



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. 15 OF 2020

(Formerly Kajiado High Court Reference No. 2 Of 2019)

GEOFFREY KARANU RWENJI..... APPLICANT

VERSUS

ROSEMARY WAMBUI MAKOKHA

(Suing as the widow and personal representative of the estate of JAMES AGGREY

MAKOKHA - DECEASED)1ST RESPONDENT

ISAAC MASIDZA.....2ND RESPONDENT

COUNTY GOVERNMENT OF OL KEJUADO.....3RD RESPONDENT

RULING

What is before Court for determination is the Applicant's Chamber Summons application dated the 9th August, 2019 and filed on 22nd August, 2019 brought pursuant to paragraph 11 (2) of the Advocates (Remuneration) Order 2014 wherein he seeks the following orders:

- a) The learned Taxing Officer's ruling dated 22nd July, 2019 taxing items 1 – 45 of the 1st Respondent's Party and Party Bill of Costs dated 18th March, 2019 in the sum of Kshs. 181, 523.00 in Misc Application No. 23A of 2019 Rosemary Wambui Makokha (Suing as the widow and personal Representative of the estate of James Aggrey Makokha) Vs Geoffrey Karanu Rwenji & Others, be set aside.
- b) That the 1st Respondent's Bill of Costs be remitted to a different Taxing Officer to be taxed afresh.
- c) That the costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of GEOFFREY KARANU RWENJI where he deposes that on 19th March, 2019, the Plaintiff filed her Party and Party Bill of Costs seeking Kshs. 289, 023 in Misc Application No. 23A of 2019, which Bill was assessed at Kshs. 181, 523 by the Taxing Officer on 22nd July, 2019 that has culminated in this reference. He explains that his lawyer wrote to the Deputy Registrar seeking a certified copy of the Ruling and the reasons for the taxation vide a letter dated the 25th July, 2019. He contends that the Court in its Ruling that led to the taxation proceedings only awarded the Plaintiff costs of the application and not the suit in ELC No. 453 of 2017 Rosemary Wambui Makokha (Suing as the widow and personal Representative of the estate of James Aggrey Makokha) Vs Geoffrey Karanu Rwenji & Others. He claims instruction fees are only payable for instituting/defending an action or a claim and the learned Taxing Officer hence erred in awarding the same on an application. Further, that the suit had already been concluded vide a consent dated the 30th November, 2015 where there were no order as to costs. He insists the said Consent Order fully dispensed with the issue of instruction fees and as such the Taxing Officer erred by awarding it Kshs. 120,000. Further, that the Taxing Officer erred in awarding travelling expenses as they are not provided for under the Advocates Remuneration (Amendment) Order 2014. He avers that the Taxing Officer erred in awarding the costs of disbursements without proof as there were no receipts. He reiterates that the taxed costs are manifestly excessive, unjustifiable and amounts to unjust enrichment and there are arithmetical mistakes in computing it.

The 1st Respondent opposed the application by filing a replying affidavit sworn by LIVINGSTONE MAINA OMBETE who is an Advocate

in conduct of the matter on her behalf where he deposes that the Applicant's reference was filed out of time contrary to Rule 11(2) of the Advocates (Remuneration) Order and thus there is no valid reference herein. He explains that the action was supposed to be concluded on 30th November, 2015 when parties recorded a consent order which was silent on costs and had the Applicant honoured including complied with the terms of the said consent, the 1st Respondent would not instituted proceedings for which she was awarded costs. Further, that the 1st Respondent instructed his firm to apply for execution of the consent order by way of sale by public auction of the property known as Plot No. 193/ Residential - Ongata Rongai T. Centre, which property was consequently sold through the said public auction on 4th December, 2017 to Christian Community Calvary Ministry for a sum of Kshs. 5.2 million. He claims that despite the fact that the said property had been sold, the Applicant declined to hand it over to the third party culminating in the 1st Respondent applying to the Court by way of Notice of Motion dated 20th February, 2018 vide a new Miscellaneous Application No. 23A of 2019 to compel the Applicant to transfer the property. He confirms that the aforementioned application was determined vide a Ruling dated the 25th February, 2019 and it was on that basis that the 1st Respondent filed the party and party Bill of Costs dated the 18th March, 2019 which the taxing officer taxed as indicated above. He insists the Taxing Officer cannot be faulted in the exercise of his discretion in taxing the Bill of Costs as such. Further, that the overall amount awarded is not excessive and unjustifiable as alleged, nor is it based on any error of principle. He reiterates that there is no rule that requires a party to attach copies of disbursement receipts of amounts incurred in their Bill of Costs and the said Bill was drawn as per the scale. Further, that the value of the whole case that was concluded when the learned Judge awarded costs to the 1st Respondent was Kshs. 5.2 million and it was this sum that the taxing officer based the instructions fees he awarded to the 1st Respondent. He avers that the item relating to travel expenses is provided for on page 288 of the Legal Notice No. 35 of 2014.

The Applicant's Counsel Henia Ruara filed a further affidavit reiterating their claim and explaining why they lodged the reference on 16th August, 2019. Further, that having received the typed and certified Ruling from the Court's registry on 16th August, 2019, the application seeking to set aside the decision was filed on time and in accordance with the provisions of Rule 11(2) of the Advocates Remuneration Order.

The Applicant and the 1st Respondent filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion application including the rivalling affidavits and submissions, the only issue for determination is whether the 1st Respondent's Party and Party Bill of Costs dated 18th March, 2019 taxed in the sum of Kshs. 181, 523.00 vide the Taxing Officer's Ruling dated the 16th July, 2019 should be set aside.

The Applicant contends that the Taxing Officer erred by awarding instruction fees on the Notice of Motion and disbursements without proof. Further, that the attendance fees is not taxed to scale. He insists there is a valid reference on record. In his submissions, he reiterated his claim and relied on the decisions of **Proto Energy Limited Vs Hashi Energy Limited (2019) eKLR; Paul Imison & Another Vs Jodad Investments (2014) eKLR; First American Bank of Kenya Vs Shah & Others (2002) EA; L'Oreal Vs Interconsumer Products Limited (2014) eKLR; and Desai, Sarvia & Pallan Advocates Vs Jambo Biscuits (Kenya) Limited (2014) eKLR** to buttress his averments. The 1st Respondent submitted that there is no valid reference on record as the instant reference was filed out of time, nearly two weeks after the expiry of the deadline without leave. Further, that the Applicant contravened Rule 11 of the Advocates (Remuneration) Order. She insists the Notice of Motion dated the 20th February, 2018 was an institution of fresh proceedings to compel the Applicant to do what he had been expected to do in the primary suit. He further submitted that travelling expenses were allowed under Schedule 5 of the Advocates Remuneration Order of 2014 (Legal Notice No. 35 of 2014). Further, there was no law requiring a party to attach copies of court receipts. She relied on the decision of **Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board 2005 KLR 528** to support her arguments.

On the issue whether there was a reference before Court, I note the Applicant provided an explanation and the process server Mr. Maungu swore an affidavit and clarified the chronology of events culminating in filing the reference on 22nd August, 2019. From the averments therein, it is evident it is the court that delayed in providing the written reasons for taxation as provided for in Rule 11 (2) of the Advocates Remuneration Order to enable the Applicant file his reference in time. Based on the facts before court and relying on Rule 11 of the Advocates Remuneration Order, I find the Applicant's explanation sufficient and hold that there is indeed a valid reference before court.

On the issue of the instruction's fees, an excerpt from Schedule 6 of the Advocates Remuneration Order 2014 provides that: ***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 (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..'***

From a reading of this excerpt it is quite clear that instructions fees can actually be charged on a suit commenced by a Notice of Motion. In applying these provisions to the proceedings herein and since the previous matter had been concluded but the 1st Respondent was compelled to commence a miscellaneous cause to compel the Applicant to transfer the suit land to the highest bidder at an auction and the 1st Respondent having been awarded the costs, I opine that the 1st Respondent was indeed entitled to instructions fees. Further, pegged on the fact that the suit land was sold by public auction at Kshs. 5.2 million and relying on the provisions of the Advocates Remuneration Order 2014, I find that the Taxing Officer did not err in principle by awarding Kshs. 120,000 as instructions fees and will proceed to uphold it.

On the issue of the Applicant challenging the remaining costs and disbursements awarded. I have made reference to the Advocates Remuneration Order 2014 on the respective line items, applied it to the 1st Respondent's Party and Party Bill of Costs, and hence making a

finding that the Taxing Officer indeed taxed the same as per the scale. I further find that the 1st Respondent was indeed entitled to disbursements as itemized in her Party and Party Bill of Costs. In the circumstances, I do not see the need of interfering with the Taxing Officer's findings and will proceed to uphold it.

It is against the foregoing that I find this reference unmerited and will proceed to dismiss it with costs to the 1st Respondent.

Dated Signed and Delivered at Kajiado this 17th Day of September, 2020

CHRISTINE OCHIENG

JUDGE