REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 936 of 2010

KAMUNYORI & COMPANY ADVOCATES……. PLAINTIFF

- VERSUS –

MULLY CHILDREN'S FAMILY TRUST……..…….. DEFENDANT

RULING (NO. 2)

1. On 21st February 2012, the Court allowed a review on the taxing master's decision dated 16th August 2011. I held as follows:

"I am of the considered opinion that the taxing master misdirected herself in a matter of principle and on the law of evidence which tainted her taxation and led to a miscarriage of justice. The error of principle was in considering the wrong bill of costs. The misdirection on law of evidence was in placing reliance on alleged payments in the absence of cogent or reliable evidence and on the purpose of those payments. I thus order that the portion of the ruling relating to Miscellaneous Case No 936 of 2010 at the paragraph numbered 3 in the ruling dated 16th August 2011 be and is hereby set aside. I further order that the amended bill of costs dated 21st February 2011 be taxed afresh by any other taxing master of this court other than L.M. Njora (Mrs) Deputy Registrar".

2. The applicant has now returned to Court challenging the fresh taxation done on 15th November 2012. It is submitted that the taxing master erred in three respects: Finding the value of the subject matter to be Kshs 5,200,000 instead of Kshs 8,500,000; employing the wrong formula in calculating instruction fees; and, reaching an erroneous finding on getting – up fees and other items in the further amended bill of costs. Those matters are buttressed in the annexed affidavit of John Kamunyori sworn on 16th January 2013.

3. The application is opposed. There is filed a replying affidavit of Charles Mutua sworn on 15th March 2013. The respondent avers that the value of the subject matter is Kshs 5,200,000, that the formula employed in taxing the bill was accurate, and that the respondent has "overpaid" the applicant. To support that allegation, the respondent depones that a sum of Kshs 201,000 paid to the applicant was not credited in the taxation and that so far, they have paid the applicant in excess of Kshs 1,196,519.60.

4. I have heard the rival submissions. I have in addition studied the pleadings, depositions and the written arguments of the applicant dated 25th March 2013 as well as those of the respondent dated 18th March 2013. The Court can only interfere with the decision of the taxing master if there is an error of principle or the fee awarded is manifestly excessive or low as to lead to an inference of error of principle. See generally *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64, *Steel*

Construction *Petroleum Engineering E A Ltd Vs Uganda Sugar Factory* [1970]

E A 141, *Kamunyori & Company advocates Vs Mully Children Trust* *and another* (Ruling No 1) High Court Misc. App 936 of 2010 [2012] e KLR.

5. The applicant is seeking a third bite at the cherry: The bill was first taxed on 16th August 2011. The applicant was aggrieved. I allowed the review. It was taxed afresh by a different taxing master on 15th November 2012. The applicant now beseeches this Court to reverse that second finding and to recalculate his fees. One can then appreciate why I take umbrage on the motion: it is anathema to the overriding objective of the Court set out at article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. In particular, the latter enjoins counsel and the parties to assist the Court to meet its key objective: to utilize existing judicial and administrative resources in an efficient and cost effective manner. I know there is no love lost between the applicant and his former client, the respondent. It partly explains the hardened positions taken by both parties in the course of determination of costs.

6. Granted those circumstances, I would have been extremely reluctant to disturb the findings of the taxing master. However, both parties concede that the taxing master erred in her findings and they both crave an order for review. I have already set out the three grounds put forth by the applicant for review. The respondent seeks review on a different platform. The written submissions capture the respondent's case:

"My Lord, having perused the Taxing officer's ruling, it's our submissions that the bill as taxed is high and excessive on the part of the applicant. The respondent paid the applicant more than one million shillings contrary to the finding of the Taxing officer.

Secondly, the Taxing officer made errors while taxing the bill which the respondents are aggrieved with. For instance, in her ruling the Taxing officer ruled that the issue of payments made by the respondent to the applicant had been determined by the High Court Judge. This is wrong position as the Judge had only observed that the respondent had not sworn an affidavit as evidence to confirm that the attachments on the submission reflected true payments made to the respondents.

My Lord, after the matter was send back to the deputy registrar, the respondent swore an affidavit and attached all the documents supporting their claim that they had paid the applicant a sum of Kshs 1,196,519.60. The Taxing officer completely failed to consider this evidence.

Further, the Taxing officer erred to allow items 136 to 183 which concerned costs of the reference filed in the High Court yet the Honourable Judge had not awarded the applicant costs for the application. This was a mistake which needs to be corrected. It appears that the Taxing officer on her own decided to award the applicant costs of the application filed in the High Court".

7. I do not agree with the applicant that the taxing master erred in taking Kshs 5,200,000 as value of the property. It was not out of the blues: It was based on the purchase price. The applicant concedes that. True by the time of instruction on 30th August 2004 the value had appreciated. There was a valuation at the instance of the applicant placing the value at Kshs 8,500,000. That was not binding on the taxing master. It is difficult to have the warring parties to agree on a value. So the taxing master was well within her discretion to adopt the purchase price. That was a value that could be ascertained from the pleadings, judgment or settlement.

8. I thus set aside the award by the taxing master but on a very narrow review as follows;

a) The taxing master shall not re-open the question of value of the subject matter.

b) The review shall be limited to a consideration whether the advocate had been paid Kshs 201,000 vide cheque number 101828 on 6th September 2010 or had been paid a sum of Kshs 1,196,519.60 as per the respondent's affidavit in reply. In short, should the respondent be granted credit for sums paid? Should

the applicant refund some monies to the respondent?

c) The taxing master shall not re-open taxation on any item not raised by any of the parties. In that regard, the only items remitted for reconsideration are;

1) Getting up fees.

2) Items 7, 27, 29, 32, 86, 94, 99, 103, 105, 107, 112, 124, 143, 156, 159, 162, 173.

3) Reconsider items 136 to 183 regarding the reference to the High Court noting that the High Court did not expressly award costs.

9. For the avoidance of doubt, the re-taxation shall be done by Ms D.W. Nyambu, Deputy Registrar who last dealt with the matter. I make no order on costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of May 2013.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. J. Kamunyori for the Applicant.

Mr. P.W. Odida for Mr. Mulanya for the Respondent.

Mr. C. Odhiambo Court Clerk.