



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC APPL. CASE NO. 7 OF 2019

MUCHIRI WA GATHONI & CO. ADVOCATES.....APPLICANT/ADVOCATES

AND

RICHARD MITHAMO MUGAMBI.....CLIENT/RESPONDENT

ARISING FROM

NYERI ELC CASE NO. 203 OF 2016

RICHARD MITHAMO MUGAMBI.....PLAINTIFF

(Suing as the administrator of the estate of GEORGE MUGAMBI MUNDIA (Deceased))

MUCHIRI WA GATHONI & COMPANY ADVOCATES.....APPLICANT

-VERSUS-

GATHUTHI TEA FACTORY.....DEFENDANT

AND

ANTONY GITHINJI MUGAMBI.....1ST THIRD PARTY

MARTIN KIMATHI2ND THIRD PARTY

CHARLES GITAKA KAMAU3RD THIRD PARTY

THE LAND REGISTRAR, NYERI COUNTY.....4TH THIRD PARTY

RULING

1. Before me is a Chamber Summons dated the 12th November 2019 and filed on the 13th November 2019 pursuant to the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order, and all enabling provisions of the Law, where the Applicant seeks for orders that:-

- i. That the honorable Court be pleased to set aside item No. 1 in the Taxing Officer’s order dated the 10th September 2019 so that the same can be taxed afresh.
- ii. That the Applicant herein be awarded fees for getting up and preparing for trial.
- iii. That costs of this application be provided for.

2. The said application was supported by the grounds on its face and the supporting Affidavit, sworn by H. S Mshila Advocate, on the 12th November 2019

3. The Application was opposed by the Respondent via his grounds of opposition dated the 12th January 2020 to the effect that it had been filed out of time and further that the orders sought were untenable as the same were not limited to the Notice of Objection to taxation dated the 12th September 2019 and lastly that the Taxing Master had exercised judicial discretion afforded in law in awarding the said instruction fee.
4. The Application was canvassed by way of written submissions to which the Applicant submitted that taxing master misdirected herself in awarding Ksh. 124,326/= as instruction fee which amount was manifestly low in comparison to the value of the subject matter which had been placed at Ksh 21,058,300/=
5. That the Taxing Master further failed to take into consideration the complexity of the matter, difficulty of novelty of the questions raised, the nature and importance of the matter and the general conduct of the proceedings while taxing item No. 1 in the Applicant's bill of cost dated 10th September 2019.
6. That the Taxing Master had also failed to award fees for getting up or preparation for the trial yet the matter had been certified ready for hearing on the 14th December 2016. That the Taxing Master had discretion to allow costs even where they had not been set down in the Bill of Costs.
7. In response to the Respondent's grounds of opposition dated 29th January 2020 in opposition of the Reference, the Applicant submitted that the present application was filed within time and in compliance with the relevant law. That it had not been denied that the ruling of the Taxing Master was delivered on 10th September 2019 where the Applicant filed his notice of objection to the taxation on the 12th September 2019 and served the same upon the Respondent on the 13th September 2019 in accordance with clause 11 of the Advocates' Remuneration Order 2009.
8. That having not been served with any reason for awarding Ksh. 124,326/= as instruction fee in comparison to the value of the subject matter which had been placed at Ksh 21,058,300/=, as requested in the notice of objection and in compliance with order 11 of the Advocates' Remuneration Order 2009 nearly 45 days later, the Applicant had elected to apply for certified copy of the ruling vide a letter dated 24th October 2019 which was received on 28th October 2019 in the registry and a certified copy of the ruling collected on the 13th October 2019 which still did not state the reason for taxing of item No. 1 by the Taxing Master was requested in the Notice of Objection. The Applicant then proceeded to file his Reference now before Court. The Applicant relied on the decided case in **Kinyua Muyaa & Co. Advocates vs Kenya Ports Authority Oensin Scheme & 8 Others [2017] eKLR** amongst others to submit that time started to run from 13th February 2018 when the Applicant received the certified copy of the ruling that had contained the reasons and therefore the Reference was filed in good time and the Respondent's argument to the contrary could not stand.
9. On the issue as to whether the orders sought were untenable, the Applicant's submission while drawing the Court's attention to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act was to the effect that the Court had powers to act without undue regard to technicalities. That it was sufficient that the Applicant had sought that the Taxing Master's orders dated 15th September 2019 be set aside and item 1 of the bill of costs be taxed afresh. That it was not necessary for the Applicants to specifically instruct the Court on who should re-tax the bill as was being insinuated by the Respondent.
10. Finally the Applicant concluded while relying on the decided case in **Premchand Raichand Ltd & Another vs Quarry Services E. Africa Ltd [1972] E.A 162** that while taxing item 1 of the bill of costs dated 11th April 2019, the Taxing Master deviated from the provisions of the Advocates' Remuneration Order 2014 thus arriving at a figure that was manifestly low in the circumstance. That the chamber summons dated 12th November 2019 was merited and the same should be allowed with costs.
11. The Respondent's response on the other hand was to the effect that the certified copy of the ruling stating the reasons for taxation was available as at 10th September 2019, the Applicant's Reference dated 12th November 2019 was filed 60 days after delivery of the ruling and 49 days after the expiry of the 14 days period for compliance with Rule 11 (1) and (2) of the Advocates' Remuneration Order. That the Applicants did not seek for extension of time as provided for under Rule 11(5) of the Advocates' Remuneration order to file the subject Reference out of time.
12. That the provisions of Rule 11(2) of the Advocates Remuneration Order were structured in mandatory terms to the effect that the duty of the Taxing Officer to provide the reason shall not be extended beyond 14 days otherwise an objector was required to seek leave to file their Reference out of time where 14 days lapsed and no reason had been provided. The Respondents relied on the case of **Kinyua Muyaa** (supra) to submit that if the reasons for taxation were available in the a ruling by the Taxing Officer, the Reference ought to be filed within 14 days after the taxation ruling or else the Reference would be incompetent if filed 14 days after delivery of the ruling. That where there were reasons on the face of the decision, it would be futile to expect the Taxing Officer to furnish further reasons.
13. That regarding the issue of getting up fees for trial, the same was conceded by the Applicant that this issue was neither raised in the Notice of Objection pursuant to Rule 11 (1) nor in the bill of costs dated 11th April 2019 which was the subject of the ruling dated 10th September 2019.
14. Reliance was placed on the decided case of **Paul Imison & Another vs Jodad Investments Limited [2014] eKLR** to submit that the Applicant could only pursue the Reference with regard to only those items which he had given notification in writing that he was objecting to and no more. That to do otherwise would amount to sneaking into the Reference items which were outside the objection.
15. On the last issue as to whether the Taxing Master exercised judicial discretion granted by the law in awarding instruction fee which included reducing and or increasing the same, the Respondent relied on the case in **Nyangito & Co Advocates vs Doinyo lessos Creamqaries Ltd [2014] eKLR** to submit that it was the discretion of the Taxing Officer to either increase or reduce the instruction fee and

