REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC. CASE NO. 767OF 2010

ZEPAHNIA NGARIA ANGWENYE…….....PLAINTIFF/APPLICANT

VERSUS

MOSES LUTOMIA WASHIALI…..1ST DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK…...2ND DEFENDANT/ RESPONDENT

RULING

1. The Application before the court is a Chamber Summons application by the 1st Defendant dated 24th August 2015. In it the Applicant prays that the decision by the taxing master, the Honourable Ms. Sandra Ogot, made on 27th July, 2015 on the Plaintiff's advocate's bill of costs filed on dated 24th April, 2014 be set aside. The applicant also prayed for the bill to be remitted back for re-assessment, together with the cost of the application.

2. The attack on the decision of the taxing master was that first, she applied the wrong principles by stating the value of the subject matter could not be discerned when the same was clearly distinguished in the pleadings. That the taxing master should have based the instruction fees on Kshs. 2, 100,000/= since the figure of Kshs. 2, 800,000/= given by the Plaintiff/Respondent was speculative and not backed by a current valuation report. Secondly, that the instruction and getting up fees taxed as payable were manifestly excessive and the learned tax master applied the wrong principles of law in computing the same.

3. The review is opposed by grounds of opposition dated 24thSeptember 2013 together with the replying affidavit of the Plaintiff sworn on 17th September, 2015. In summary, the Respondent's case is that no plausible grounds have been laid to interfere with the discretion and decision of the taxing master.

4. On 22nd September, 2015, the prayer for stay of execution of the recovery of the taxed amount of Kshs. 2, 138, 820/= was also abandoned by the Applicant. The parties agreed that the application be determined by written submissions. Subsequently, the applicant's submissions were filed on 22nd January, 2015 while those of the Respondent were filed on 7th October, 2014.

5. According to the Applicant's submissions the taxing Master arrived at the value of the subject matter erroneously and the same should therefore be taxed off. Further that the getting up fee should also be taxed off as the same was pegged on the value of the subject matter which was erroneously arrived at by the Taxing Master. In addition, the 1st Defendant took issue with the amounts taxed with regard to court

attendances and other attendances plus the disbursements under items No. 136 to 171 of the Bill of Costs. The applicant therefore urged the court to allow the application as prayed.

6. In a rebuttal to these submissions, the Plaintiff asserted that the Deputy Registrar was entitled to use her discretion to assess the instruction fee as she considered just, given the complexity of the issues involved in the suit. The Plaintiff further argued that though the subject matter was purchased at Kshs. 2,100,000/=, the taxing master considered the fact that the same had appreciated over time and arrived at the value of the subject matter at Kshs. 2800000/= for purposes of taxation correctly.

7. The Plaintiff also contended that the amounts taxed for the court attendances, service attendance and other attendances were correct. In sum the Plaintiff urged the court to dismiss the application with costs.

8. I have considered the summons, the grounds of opposition, replying affidavit and the rival submissions. The legal strictures within which the Court can interfere with the taxing master's decision are well settled. In the case of **First American Bank of Kenya Vs Shah and others [2002] E.A.L.R** 64 at 69, **Ringera J** (as he then was) delivered himself thus;

> ***"The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly (Steel Construction Petroleum Engineering (EA) Limited vs Uganda Sugar Factory [1970] EA 141 followed). Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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.***
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> ***Though the High Court had the jurisdiction and the discretion to reassess the bill itself (Steel construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (supra) and Arthur vs Nyeri Electricity Underwriters [1961] EA 492 followed), the normal practice where the Taxing Officer's decision disclosed errors was to remit it back to the Taxing Officer for reassessment unless the court was satisfied that the error did not materially affect the assessment (Nanyuki Esso Service v Touring and Sports Cabs Ltd [1972], Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar (supra) and Arthur v Nyeri Electricity (supra) followed)."***

9. The views expressed in the above case are not entirely novel. They are reiterated in the 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 principles were also re-affirmed by the Court of Appeal in **Joreth Limited Vs Kigano and Associates [2002] 1 E.A 92**.

10. 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 as to lead to an injustice. This last element was well explained in **Premchand's case(supra):**

> ***"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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other"***

11. The issue that thus falls for determination in this matter is whether the 1st Defendant has produced sufficient reason for this court to disturb the award by the taxing officer.

