



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT 146 OF 2004**

**JOEL K. KIBIWOTT.....1<sup>ST</sup> PLAINTIFF**  
**WILSON KIPTANUI ROTICH.....2<sup>ND</sup> PLAINTIFF**  
**STEPHEN K. BUSINENEI.....3<sup>RD</sup> PLAINTIFF**  
**PAUL K.A. SAMOEI.....4<sup>TH</sup> PLAINTIFF**  
**SAMWEL M. TUWEI.....5<sup>TH</sup> PLAINTIFF**  
**AND 353 OTHERS.....PLAINTIFFS**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE  
MONASTRY OUR LADY OF VICTORY .....DEFENDANT**

**RULING**

This is a reference under the **Rule 11(2)** of the **Advocates Remuneration Order** from the Deputy Registrar's taxation of the defendant's advocate's bill of costs in this case in which she taxed the bill as drawn at Kshs. 2,594,157/=. The reference is based on the grounds that the bill was taxed ex-parte; that the taxing master erred in not taxing the bill item by item and that taking the nature of this case, the bill was taxed at a grossly excessive and highly bloated figure.

Citing several authorities, counsel for the plaintiff contended that by stating that the bill is taxed as drawn is clear proof that the taxing master actually did not tax it. He said that the absence of the plaintiff's counsel should have made the taxing master to be even more careful and go through all the items but she did not do that.

Counsel for the plaintiff also complained that the figure of Kshs. 124 million upon which the instruction fees of Kshs. 1,900,000/= was based was not the valuation of the suit property but a mere figure contained in the replying affidavit. According to counsel, a replying affidavit in this case is not a pleading as directions had not been taken to deem the affidavits filed as pleadings.

Counsel for the defendant strongly opposes the reference describing it as an abuse of the court process meant only to delay the defendant's recovery of the taxed costs. He said that despite service, the plaintiff's advocate did not appear to contest the bill and the taxing master was therefore entitled to tax it ex-parte. He also submitted that from what is stated in the taxing master's ruling, she considered every item and taxed the bill basing it on the value of the property as stated in the replying affidavit which, in this case, is a pleading. He said it is the defendants who know the value of their property and the figure they gave must therefore be accepted as the correct one.

I have considered the rival submissions and read the record as well as the authorities cited. To start with I wish to point out that the insinuation of impropriety on the ex-parte taxation of the bill of costs has no merit as the record shows that counsel for the plaintiff was served with the taxation notice. They chose to ignore the taxation and having not proffered any reasons therefor, they cannot now be heard to complain.

Counsel for the plaintiff's complaint that the sum of Kshs. 124 million upon which the instruction fees was based was not contained in the pleadings, has also no justification. In originating summonses, affidavits form the pleadings of the case. The plaintiffs' originating summons as well as the affidavit in support formed their plaint while the defendants' replying affidavit in which the figure was given is the defendants' defence in this case. In the circumstance I find and hold that the figure of Kshs. 124 million on which the instruction fees was based was contained in the pleadings as required by **Schedule VI A (1) of the Advocates' Remuneration Rules** and as was stated in the cases of **Jureth Ltd Vs Kigano and Associates [2002] 1 EA 92** and **Agricultural Society of Kenya Vs C.W. Wanjihia & Co Advocates Mombasa HC MIS. APP. No. 530 of 2007** cited by counsel for the defendant.

It is trite that a judge will normally not interfere with the taxing master's decision on taxation unless it is shown that the decision was based on an error of principle or the amount awarded was so manifestly high or low as to suggest an error of principle. Our law reports are replete with authorities on this proposition. Suffice it to cite only the cases **Steel & Petrol EA Vs Uganda Sugar Factory. [1970] EA 141** and **Alliance Development Ltd T/A Jadini Beach Hotel & Safari Beach Hotel Vs NIC Bank, Mombasa HCCC No. 54 of 2006.**

As is apparent from the averment in the affidavit in support of this reference as well as counsel's submissions, one of the Applicant's main complaints in this reference is that the taxing master taxed the bill as drawn and not item by item as required by law, an act that Justice Serگون also condemned in **Wanga & Co. Advocates Vs Busia Sugar Co. Ltd [2004] KLR 506.**

This contention is, however, incorrect. A perusal of the taxing master's ruling on the taxation makes that quite clear. It reads:-

**"I have perused the Defendant's Bill of Costs dated 18/8/2007.**

**The pleadings especially the affidavit of one F. Stephano Rwegarulira sworn on 10/8/2004 gives the approximate value of the suit property at Kshs.124,000,000/-. Though the plaintiffs denied the same through the Replying Affidavit of Joel Kibiwott sworn on 11/10/2004 they did [not] give a different figure.**

**I take the same to be the approximate value of the land and hence the instruction fee of Kshs.1,900,000 is upto scale. I allow the same as drawn; I also allow the rest of the items as drawn except item 8 which is allowed at Kshs.2,500/- and item 57 allowed at Kshs.5,000/-.**

**The Bill of Costs is, therefore, taxed at Kshs. 2,576,657/=."**

The penultimate paragraph of this ruling makes quite clear that the taxing master not only addressed her mind to the criterion for determining instruction fees but also considered each item. That is why she stated: "I also allow the rest of the items as drawn except item 8 which is allowed at Kshs.2,500/- and item 57 allowed at Kshs.5,000/-." She did not have to say something on each item in order to show that she had indeed considered each.

For these reasons I find no merit in this reference and I accordingly dismiss it with costs.

**DATED and delivered this 7<sup>th</sup> day of May 2009.**

**D.K. MARAGA**

**JUDGE.**