



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 14 OF 2020

JOSEPH MUSUNGU NGACHI.....APPLICANT

VERSUS

HENRY MUKHWANA KWENULI

LAND REGISTRAR KAKAMEGA.....RESPONDENTS

RULING

The application is dated 6th May 2020 and is brought under rule 11 (2) and 13 of the Advocates Remuneration Rules, Section 1A, 1B and 3A and order 51 rule 1 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified as urgent and be heard exparte in the first instance.
2. That the decision of the Taxing Officer delivered on the 9th April, 2020 on the respondents Bill of costs dated 30th October, 2019 be set aside.
3. That the honourable court be pleased to re-tax the respondents Bill of Costs dated 30th October, 2019.
4. In the alternative to prayer (3) above, the honourable court be pleased to remit the Bill of Costs dated 30th October, 2019 for re-taxation before a different taxing officer with appropriate directions therefore.
5. That pending determination of this application, there be a stay of any further proceedings as execution herein.
6. That costs of the reference be awarded to the applicant.

It is based on the affidavit of Vincent Mukoya Advocate and grounds that the Taxing Master erred in law by failing to take into account the nature of the matter, the amount involved, and the interests of the parties as well as the general conduct of the proceedings. The Taxing Master erred in law in granting fees on a higher scale where the suit was struck out on a legal technicality. The Taxing Master failed to consider the applicant's submissions on the fact that the instruction fees (Item 1) was over stated and under the wrong Remuneration Order. The Taxing Master having failed to analyze the appellant's itemized submissions on item 2 and 3 of the bill, the honourable court has jurisdiction to interfere with her ruling on assessment of costs. The Taxing Master erred in providing for fees not provided for. The applicant stands to suffer serious economic loss after loss of land purchased and title not passed.

The 1st respondent submitted that the higher scale of fees is applicable where a matter is defended such as this one hence the honourable magistrate did not err at all in her assessment of item 1 of the 1st respondent's/defendant's bill of costs. That a successful party is entitled to, if awarded costs as incurred and/or provided for under the relevant remuneration order irrespective of how a matter is determined.

This court has considered the application and the submissions therein. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

From the foregoing, it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision of the taxing officer, and the reference is to be filed within 14 days of receipt of the reasons. In the present case, the record shows this was not sought for and instead the present application was filed. Be that as it may, the principles of varying or setting aside a Taxing Master's decision as set out in the cases of **First American Bank of Kenya vs Shah and Others (2002) EA 64** and **Joreth Ltd vs Kigano and Associates (2002) 1 EA 92**, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.

In **First American Bank of Kenya vs Shah and Others (2002) E.A.L.R 64** the court held that;

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) eKLR**, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

The applicant in the instant application contends that the Taxing Master erred in law by failing to take into account the nature of the matter, the amount involved, and the interests of the parties as well as the general conduct of the proceedings. The Taxing Master erred in law in granting fees on a higher scale where the suit was struck out on a legal technicality. The Taxing Master failed to consider the applicant's submissions on the fact that the instruction fees (Item 1) was overstated and under the wrong Remuneration Order. In the instant matter the subject matter cannot be ascertained from the pleadings and the law is that, if the subject matter is unascertainable from the pleadings, judgments or settlement, the taxing master is entitled to use his/her discretion to access such instruction fee as he/she considers just, see the Court of Appeal decision in **Joreth Ltd vs Kigano & Associates (2002) eKLR** in this regard. I find that the taxing master considered the **fair value upon the work and responsibility involved**. I see no reason to interfere with the decision of the taxing master.

In **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’njuguna (2006) eKLR Ojwang, J** (as he then was) expressed himself 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 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...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 parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for...The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

From the facts of this matter and authorities cited above I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH OCTOBER 2020.

N.A. MATHEKA

JUDGE