further that the mere fact that the Advocate did carry out some research before filing an informed defence was not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with the basic principles of the law and that such unfamiliarity ought not to be turned into an advantage against the adversary.

16. That the Taxing Officer exercised her discretion as afforded by the law, the advocate did not conduct the hearing in the proceedings, nor the settlement and no amount of money used exhibited the complexity of the matter.

Determination.

17. Vide the Applicant's Chamber Summons dated the 12th November 2019, the Applicant seeks to set aside the decision of the Taxing Master, R. Kefa the Deputy Registrar, dated 10th September 2019. The said Application is supported by the grounds on its face as well as an Affidavit, sworn by H. S Mshila Advocate, on the 12th November 2019

18. The Applicant's grounds are based on the following:

- i. That the honorable Court be pleased to set aside item No. 1 in the Taxing Officer's order dated the 10th September 2019 so that the same can be taxed afresh.
- ii. That the Applicant herein be awarded fees for getting up and preparing for trial.
- iii. That costs of this application be provided for.

19. In opposition of the said Reference the Respondent filed their grounds of opposition dated the 12th January 2020 to the effect that the Reference had been filed out of time and further that the orders sought were untenable as the same were not limited to the notice of objection to taxation dated the 12th September 2019 and lastly that the Taxing Master had exercised judicial discretion afforded in law in awarding the said instruction fee.

20. The issues for determination herein are;

- i. Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.**
- ii. Whether the Taxing Officer had committed any errors of principle while taxing the bill of costs.

21. From the analysis of the issue at hand it is clear that the Taxing Officer rendered a written ruling on the 10th September 2019 wherein the Applicant sought for reasons for the decision of the Taxing Officer on Item No 1 in the bill of costs vide the Notice of objection dated the 12th September 2019.

22. Rule 11 of the Advocates Remuneration Order provides as follows:

- (1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he 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.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

23. On the first issue for determination, I find that the ruling herein was delivered on 10th September 2019. I also note from the footnote of the ruling that parties were aware of date for the delivery of the same. It is therefore of interest and concern to note that although the Applicant herein was aware of the date for the delivery of the ruling which was available as at the 10th September 2019, that he filed his objection on item No 1 on the 12th September 2019 and thereafter sought for the certified copy of the ruling vide his letter dated the 24th October 2019 which was about 41 days later.

24. From the provisions of Rule 11 (1) such notice was within the stipulated time however upon considering the fact that the Taxing Master had captured the reasons for her taxation on item No 1 in the written ruling, it was incumbent upon the Applicant to exercise the option of filing his Reference, without waiting for reasons from the Taxing Officer as contemplated by paragraph 11(1) of the Advocates Remuneration Order as it would have been *futile to expect the Taxing Officer to furnish further reasons. I therefore find that between the date of the filing of the notice and the present Reference there was inordinate delay of more than 50 days which delay ran afoul the provisions of Rule 11 of the Advocates Remuneration order.*

25. The Court in the case of **Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Ltd(2)**[2006]1 EA held as follows:-

‘...although Rule 11 (1) of the Advocate Remuneration Order stipulates that any party who wishes to object to the decision of the Taxing Officer, should do so within 14 days after the said decision and thereafter file his Reference within 14 days from the date of receipt of the reasons, where reasons for taxation on disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reason simply because of unfortunate wording of sub Rule (2) of Rule 11 of Advocates Remuneration Order demands so.’

26. Since the present Reference was then filed on the 12th November 2019 over 50 days after the filing of the notice, *I uphold the Respondent's grounds of objection to the effect that the Reference herein is incompetent in relation to the provisions of Rule 11(1) of the Advocates Remuneration order. In case I am wrong than I shall consider the second issue for determination as follows:*

27. The often cited case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64** sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Officer's exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in **Premchand Raichand Limited (Supra)** and **Arthur vs Nyeri Electricity Undertaking [1961] E.A 492**. The said principles were also re-affirmed by the Court of Appeal in **Joreth Limited vs Kigano and Associates [2002] 1 E.A 92**. These principles include

i. that the Court cannot interfere with the Taxing Officer's discretion 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 interference that it was based on an error of principle;

ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;

iii. 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 and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

iv. it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

28. From the above, it can be discerned that there is thus a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low as to lead to an injustice, see **Premchand's case** (supra)

29. The Applicant contends that the Taxing Master ought to have considered the instruction fee in Item 1 in regard to the parcels of land whose value had been concluded to have been Ksh 21,058,300/= and that the matter had been complex and therefore the instruction fee ought to have been taxed at a more higher rate than Ksh 124,236/= which amount was manifestly low and amounted therefore to a misdirection.

30. I have considered the plaint annexed in the Applicant's application herein, where the Defendants herein had been sued for illegal and fraudulent activities in a bid to illegally transfer Nyeri/Uasinjiro/72 to themselves thus depriving the estate of the deceased proprietor, the benefit of having the said property distributed legally via a succession Cause. The Plaintiff thus sought for a declaration that the entire land parcel known as Nyeri/Uasinjiro/72 comprises the estate of George Mugambi Mundia (deceased) and its transfer to the Defendant without going through the succession and transmission process was illegal and/or irregular and therefore void ab initio. The Plaintiff had also sought for an order of rectification of the register to the suit property Nyeri/Uasinjiro/72 by deleting the registration of the Defendant and reverting the name of the original proprietor of George Mugambi Mundia.

31. In the case of **Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99**, the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his/her discretion to assess such instruction fee as (s)he considers just, *taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.*

32. Schedule 6 paragraph 1(j) (ii) of the Act provides that in matters not complex and opposed the instructions fees should be Kshs. 45,000.00 and in matters complex and opposed it should be Kshs. 100,000.00. In this case, it is clear from the record that the suit was opposed. However there was nothing to show that the matter was complex. **The nature of the forensic responsibility placed upon Counsel in terms of the considerable amount of industry that was time-consuming, the large volumes of documentation that had to be classified, assessed and simplified, and the details of such initiative by Counsel which ought to have been specifically indicated** were not **specified cogently and with conviction** nor placed before the Taxing Master. In my view, the *responsibility entrusted to Counsel* in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field.

33. The Applicant has failed to demonstrate that the calculation of instruction fees based on an disclosed value of the subject matter was erroneous and was not based on any discretionary powers vested on the Taxing Master, hence there is nothing to show that the amount allowed by the Taxing Master on the instruction fees was inadequate and not within the scale fees.

34. In the case of **Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001 [unreported]** the Court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the Taxing Officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the Taxing Officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that Courts would remain accessible to only the wealthy. Also while the Taxing Officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that Taxing Officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”

35. That since it was a defended suit, the Taxing Master held that:

“According to the agreement for sale (Ann EMN 1(a))the purchase price for the property is indicated to be 21,058,300 which I shall consider to be the value of the subject matter and Item is therefore taxed at Ksh 124,136 as per paragraph 1(b) of the schedule’.

36. The Taxing Master used her discretion to award Kshs.124,136/- as instruction fees and I cannot fault her.

37. On item No 2 which is the getting up fee, the same was conceded by both parties that this issue was neither raised in the notice of objection pursuant to Rule 11(1) nor in the bill of costs dated 11th April 2019 which was the subject of the ruling dated 10th September 2019. As was held in the decided case in **Paul Imison** (supra) the Applicant could only pursue the Reference with regard to only those items which they had given notification in writing that they were objecting to and no more otherwise to include the getting up fee would amount to sneaking into the Reference items which were outside the objection.

38. *The end result is that I find no merit in the Reference herein and proceed to dismiss the same with cost.*

Dated and delivered at Nyeri this 1st day of October 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE