to object in writing by requesting the Taxing Masterto give reasons for the items of taxation that he is objecting to and thereafter file reference to this Court.

18. The 1st Defendant has filled his Application dated the 4th November 2019 under a Notice of Motion pursuant to Order 45 Rule 1 and 2 of the Civil Procedure Ruleschallenging the Taxing Master's ruling delivered on the 9th October 2019 and seeking that the Court do set aside it aside and to reinstate the items taxed off in the Applicant's Bill of Costs dated the 28th May 2019 and his Bill of Costs dated 10th July 2019.

19. I find that an order by the Taxing Master concerning taxation of an advocate/client/Bill of Costs can only be challenged before a Judge by way of a referenceinitiated by wayof a chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order and not by way of a review under the provisions of Order 45 Rules 1 and 2 of the Civil Procedure Rules.

20. The 1st Defendantcannot invoke the Civil Procedure Rules to circumvent the procedure provided for under the Advocates Act and the Advocates Remuneration Order in regard to review of a decision of the Taxing Masterin an advocate/client Bill of Costs because the Taxing Masterin this instance was exercising herspecial jurisdiction conferred upon her under the Advocates Remuneration Order and NOT in her capacity as the Deputy Registrarwho exercises her jurisdiction in accordance with the powers given to her under the Civil Procedure Act/ Rules. The two roles of the said Master of the Court are separate and distinct. The two jurisdictions and their separate procedures are mutually exclusive. One procedure cannot be substituted for the other. See **Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation [2015] eKLR.**

21. The Court of Appeal in its decision in the case **Machira & Company Advocate vs Arthur K. Magugu (2012) e KLR** held that;

“Appeals require the tying of proceedings compiling of records of Appeal and hearing of the same in open Court. Reviews, however, would require provisions a kin to those of Section 80 of the Civil Procedure Act, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on Advocates Bill of Costs through references under Rule 11 to a judge in chambers.”

22. The Learned Judges of the Appellate Court further stated;

*“The appellate jurisdiction of any Court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the Advocates’ Bill of costs, we agree with the decision of Ringera J (as he then was) in **Machira Vs Magugu (1)** that the Advocates Remuneration Order is a complete code which does not provide for Appeals from the taxing master’s decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an Appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”*

23. In yet another holding in **Abok James Odera T/A A.J. Odera & Associates vs John Patrick Machira T/A Machira & Company Advocates (2013) e KLR**, citing with approval the case and decision of **Kariuki Networks Ltd & Another vs Dally Figgis Advocates, Civil Application No. Nai 293 of 2009** the court of Appeal held that:

“The Application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the Court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the Court is under a duty to ensure that the Application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of Appeals

24. From the above findings which is binding to this Court, it is clear that the oxygen principle and/or Article 159(2) (d) of the Constitution does not oust the jurisdiction of this Court to determine that the Application that was filed under the Civil Procedure Rules when there are clear procedures under the Advocates Act was incompetent in limine. It is to this effect that the 1st Defendant’s Application by way of Notice of Motion dated the 4th November 2019 is herein dismissed.

25. On the second Application dated the 22nd November 2019 I find the issue for determination is whether the Taxing Master committed any errors of principle while taxing the Bill of Costs.

26. The often cited case of **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64** sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162** and **Arthur vs Nyeri Electricity Undertaking [1961] E.A 492**. The said principles were also reaffirmed by the Court of Appeal in **Joreth Limited vs Kigano and Associates [2002] 1 E.A 92**. These principles include

i. that the Court cannot interfere with the Taxing Master’s discretion on 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 of 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 decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master 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 Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

27. From the above stated, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see **Premchand’s case** (supra)

28. The Plaintiffs are aggrieved by Taxing Master’s generalized reasons for taxing the items no; 15, 16, 17, 21, 22, 23, 26, 27, 28, 30, 31, 32, 35, 37, 40, 41 and 44 of the 1st Defendant’s Bill of Costs as having supposedly been drawn to scale without particularizing the reason for each item and/or identifying the scale she was referring to and/or how it had been covered by the provisions of the Advocates’ Remuneration Order.

29. That the Taxing Master did not take into account that the 1st Defendant’s Bill of Costs was not the same as one on an Advocates’ party to party costs and therefore there was a requirement that disbursements issued be receipted or vouchers thereof produced. That the costs of the 1st Defendant therefore came under the ambit of rule 74(1) (b) of the Advocates’ Remuneration Order.

30. Section 74 provide as follows;

“Subject to section 74A, receipts or vouchers for all disbursements charged in a Bill of Costs shall be produced if required by the Taxing Master”.

31. Section 74A (1) (b) provides thus;

The Taxing Mastershall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors—

(b) if the witness is a party, the time spent giving evidence;

32. My understanding of these provisions is that if the Taxing Master required prove of items under disbursement then she would ask the party concerned to avail them. In her ruling, the Taxing Master had opined that since the 1stDefendant had appeared in person at the hearing he was not entitled to instruction fees although he was entitled to costs that he had actually incurred during the proceedings wherein she found the impugned items drawn to scale and proceeded to award the 1stDefendant the same.

33. There is no indication to the effect that the Applicant was unable to avail the receipts or vouchers. Counsel for the Plaintiff however submitted that after the Taxing Master had allowed the impugned items as drawn to scale, they had sought for reasons for her decision wherein the reason given was that the items had been taxed strictly in accordance with the provisions of the AdvocatesRemuneration Order as applicable, without particularizing the reason for each item.

34. It must be remembered that before the Court interferes with the decision of the Taxing Master it must be satisfied that the Taxing Master’s ruling was clearly wrong. The Court can interfere if it is proved that the amount taxed was manifestly excessive or low, or where there is proof that the Taxing Masterfollowed a wrong principle in reachingher decision.

35. A moderating balance must be struck to afford 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. The ultimate question remains whether the Taxing Master in this case struck this equitable balance.

36. I have taken the liberty of randomlyperusing some of the items complained of by the Plaintiff herein; for example, on Item No.15, I find that on the 25th March 2009, the Plaintiffs were awarded the costs of the day, the 1st Defendant could therefore be awarded the costs too, on Item No. 16, the record does not show any Notice of Appointment of M/S Macharia Advocate, and therefore again, the 1st Defendant was not eligible to be granted costs, onItem No. 19, the same refers to photocopies made on 28th May 2008, I find that the suit was filed on the 18th December 2008 and therefore costs could not be awarded.

37. Based on the above sampling, it is also my conclusion that the Taxing Masterdid not exercise her discretion judicially thereby following a wrong principle in reaching her decision. I therefore find that the Application dated 22nd November 2019 is merited, I allow the same with the following orders:-

- i. *That the taxation of the 1stDefendants Bill of Costs dated 28th May 2019 and all the consequential orders are hereby set aside.*
- ii. *That the said Bill of Costs be and is hereby remitted back to the Taxing Master to be taxed afresh on the items objected to by the Plintiffs.*
- iii. *That each party shall bear its own costs for this Application.*

It is ordered.

Dated and delivered at Nakuru this 6th day of August 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE