REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 1 OF 2020

SHIVA ENTERPRISES.....APPLICANT

VERSUS

MWANGI NJENGA & COMPANY ADVOCATES.....RESPONDENT

RULING

(Taxation of Advocate/Client Bill of Costs; applicant contending that they had an agreement with the respondent law firm on the fees payable; applicant asserting that the whole of the agreed fee was duly paid; position of the respondent being that there was no agreement in respect of the fees and that no money was paid on the brief; Section 45 Advocate's Act, providing that advocate fees can be agreed but to be enforceable this has to be in writing; no document indicating any agreement in respect of the contested matter in which the respondent represented the applicant; cannot therefore be said that there was any agreement in respect of fees; basis of taxation had to be the Advocates Remuneration Order; no value disclosed in the pleadings; whether in such an instance a valuation of the subject matter can be done for purposes of taxation; court not seeing anything that would bar the subject matter being valued; value of the subject matter would be the same, whether or not disclosed in the pleadings, and an advocate ought not to be disadvantaged merely because the value is not disclosed in the pleadings; in land cases, the value of the subject matter would be the value of the land which would be its actual value and not the forced sale value; erroneous for the taxing officer to have used the forced sale value; in the case at hand, matter remitted back to the taxing officer for taxation for the valuation report covered the whole of the land whereas the applicant was only entitled to part of it)

1. The applicant in this matter has applied under Rule 11 (2) of the Advocates (Remuneration) Order seeking to set aside the decision of the taxing officer delivered on 11 December 2019 over a taxation of an advocate/client bill of cost. On the other hand the respondent, who is the advocate, has filed a cross-reference against the same decision.

2. To put matters into perspective, the applicant was sued as 1st defendant in the Environment and Land Court at Mombasa in the case *Mombasa ELC No. 4 of 2017, Mbeyu Mwandaza Mwangoni & 2 Others vs Shiva Carriers Limited and 6 Others*, which was a suit commenced by way of plaint filed on 5 January 2017. The suit sought orders of injunction to restrain the applicant and the other defendants from evicting the plaintiffs from the land parcels 1847/III/MN and 1000/III/MN. The plaintiffs also sought orders to compel the Land Registrar and the National Land Commission (sued as the 6th and 7th defendants) to issue them with title to the suit land. It appears as if the plaintiffs claimed that the suit properties had been allotted to them in the year 1991. The respondent was appointed by the applicant, and proceeded to enter appearance, and file defence on 15 March 2017, on behalf of the applicant. It was pleaded in the defence that the applicant was the first allottee of the property LR No. 1000/Section III/Mainland North (Plot No. 1000) having been issued with an allotment letter on 18 April 1995. I have seen in the documents and statements of the applicant, that upon being allotted the Plot No. 1000, there emerged litigation over the same, being *Mombasa ELC No. 160 of 2014 (formerly Mombasa HCCC No. 242 of 1995, Javan Lewa Muye vs Shiva Enterprises & 3 Others)*. The said suit was settled in the year 2015 with the said Javan Lewa Muye being awarded 5 ¼ acres of the said land and his advocate ½ acre as his fees. The balance of the land was to remain with the applicant. I have seen that the land was subsequently subdivided into three portions, being Plots No. 11096, 11097 and 11098, measuring 4.787 Ha, 2.125 Ha, and 0.2024 Ha, which I believe was so as to satisfy the decree in Mombasa ELC No. 160 of 2014.There were various appearances in the suit until 14 May 2018 when the matter was stood over generally.

3. On 6 May 2019, the respondent filed an Advocate-Client Bill of Costs wherein he sought his services to be quantified in the sum of KShs. 7,026,085.00 add VAT of 16% (KShs. 1,124,173.60) thus KShs. 8,150,258.60 in total.