12. However, before I embark on the merits or otherwise of the application, it is important to point out that in his submissions, the applicant introduced new factual matters which were not contained in the affidavit in support of the application. In the affidavit of support, the applicant deponed extensively on the

issue of the instruction fee and the value of the subject matter. Issues with regard to court attendances, other attendances and disbursements were only introduced in its written submissions filed on 7th October, 2014 ***In Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000***, the Court of Appeal held:

> ***"We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281)."The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of R v.Wandsworth Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.'***

13. The principle from the above case is that it was therefore improper for the applicant to attempt to introduce factual evidence by way of submissions when the verifying or supporting affidavit does not allude to the same. Though the above case touched on a Judicial Review matter, I am of the view that the same principle can apply here. Accordingly, I hold that the court should determine this application based on the facts contained in the supporting affidavit and not issues in the submissions that are unsupported by affidavit.

14. The first issue that was raised by the Applicant was that the learned taxing master erred in law and in fact in holding that the value of the subject matter was Kshs. 2, 800,000/= for the purposes of determining the instruction fee. In **Joreth Limited Vs Kigano (supra)** the Court of Appeal stated that where the value of the subject matter cannot be discerned from the pleadings or judgment, the taxing master has discretion to assess it weighing a number of parameters:

> ***"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 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 asses such instruction fee as he considers just, taking into account, amongst other matters, the nature and 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. That is what CK Njai Esq did when he said:***
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> ***"As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel."***

15. The case above gives critical guidelines on how the issue of the value of the subject matter can be resolved. In the impugned decision of the taxing master made on 27th July, 2015 on the item of instruction fees, she delivered herself as follows:-

> ***"ITEM 1 –Instruction Fees***
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> ***The Plaintiff has submitted that the subject matter was over Kshs. 25,000,000/= therefore an amount of Kshs. 7,500,000/= is sufficient compensation as instruction fees.***

The 1st Defendant has argued that the figure of Kshs. 7, 500,000/= was arrived at arbitrarily since no such value appears anywhere in the Pleadings and that no valuation report was filed in court or produced as evidence. He submitted that the 1st Defendant admitted to buying the suit property for Kshs. 2,100,000/= and that is what should be used in calculating the instruction fees which he indicated should be Kshs. 93,200/=.

I do agree with the Defendant that nowhere in the pleadings has the value of the property been indicated. In fact in the Plaint filed in 2010, the Plaintiff avers that the same was worth Kshs. 2,800,000/=. I also agree with counsel for the Plaintiff that land appreciates in value over time but I find it difficult to fathom that land that cost Kshs. 2,800,000/= in 2010 can now be Kshs. 25,000,000/= yet there was no valuation report to that effect.

I therefore ascertain that the value of the subject matter cannot be determined from the pleadings, judgement or settlement between the parties."

16. From the above findings, it is easy to discern the Taxing Master's thought process. She correctly found that the value of instruction fees can be determined from the pleadings or settlement.

17. I have perused the Plaint and Defenses on record. It is clear that the same do not contain the value of the subject matter.

18. Further the purchase price of the subject matter could not be utilized, since it was clear that due to the passage of time, the piece of land had appreciated in value. To this end, the Taxing Master was correct in exercising her discretion to determine the instruction fee. She applied the correct formula in arriving at the figure for instruction fee by assessing the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel, when she noted as follows ;

"I note that the Plaintiff in his pleadings sought 3 declarations, 2 orders and a permanent injunction, general damages and costs and interest of the suit. I also confirm from the judgement on record he was awarded all the orders and declarations sought as well as the permanent injunction and costs of the suit. The only order not granted was for general damages.

In light of the aforementioned and having regard to the case and the labor required, the number and length of the papers perused, the nature and importance of the matter, the interest of the parties and all the circumstances of the case and to be fair and reasonable; and considering that had I used Kshs. 2,800,000/= as the basis from calculating instruction fees, the same would be Kshs. 104,000/=; I determine that an increase to Kshs. 1, 500,000/- based on my discretion as Taxing Master to be appropriate figure as instruction fees for the Applicant . I therefore tax Item 1 at Kshs. 1,500,000/=. I tax off Ksh. 6,500,000/="

19. Having exercised her discretion to tax the amount as she did, I am of the view that the court cannot substitute its own view of quantum.

20. The entire bill was allowed in the sum of Kshs.2,138,820/=. Considering the complexity of the matter and the other considerations made by the taxing master, it is in my view that the figure is a reasonable quantum of fees. I cannot say that the award was manifestly high or low.

21. I am thus of the view that the court should decline to disturb the findings of the taxing master. To this end, the instruction fee arrived at was also in my view correct. In the result, the Applicant's application be and is hereby dismissed with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 5th day of November, 2015.

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C. KARIUKI

JUDGE