REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HC. MISC. NO.283 OF 2013

MUEMA KITULU T/A

MUEMA KITULU & CO. ADVOCATES…………PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KITUI………DEFENDANT/RESPONDENT

R U L I N G

1. **MUEMA KITULU T/A MUEMA KITULU & Co.** Advocates**, "The Applicants",** approached this court by way of **Chamber Summons** pursuant to **Section 3, 3A** and **63E** of the **Civil Procedure Act** and **Rule 11(2)** of the **Advocates Remuneration Order, Cap 16** of the **Laws of Kenya.**

2. The applicant sought an order that this court do set aside, review or substitute the taxing Master's decision in **HC Misc. No. 283 of 2013** issued on **21st July, 2014** and the costs of the application to be in the cause.

3. The application is premised on the grounds that the applicant filed an Advocate/Client Bill of Costs before the court on the **28th November, 2013** seeking **Ksh.31,936,469.04** as costs arising from legal services provided in **HCC No. 76 of 2003, Machakos – John K. Ututu** and **5 others** vs **County Council of Kitui** & **Another.** The case was a representative suit involving over 730 persons. It entailed a dispute over control, occupation and title to land parcel **L.R. No. 12010** whose leasehold title was held **by Kitui Yatta Kanyonyoni Co-operative Society** after allocation to it by the **County Council of Kitui** for beef ranching purposes. In all pleadings filed, the suit

is described as **LR 12010** and at no time was the issue defined to relate to boundary with other land parcels or right to occupy or use different parcels of land.

4. Further, it is averred that when the Bill was filed, the Respondent instructed the firm of **J.K. Mwalimu & Co. Advocates** who in their written submissions stated that the dispute related to some 20 acres valued at **Ksh.30,000/-** per acre. The submissions were discounted by the applicant who drew the **Taxing Master's** attention to the clear wording of the Plaint and that the Plaintiffs were pursuing the entire parcel comprised in **LR 12010, Kitui.** The applicant was directed to file and serve a bundle of documents from the applicant's file enclosing all the relevant pleadings to assist the taxing master arrive at a fair determination of the instruction fee.

5. It was also deponed that the department of survey confirmed parcel **LR 12010** as comprising of **12582 Hectares** or thereabout**. (31,090.75 acres).** Consequently the appellant agreed to concede the valuation proposed by the respondent's advocate of **Ksh 30,000/-** per acre and asked the **Taxing Master**

to amend item **No.1 of the Bill.** ***(The instruction fee)*** under which position the applicant would be entitled to a fee of **Ksh 10,454,050/-** down from **Ksh 18,077,000/-** earlier sought in the **Bill of Costs**.

6. The assessment was not disputed by the respondent, however, on **21st July, 2014** when the Taxing Master issued the award, she made a finding of fact in variance with the evidence before Court and introduced her own opinion and evidence and arrived at erroneous and factually incorrect finding that the Land in dispute in the pleadings was **LR 11802** and not **LR 12010**. That the Taxing Master also went on to delve into irrelevant consideration in assessing the applicable instruction fees as to declare the suit land ancestral land and to remark that the economic plight of the plaintiff should be considered. The applicant therefore objects to the sum awarded as instruction fees i.e. **Ksh.2,000,000/-** and prays the court to substitute it with **Ksh.10,454,050/-.**

7. In a response thereto the respondent filed grounds of opposition stating that there is no legal basis for interference with the taxing officer's decision as regards the Advocates instruction fees. The taxing officers considered all the salient issues of the case in arriving at the decision being challenged, the level of engagement of services were on interlocutory basis as the instructions were terminated by a change in the law before even the case was set down for hearing and the amount awarded was generous and sufficient.

8. In a further response, **Japheth Kiteme Mwalimu**, the respondent's advocate swore an affidavit in reply where he deponed that: The claim in Machakos **HCC No. 76 of 2003** was a dispute over the control and occupation of land and not its valuation. All tentative valuation given by the applicant and the respondent during taxation of the **Advocates Client Bill** of **Costs** were speculative as no formal valuation had been done over the suit land which is a range land in **Kitui County**. It was not true that the respondent admitted the instructions fees of **Ksh 10,454,050/-** because the respondent had offered instructions fees of **Ksh 63,000/-** as per the submissions filed on **23rd May, 2014**. The Taxing Master fully analyzed all the pertinent issues in the case and correctly arrived at an award of **Ksh 2 million** as instruction fees. That the claim in **Machakos HCC No. 76 of 2003** has not yet been determined and the applicant herein was not claiming to have conducted the case to its conclusion as no witnesses have testified.

9. The issue for determination is therefore whether: The Taxing Master erred in taxation of the bill of costs by awarding **Ksh.2,000,000/-** instead of the sum of **Ksh.10,454,000/-** that the applicant seeks.

10. In this matter I am guided by case law. In the case of **Joreth Limited –vs- Kigano** and **Associates, Civil Appeal No 66 of 1999 (2002) EA 92** it was stated that: the value of the subject matter 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 the 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. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle he should refer the bill back for taxation by the same or another Taxing Officer with appropriate directions on how it should be done.

11. In another case of **Republic vs Ministry of Agriculture & 2 others** Ex parte **Muchiri Wanjuguna** & **6 others (2006) eKLR, Ojwang J**. (as he then was) expressed himself inter alia as follows:

> **"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat is too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other….**
>
> **The court cannot interfere with the taxing officer's decision 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 inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the proceedings and any direction by the trial Judge"

12. The suit in issue was instituted by way of plaint. The claim per the amended plaint was for a declaration that parcel No.12010 is a trust land and that the plaintiff's are the beneficial owners. It was a representative suit. The value of the subject matter was not given and could not be determined from the pleadings. On the area, acreage is given **(vide page 114 of the Bundle).** The matter is pending hearing therefore there is no way the taxing officer could determine it from proceedings or judgment.

13. It is apparent that the taxing officer used her discretion and for reasons given, she came up with fees for instructions that were commensurate with the instructions given. She took into consideration the fact of the suit being a representative one. The same having touched on thousands of livelihood dating from the early 1900s and the probability of the suit changing the socio-economic fabric of the county at large.

14. These were indeed important factors that were relevant to the suit. The figure arrived at is neither too high nor too low. Therefore there was no error occasioned that necessitates my interference.

15. Consequently, the reference lacks merit. It is dismissed with costs to the respondents.

DATED, SIGNED and **DELIVERED** at **KITUI** this 8th day of **October, 2015**

L.N. MUTENDE

JUDGE