4. To oppose the bill, the applicant filed an affidavit sworn by Harshadray Popatlal Rana, a director of the applicant. He deposed that the applicant had a long standing relationship with the respondent and was retained to provide legal services in the subject case (Mombasa ELC No.4 of 2017) and several other matters. He deposed that in September 2018, a meeting was held between himself, a Mr. Bhupesh, and Mr. Mwangi Njenga (the advocate), wherein the latter advised that he had health related issues, and for that reason, his firm could no longer continue rendering legal services to the applicant. At the time, the respondent firm was conducting two other suits on behalf of the applicant, being Mombasa ELC No. 160 of 2014 (earlier mentioned) and *Mombasa High Court Civil Suit No. 101 of 2008, Johnstone Humphrey Lwembe vs Shiva Enterprises Limited*. He deposed that Mr. Mwangi Njenga requested to be paid all the outstanding fees, in the subject suit

and in ELC No. 160 of 2014, so that he could hand over the files to the applicant, to enable the applicant retain another firm of advocates to represent it. He deposed that he negotiated with Mr. Mwangi Njenga and it was agreed that the applicant would pay the sum of KShs. 3,218,200/- in full and final settlement of the legal fees in respect of the said matters. He deposed that there were correspondences exchanged over the fees and he annexed some letters in an attempt to demonstrate that the sum of KShs. 3,218,200/- was intended to settle legal fees for the said matters. He deposed that the applicant paid an initial deposit of KShs. 500,000/= on 6 November 2018, and that on 8 November 2018, the respondent wrote a letter of even date demanding the release of the balance of KShs. 2,718,200/-. The applicant however demanded that the respondent do release the files to M/s Taibjee & Bhalla Advocates, as a condition for the release of the balance of the agreed legal fees and a letter dated 23 November 2018 was written to that effect. He deposed that it was only after release of the files that the applicant proceeded to release the balance of KShs. 2,718,200/= in February 2019. He thus asserted that there is no pending fee and thus the bill of costs ought to be struck out.

5. There was no replying affidavit filed by the respondent to respond to the claims of the applicant.

6. Parties agreed to file written submissions in respect of the taxation of the bill and this was done. I note that in the submissions filed before the taxing officer, counsel for the applicant, inter alia submitted that the payment of the sum of KShs. 3,218,200/- was in full and final settlement of the agreed fees. She further pointed out that this deposition had not been rebutted. She thus asked the taxing officer to find that the fees was agreed and settled. In the alternative, she submitted that if the bill was to be taxed, the value of the property was not in the pleadings, and that the respondent had sought instruction fees on the value of KShs. 216,000,000/= based on some letters of offer for the purchase of the property which she thought was wrongful.

7. On the part of the respondent, it was submitted inter alia that there was no evidence of payment of fees, as the RTGS payments annexed in the affidavit of Mr. Rana showed payment to another party (M/s Tajbai & Bhalla Advocates). He submitted that proof had only been tendered for payment of KShs. 500,000/= and even this was in respect of two matters (including the suit Mombasa ELC No. 160 of 2014). He submitted that the applicant has not presented any retainer agreement in accordance with Section 45 of the Advocates Act and that the correspondences and payments do not amount to a retainer agreement.

8. Within the course of the taxation, counsel for the respondent sought to have the property valued. The parties also agreed that the point of departure is the instruction fees. A valuation was done by M/s Njehia Muoka Rashid Valuers upon the instructions of the respondent. I have gone through the valuation report which was for valuation of the land parcel No. 1000/III/MN. The valuation report states that the property measures 7.3 Ha (18.039 acres). The property was valued at KShs. 180 million with a forced sale value of KShs. 135 million. The report is dated 25 November 2019.

9. The taxing officer then proceeded to tax the bill. In his ruling, the taxing officer interrogated whether there was a retainer agreement. He found that the credit note issued by the respondent only referred to the suit ELC No. 160 of 2014 and not this suit. He continued to state as follows :-

> *"From the foregoing, I am unable to establish whether there was a retainer agreement between the Applicant and the Respondent with regard Mombasa ELC No. 4 of 2017. This court can only rely on documents with clear agreements and will not rely on any presumption. As a result, I do find that the Respondent's affidavit dated 30th October 2019 is unwarranted and I will therefore proceed to tax the Applicants (sic) bill of costs."*

10. Having found as above, the learned taxing officer proceeded to use the valuation report as the basis for calculating instruction fees. He used the forced sale value and not the actual value of the land. He found the fee payable to be KShs. 2,230,000/= and taxed 75% of it thus KShs. 1, 672,500.00. In total, adding other smaller amounts that were not disputed, the fee was taxed as follows :-

Sub total (instruction fees) KShs. 1, 821,200.00

Increase by ½ - KShs. 910,600.00

Add VAT @ 16% KShs. 437,088.00

Add disbursements KShs. 1,040.00

Total KShs. 3,169,928.00

11. In this reference, the applicant has contended inter alia, that the taxing officer fell into error in failing to appreciate that the applicant had paid fees in full, a fact which the applicant argues was not controverted by the respondent. In the alternative, the applicant avers that the taxing officer erred in failing to find that the value of the subject matter was not ascertainable in the pleadings and erred in assessing instruction fees based on the valuation report dated 25 November 2019. It is urged that the said valuation report was done after the Bill of Costs had been filed and hence could not be relied upon as a basis for determining instruction fees. It is further stated that the taxing officer erred in levying VAT on all taxed items without satisfying himself whether or not the said items attracted VAT and if indeed the respondent was seeking reimbursement which could not attract further VAT. It is contended that the taxation of costs in the sum of KShs. 3,169,928/= is based on wrong principles, and so manifestly high, as to occasion a grave miscarriage of justice.

12. The supporting affidavit is yet again sworn by Harsharday Popatlal Rana. He has more or less reiterated the points above.

13. On his part, the respondent in his the cross-reference, contends that the taxing officer erred when he based his assessment on the forced sale value of the subject matter rather than the market value. It is further urged that the taxing officer erred when he taxed the instruction fees at 75% of the chargeable fees and that he also erred in failing to award items 28 (KShs. 50,000/= charged as instruction fees to oppose a

notice of motion application dated 4 January 2017) and 41 (fees for getting up and preparing for trial being 1/3 of instruction fees) of the bill of costs. The respondent wishes to have the taxation done afresh based on the market value of the property.

14. Both counsel for the applicant and for the respondent agreed to dispose of this matter through written submissions. They also agreed that there are three issues for determination being :-

(i) Whether the advocate was paid the full fees in the sum of KShs. 3,218,200/- the payment of which is disputed by the advocate who asserts that on account of this brief (Mombasa ELC No. 4 of 2017) no payment was made.

(ii) The amount of instruction fees payable.

(iii) Whether the valuation report could be used to calculate the instruction fees payable.

15. I have taken into account the submissions filed by Ms. Waithera Ngigi, learned counsel for the applicant, and Mr. Gachiri Kariuki, learned counsel for the respondent. Ms. Ngigi reiterated her client's position that the respondent was paid an agreed fee of KShs. 3,218,200/=. She referred me to the affidavit that was filed by her client in response to the respondent's bill of costs and the correspondences therein. She pointed out that the facts in the affidavit were never controverted by the respondent. She submitted that the valuation report could not form the basis of taxation. On the cross-reference, she submitted that the same was filed out of time. Mr. Kariuki on his part inter alia submitted that there was no evidence that the advocate fees had been paid. On the valuation, he submitted that a taxing officer has wide discretion to determine the value of the subject matter. He submitted that counsel for the applicant did not object to the production of the valuation report. He submitted that the decision of the taxing officer should not be interfered with. On the cross-reference, he submitted that it is within the court's discretion to allow it out of time as there is a specific prayer for it to be so allowed.

16. I have considered the matter. The key determination is whether or not there was an agreement on the fee payable and whether this fee was paid. If I find that there was an agreement, then I really do not need to make any determination on the other issues.

17. Section 45 of the Advocates' Act, CAP 16, does make provision for agreements in respect of the remuneration of an advocate. It is drawn as follows :-

45. Agreements with respect to remuneration

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof,

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

18. Section 45 is of course subject to Section 46 of the Act, which relates to illegal contracts but the same is not applicable to our situation here.

19. What one will see from a reading of Section 45 above, is that an advocate is at liberty to agree with his client on the remuneration payable for the services rendered or to be rendered. The agreement is binding, provided it is in writing, and is signed by the client or his agent. I do not think that such agreement must be in one document titled *"agreement for payment of legal fees."* It is sufficient that there be a memorandum in writing, and this would include correspondences, so long as these reveal that they are aimed at fixing the fee payable. Indeed, in the case of *D Njogu & Company Advocates vs National Bank of Kenya Limited, Civil Appeal No. 165 of 2007 (2016) eKLR*, where the Court of Appeal upheld an agreement between an advocate and client, the agreement was actually construed from a letter.

20. In our case, when the respondent filed his bill of costs, the applicant filed an affidavit, through which he claimed that they had an agreement on the fee payable and that the fee was duly paid. I have carefully gone through that affidavit. In it, Mr. Rana alleges that the applicant held a meeting with the respondent wherein it was agreed that the respondent would be paid KShs. 3,218,000/= for three matters, that is the subject suit (Mombasa ELC No. 4 of 2016), Mombasa ELC No. 160 of 2014 and Mombasa ELC No. 101 of 2008. Mr. Rana went further to annex correspondences which he contended demonstrate this position. He also annexed some RTGS bank transaction slips to assert that the amount of KShs. 3,218,200/= was duly paid. It is thus the contention of the applicant that the correspondences demonstrate the agreement on fees.

21. I have gone through these correspondences. They are actually two letters dated 8 November 2018 and 23 November 2018. These letters are not written by the applicant, as the client, but by the respondent as the advocate. The reference in the first letter of 8 November 2018 notes the case *"HC ELC No. 160 of 2014 (formerly HCC NO. 242 of 1995) Javan Lewa Muye vs Shiva Enterprises Limited & Others."* You

will observe that it does not reference the suit Mombasa ELC No. 4 of 2017 which is the subject case. That letter inter alia states as follows:-

> *"We acknowledge receipt of KShs. 500,000/- with the balance of KShs. 2,718,200/- remaining unpaid."*

22. The other letter, dated 23 November 2018, has reference as *"HCC No. 101 of 2014 (OS) Johnstone H. Lwembe vs Shiva Enterprises Limited & Others."* Again this letter does not refer to the case Mombasa ELC No. 4 of 2017. That letter, in part, states as follows :-

> *"We refer to the telephone discussion this morning the 23rd November, 2018 between the undersigned and your Mr. Rana wherein you assured us that payment of our fees will be made by Monday 26th November, 2018 if we forwarded the case and conveyance files for Johnstone Lwembe to your lawyers and we also forward ELC Case No. 4 of 2017 Mbeyu M. Mwangoni & 2 Others vs Shiva Enterprises and 7 Others. By a copy of this letter we are forwarding the files i.e Hcc No. 101 of 2008 (OS), ELC Civil Case No. 4 of 2017 and the conveyance file in respect to Davinder Dhanjal & 2 Others…. By a copy of this letter we are herewith forwarding the three original files to your Advocates as requested by you…*
>
> *Cc Taibjee & Bhalla Advocates, Nairobi.*
>
> *"Please find herewith enclosed three original files (1) HCC No. 101 of 2008 (2) conveyance matter thereto and also (3) ELC case no. 4 of 2017. Please endeavour to discharge your undertaking by paying us as confirmed by Mr. Rana of Shiva Enterprises Ltd."*

23. This letter says nothing about any agreed fee. It is simply sending the files to the applicant's appointed advocates and calls for payment of outstanding fees. Nowhere in that letter does it state what the agreed fee is and in respect of which file. There is of course mention of an undertaking, but that undertaking has not been presented to me so that I may know its particulars and I am unable to speculate on the details of it.

24. I have also gone through the RTGS payments annexed by Mr. Rana in his affidavit. The first payment is made on 6 November 2018 to the respondent. It is for the sum of KShs. 500,000/= but the RTGS slip does not state why this payment is being made. The letter of 8 November 2018 however acknowledges the sum of KShs. 500,000/= in respect of the suit ELC No. 160 of 2014 and I believe it can be assumed that this was payment in respect of that matter. The second RTGS is that dated 26 November 2018 for the sum of KShs. 2,000,000/= and the third RTGS payment is made on 28 November 2018 for the sum of KShs. 718,200/=. Both of these remittances are to M/s Taibjee & Bhalla Advocates. There is nowhere in the said remmitances where it is indicated why these payments are being made to the said firm. Neither is there any correspondence or written instruction that has been displayed by Mr. Rana, giving instruction to M/s Taibjee & Bhalla, directing the firm on what to do with this money. I am thus unable to tell why this firm of advocates is being paid this money. There is no correspondence from M/s Taibjee & Bhalla that has been displayed by Mr. Rana to say what that law firm did with this money. There is certainly no correspondence disclosed, between the respondent law firm and the firm of M/s Taibjee and Bhalla Advocates, to demonstrate that M/s Taibjee & Bhalla paid to the respondent this money. I am therefore unable to speculate that the money was for payment to the respondent, and for what purpose, and further unable to speculate that this money indeed reached the respondent. If this was the purpose for which the money was being sent to M/s Taibjee & Bhalla Advocates, why did Mr. Rana not annex correspondences between the two firms , or disclose the particulars of the undertaking that M/s Taibjee & Bhalla were giving the respondent ? Why didn't any person from M/s Taibjee & Bhalla swear an affidavit to say what happened to this money?

25. Given the reference noted in the letter dated 8 November 2018, and there being no correspondence or any other document from the applicant to point to any contrary position, the only conclusion I can reach is that the amount of KShs. 3,218,200/- was the agreed fee in respect of the case Mombasa ELC No. 160 of 2014 and that there was a payment of KShs. 500,000/= on 6 November 2018 in respect thereof. I have absolutely nothing that informs me that the sum of KShs. 3,218,200/= was agreed fee for the three matters that were being handled by the respondent on behalf of the applicant. It is not enough to depose that this was the agreed fee. The law at Section 45 of the Advocates Act, requires that there be proof in writing of the agreement, and in this instance, there is none. There is certainly no document before me that says the agreed fee for the three matters is KShs. 3,218,200/= . My conclusion therefore is that there is no proof of any agreement that the sum of KShs. 3,218,200/- also encompassed legal fee for the suit Mombasa ELC No. 4 of 2017. In essence, my finding is that there is no agreement disclosed between the applicant and respondent that evidences that the two parties had an agreement of what is payable as legal fees for Mombasa ELC No. 4 of 2017.

26. I find no fault with the taxing officer's finding, that there was no remuneration agreement in respect of fees for legal services offered in Mombasa ELC No. 4 of 2017. That being the case, the respondent was within his rights to file a bill for taxation and taxation had to follow the Advocates Remuneration Order.

27. This now brings me to the next point. What would be the basis for taxing instruction fees?

28. The suit Mombasa ELC No. 4 of 2017 was filed in the Environment and Land Court which is a court with the status of the High Court. The taxation would thus follow the same line of taxation for a matter that has been filed in the High Court. This would be Schedule 6 of the Advocates Remuneration Order which provides as follows:-

> *1. Instruction fees*
>
> *Subject as hereinafter provided, the fees for instructions shall be as follows —*
>
> *(a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).*
>
> *(b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going*

to full trial the fee shall be 75% of the fees chargeable under item 1(b).

(c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—

(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—

That value exceeds Kshs. But does not exceed Kshs. Kshs.

— 500,000 45,000

500,000 750,000 65,000

750,000 1,000,000 75,000

1,000,000 20,000,000 fees as for Kshs. 1,000,000 plus an additional 1.75%

Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds Kshs . But does not exceed Kshs. Kshs.

- 500,000 75,000

500,000 750,000 90,000

750,000 1,000,000 120,000

1,000,000 20,000,000 fees as for Kshs. 1,000,000 plus an additional 2%.

Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.

(c) To defend proceedings where the defendant substantially adopts the defence of another defendant; an instruction fee calculated under sub-paragraph 1(a).

(d) To defend any other proceedings; an instruction fee calculated under sub- paragraph 1(b).

29. The respondent was engaged to defend the suit on behalf of the applicant. There is no indication that the applicant substantially adopted the defence of another defendant, in which event, the fee payable would be as prescribed in paragraph 1 (d) above, i.e the instruction fee would be similar to that calculated under sub-paragraph 1 (b). Sub-paragraph 1(b) provides for a graduated scale *"where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties."*

30. In her submissions before the taxing officer, counsel for the applicant, in stressing what would be payable as instruction fees, did aver that the applicable law would be Schedule 6 Part A 1(b) of the Advocates Remuneration Order. This we have seen is on point. Counsel proceeded to argue that the value of the subject matter was not pleaded anywhere in the pleadings and either I am missing part of her submissions on what she prescribed ought to have been the basis for taxation or none was offered by her. I have also gone through the submissions filed in this reference by counsel for the applicant, and nowhere does counsel provide what she believes would have been the basis for taxation of the bill. She however referred me to the case of *S.G Mbaabu & Co Advocates vs Joseph Muoki Kakenyi & 2 Others (2018) eKLR*. In that case, Angote J, was of opinion that valuation reports cannot form the basis of assessing instruction fees.

31. I do observe that sub-paragraph (b) does provide for *"where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties."* There certainly would be no problem if the value of the subject matter is in the pleadings or judgment, which is generally what you would find in suits for damages or where a specific amount of money is sued for. But in suits over land, you have a unique situation, as in most cases, the value would not be disclosed in the pleadings mainly for reason that it is not necessary to do so. Take for example a case of adverse possession. The applicant does not need to quote the value of the land in his suit. Let us take another scenario, where the case is of two persons who have title to the same land and the plaintiff seeks cancellation of the title of the defendant. Again, value here is not an issue for determination, but the issue would be whether the title of the defendant should be cancelled. Nonetheless, the parcels of land in dispute would still have a value, and where a party succeeds, then he obtains the benefit of the value of the land, in as much as that value is not disclosed. Thus, in the case of the adverse possessor, if he succeeds in his suit, he ends up

obtaining the land together with its value and he can be said to have gained an asset of certain value, which if need be can be quantified and made specific. Now, should we discriminate because the value is not disclosed in the pleadings, so that an advocate who sues or defends a claim for land becomes disadvantaged because the value is not in the pleadings or judgment? And assuming that the adverse possessor in his suit claims that the land is of a specific value, and that is in the pleadings, does it make a difference that in one suit the value of the land is not disclosed and in the other the value of the land is disclosed? At the end of the day, is the success or failure of a litigant, in terms of value, not the same as that where the value is disclosed in the pleadings? My view is that in land cases, the remuneration of the advocate, bar an agreement, would have to be pegged on the value of the land which is the subject of litigation, whether or not that value is disclosed in the pleadings.

32. Fees, where there is no agreement, will need to be pegged on the value of the subject matter, and I see nothing wrong with a party to the taxation, presenting a valuation report in order to demonstrate the value of the subject matter, more so in cases touching on land. That was indeed what I held in the case of *Masore Nyangau & Company Advocates vs Kensalt Limited, ELC Nakuru, Miscellaneous Application No. 196 of 2015 (2019)eKLR* where I stated as follows :-

> *20. Schedule 6 above, does prescribe how costs should be assessed 'where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties'. The said schedule does not however explicitly prescribe what should be done, where the value of the subject matter is not in the pleadings, judgment or settlement. You could indeed have litigation where the value of the subject matter is not given in the pleadings, judgment or settlement. A common example is in land cases, where say, the plaintiff files suit to cancel the defendant's title claiming that the defendant acquired the title through fraud but the title rightfully belongs to the plaintiff. In such a case, all that may be given in the pleadings is the registration particulars of the said land and no more. Assuming the plaintiff in such a case succeeds, and the court orders the defendant's title to be cancelled, and in place, the plaintiff to be registered as proprietor, what would the plaintiff be entitled to as costs in respect of instruction fees since no actual value may be given in such a judgment ?*
>
> *21. At the end of the day, costs will need to be pegged on the value of the subject matter, and my own view of the matter, is that the court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, or refer to other documents provided in the course of the case, and which may point at the value of the subject matter. Such documents may include the sale agreement, valuation report, or the consideration noted in the transfer instrument or title. Indeed, Rule 13 of the Advocates' Remuneration Order does allow the court to even call for evidence for purposes of determining a dispute before it. The said provision of the law is drawn as follows :-*
>
> *13 A. Powers of taxing officer*
>
> *For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.*
>
> *22. It is thus a fallacy to suppose that the court can look at nothing else other than the pleadings, or judgment, or settlement, so as to determine the value of the subject matter. If the court can call for witnesses to determine the matter at hand, a fortiori, the court can certainly refer to documents presented before the court, so as to determine the value of the subject matter, which will then lead to a decision on instruction fees.*

33. I stand by my dictum above and respectfully disagree with the position taken by my brother in the case of *SG Mbaabu & Co. Advocates vs Joseph Muoki Kakenyi* (supra).

34. The assessment of the fees of the respondent could only be based on the value of the subject matter. The value was not disclosed in the pleadings, but as I have argued above, the value wouldn't change just because it was not disclosed in the pleadings. It would be the same value whether or not disclosed in the pleadings. There was therefore nothing wrong with the taxing officer relying on a valuation report to determine the value of the subject matter for purposes of taxing the bill of costs. I cannot fault the taxing officer for seeking guidance based on a valuation report for the land.

35. That said, I have a few issues regarding the taxation and these have been raised in the cross-reference. First, the taxing officer used the forced sale value for purposes of taxation. No reason was given why the taxing officer used the forced sale value and not the actual value of the property. The value of the subject matter was the actual value and not the forced sale value. Barring any special circumstances, the taxation ought to have been based on the full value of the subject matter. In any event, if the applicant wished to contest the value, there would have been nothing easier than for the applicant to commission its own valuation.

36. The second issue is that the taxing officer taxed instruction fees at 75% rather than at 100%. No explanation for this was given, though I believe that the taxing officer had in mind the provisions of paragraph 1 (b) which provides as follows :-

> *To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).*

37. In my view, it was wrong for the taxing officer to tax the fee at 75% of what is payable because the suit in issue was yet to be determined, and it cannot therefore be said that the suit was *"determined in a summary manner without having gone to full trial."* The instruction fee to the advocate was earned in full once he filed the pleadings and unless the suit was determined summarily, which is not the position here, then the advocate was entitled to the whole of his fees. The taxing officer therefore fell in error in taxing the advocates' fees at 75%.

38. There was certainly an error in taxation and it is now upon this court to either remit the bill for taxation or to tax the bill itself.

39. There is something unique in this case which needs to be brought out. The plaintiffs in the suit in issue sued to obtain title to two parcels of land, that is Plot No. 1847/III/MN and Plot NO. 1000/III/MN. The applicant had no interest in the Plot No. 1847/III/MN and therefore his interests were only being protected in respect of the Plot No. 1000/III/MN. However, the applicant cannot be said to be entitled to the whole of this land, for in the suit Mombasa ELC No. 160 of 2014, which was compromised before the filing of the suit Mombasa ELC No. 4 of 2017, it was decreed that the applicant would only hold the land comprised in Plot No. 1000/III/MN but less 5 ¾ acres (that is 5 ¼ acres that was decreed in favour of the plaintiff and ½ acre to settle fees for the plaintiff's advocate in the matter) . I have already seen that the land was subdivided and what the applicant was left with was land measuring 4.787 Ha. Indeed the Plot No. 1000/III/MN cannot be said to exist. The interest of the applicant, that the respondent was engaged to protect, was thus only 4.787Ha and not the whole 18 or so acres that was originally comprised in the Plot No. 1000/III/MN. It was therefore erroneous in my view, for the taxation to be conducted on the basis of the valuation of the whole of the Plot No. 1000/III/MN. Instead, the taxation ought to have been conducted based on the value of the subdivision that was held by the applicant. To know its true value, this will require another valuation report or an agreement between the parties on its value. If I had the value of it, I would have taxed the bill, but since I do not have its value, I would remit the bill back for taxation with the instruction that the bill be taxed based on the value of the subdivision that remained to the applicant after the decree in Mombasa ELC No. 160 of 2014.

40. There is in the cross-reference a contention on items 28 and 41. I believe this was dropped after counsel agreed by consent that the only issue for determination would be the instruction fee. I will therefore not dwell on this point, but if I was to determine it, I see no error on the part of the taxing officer, for fees for getting up could not have been billed since the matter had not been certified ready for trial, and the respondent could not charge KShs. 50,000/= on an application.

41. I also do not take regard to the submissions of counsel for the applicant that the cross-reference was filed out of time. The parties agreed to the issues to be addressed and none relate to the filing out of time of the cross-reference or whether the same ought to be struck out. Tacitly, the applicant did allow the cross-reference to remain on record.

42. The only issue now left is costs. The applicant has failed and will shoulder the costs of this reference.

43. Orders accordingly.

DATED AND DELIVERED THIS 23 DAY OF SEPTEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA