



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 150 OF 2018

KEMBOY LAW ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

RAANA SHELDON ALSO KNOWN AS RAANA FATIMA ERAJ

ADEEL HAQ

MARIA BERNADETTE QUADROS

(Suing as Legal Representatives of

the Estate of Doctor Yusuf Ali Eraj).....CLIENTS/RESPONDENTS

RULING

Through the application filed on 21/8/2019, the Applicant sought an order that the decision made by the deputy registrar on 25/7/2019 on the Applicant's bill of costs dated 9/7/2018 be set aside or vacated and that the court be pleased to assess and quantify the Applicant's advocate-client bill of costs dated 9/7/2018 as appropriate. The Applicant urged that the taxing officer misapprehended and misapplied the law and the principles of taxation with respect to the nature of the suit giving rise to the taxation. Further, that the taxing master failed to apply the principles and formula provided in the Advocates Remuneration Order (ARO) and that the taxing officer arrived at an erroneous decision.

Both parties filed submissions on the application to set aside the decision of the taxing officer which the court has looked at. The Applicant submitted that the agreement for sale of land reference number 1012/49 which the Respondents entered into with Balcon Housing Limited in 2002 was for the sum of Kshs. 58,300,000/= and that Balcon Housing defaulted on the completion of the transaction and the amount due following which the agreement accumulated interest in the sum of Kshs. 96,206,904.11 at the time the Respondents sued Balcon Housing Company Limited in 2011. The Applicant stated that in the course of the proceedings, it became evident that Balcon Housing Company Limited had subdivided the Suit Property into 250 plots and sold each plot for Kshs. 600,000/= bringing the value of the land to Kshs. 150,000,000/= as at 23/5/2018. It averred that this was evident from the witness statements on the court record in **ELC 546 of 2011- Raana Sheldon also Known as Raana Fatima Eraj, Hatima Haq and Maria Bernadette Quadros (Suing as Legal Representatives of the Estate of Doctor Yusuf Ali Eraj) v Balcon Housing Company Limited & 3 Others**. Further, that the owners of the plots created had developed them and put up high-rise buildings. It added that the owners of the plots created embarked on negotiations with the Respondents to settle the suit out of court and agreed that the owners of the plots would pay Kshs. 200,000/= to the Respondent's herein so that the suit could be settled amicably but before a consent was recorded, the Respondents reneged and demanded Kshs. 1,000,000/= from each plot. The Applicant submitted that it was evident from the documents filed in ELC 546 of 2011 that the value of the subject matter was not Kshs. 58,300,000/= which was what the deputy registrar used to assess the instruction fee. The Applicant stated that the taxing officer erred in taxing court attendances on the ordinary scale as opposed to the higher scale; and in awarding the fee for registry attendances on attendance before the deputy registrar; and failing to award fees for meetings when there was proof that the meetings took place.

The Respondent submitted that taking into consideration the circumstances of the case, the taxing officer exercised her discretion correctly in arriving at the instruction fees. Further, that the taxing officer did not err and that the instruction fee awarded was proportionate to the suit and cannot be said to be unreasonable or excessive. They added that there was no clear error on the face of the record and that the taxing officer correctly found that there were no special grounds to award attendances on the higher scale as the court did not make an order that costs be taxed on the higher scale. It maintained that the deputy registrar taxed the Applicant's bill of costs fairly and in a just manner.

The Respondent relied on the decisions in **Joreth Limited v Kigano & Associates [2002] 1 EA 92** at 99; **Republic v The medical Practitioners & Dentists Board & 2 Others, Ex parte Mary A. Omamo-Nyamogo [2017] eKLR**; **Prakash Kantil Gadani v Kenya Airways Limited [2015] eKLR**; **Republic v Commissioner of Domestic Taxes, Ex parte Ukwala Supermarket Limited & 2 Others [2018] eKLR** and **Premchand Raichand Limited & Another v Quarry Services of East Africa Limited & Another**.

The court has considered the application, the submissions filed by the parties together with the authorities the parties relied on. The court has

also looked at the ruling of the deputy registrar on taxation delivered on the 25/7/2019. It has also considered the court proceedings in **ELC 546 of 2011- Raana Sheldon also Known as Raana Fatima Eraj, Hatima Haq and Maria Bernadette Quadros (Suing as Legal Representatives of the Estate of Doctor Yusuf Ali Eraj) –v- Balcon Housing Company Limited & 3 Others** which is the basis for these taxation proceedings. Instruction fees in any suit is assessed based on the value of the subject matter of a suit, which is ascertained based on the pleadings filed and the judgment of the court or a settlement between the parties if the case is resolved out of court.

There is no judgment in ELC 541 of 2011 and neither is there a settlement in the matter as the suit is pending hearing. Therefore the taxing officer had to ascertain the instruction fees due to the Applicant by relying on the pleadings on the court record. The Amended Plaintiff filed on 23/1/2012 shows that the Plaintiff sought an order of vacant possession of the suit property; eviction and demolition of the structures on the suit property; retention of Kshs. 5,800,000/= paid under the agreement for sale; Kshs. 30,000,000/= being the costs for the removal of the structures on the suit land, mesne profits, costs and interest. The Defendants disclosed in their pleadings that Balcon Housing Company Limited had sold the land to third parties who had developed the land, and who were joined as parties to the suit. The pleadings filed by these parties indicate that they bought plots resulting from Balcon Housing Company Limited's subdivision of the suit property and thereafter entered into negotiations with the Plaintiff to try and settle the suit amicably. These are relevant factors that ought to have been taken into account in arriving at the instruction fees due to the Applicant. The ruling of the taxing officer shows that she based the assessment of the instruction fees on the agreement for the sale of the property entered into by the Respondents and Balcon Housing Company Limited in 2001. The taxing officer did not consider the fact that the property had been subdivided, sold to third parties who had unsuccessfully attempted to negotiate and settle the dispute out of court.

The Applicant indicated that the taxing officer failed to award fees on the higher scale, an issue that was within the discretion of the taxing officer. The ruling of the taxing officer shows that she awarded attendance fees on the lower scale as there was no direction in ELC 546 of 2011 from the Judge that costs be awarded on the higher scale. This court is unable to fault the taxing officer on this. Paragraph 50A allows the court to make an order that costs be taxed on the higher scale in Schedule VI on special grounds arising out of the nature and importance of the dispute or the difficulty or the urgency of the case. No such order was made in ELC 546 of 2011.

The Applicant has also indicated that the taxing officer awarded fees for registry attendance for attendance before the deputy registrar and thereby wrongly found that parties did not appear in court, when they did. In addition that she failed to award fees for meetings held between the Applicant and the advocate for the defendants in ELC 546 of 2011. From the foregoing, this court is persuaded that the application dated 20th August 2019 is merited.

The court allows prayer number 1 of the application dated 20/8/2019. The Applicant's bill of costs is remitted back for taxation by a different taxing officer. There shall be no order as to costs.

Delivered virtually at Nairobi this 17th day of December 2020.

K. BOR

JUDGE

In the presence of: -

Ms. Mellyne Okina for the Applicant

Ms. Monica Munene for the Respondent

Mr. V. Owuor- Court Assistant