REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 15 OF 2020

EDWIN WAWIRE WAFULA.....APPLICANT

VERSUS

DIANA WIKUNZA MILIMU.....RESPONDENT

RULING

The application is brought pursuant to paragraph 11 (2) of the Advocates Remuneration Order seeking the following orders;

1. That the ruling of the taxing matter in respect to Kakamega MCL & E 147 of 2019 dated the 19th day of February, 2020 be set aside as relates to instructions fees in the bill of costs dated 7th November, 2019.

2. That in the alternative to prayer (1) above, all items on the bill of costs dated 7th November, 2019 be reviewed and/or remitted with an appropriate order directing to any other taxing officer to the said bill of costs as this honourable court may deem fit to recommend.

It is based on the following grounds that the applicants written submissions on costs were not considered at all as the same were missing from the court file. That the taxing officer misplaced the principles of calculating the value of the subject matter of this suit. That the taxing master erred in principle and in law in holding that Ksh. 30,000/= was reasonable as instruction fee without assigning to it any justifiable cause or reasonable grounds. That in taxing instruction fees at Ksh. 30,000/= the taxing master exercised his discretion wrongly. That the taxing master failed to appreciate and hold that the sum of Ksh. 1,070,000/= was a reasonable figure for instruction fees as proposed by the applicant in the bill of costs.

The respondent submitted that he filed Kakamega MCL & E 147 of 2019 against the applicant herein and another. The said suit was withdrawn and the applicant who was the 1st defendant in the said suit filed a bill of costs which was eventually assessed in the sum of Ksh. 42,950/= which sum the applicant acknowledges receiving from the respondent.

He stated that the suit in the subordinate court was filed contemporaneously with the application seeking injunctive orders which orders were given on 2nd October, 2019 and the application was fixed for inter parties hearing on 9th October, 2019. However, before the date for inter parties hearing, the applicant's co-defendant (in the suit) approached the respondent herein and requested the respondent to withdraw the suit. On the date of the inter parties hearing, the respondent's advocate attended court and found out that the applicant herein had responded to both the suit and the application but he had not served his pleadings. That the honourable court directed the applicant's advocate to serve the respondent's advocate and the matter was adjourned to 6th November, 2019. Service was not done as directed. Before the inter parties hearing on 6th November, 2019, the respondent withdrew the suit before the subordinate court vide a notice of withdrawal dated 30th October, 2019 and the same was served upon the applicant's advocate on 31st October, 2019. The respondent's advocate did not attend court on 6th November, 2019 as the suit had been withdrawn and communication made to the applicant and his co-defendant. However, on 7th November, 2019, the respondent's advocate was served with a bill of costs which was later taxed and it is now the subject of the instant notice of motion.

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,** are that the Taxing Master's judicial discretion can only be interfered with when it is established that the 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 6**4 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 his written submissions on the bill of costs were not considered and the same were missing from the court file. I have perused the court record and the said submissions are dated 14th January, 2020 and were filed on 4th February, 2020 and not on the 4th December 2019 when counsel for the 1st defendant addressed the court and the ruling date was given. Secondly, it is clear that this matter never proceeded to hearing and was withdrawn. This suit in the subordinate court was filed on 1st October, 2019 and the application was fixed for inter parties hearing on 9th October, 2019. On the date of the inter parties hearing, the applicant herein had responded to both the suit and the application but he had not served his pleadings. The honourable court directed the applicant's advocate to serve the respondent's advocate and the matter was adjourned to 6th November, 2019. Before the inter parties hearing on 6th November, 2019, the respondent withdrew the suit before the subordinate court vide a notice of withdrawal dated 30th October, 2019 and the same was served upon the applicant's advocate on 31st October, 2019. 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 matter 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 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE