



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CIVIL SUIT NUMBER 23 OF 2017(O.S)

RUTH CHEPKEMOI CHESIMET1ST APPLICANT

RODHA CHEMELI SIGIRA 2ND APPLICANT

VERSUS

KIPKRUI ARAP CHEPWONY.....RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 6th February 2019 brought pursuant to Rule 11 (2) of the Advocates (Remuneration) Order 1962 and all other enabling provisions of the law the Applicant seeks the following orders:

- a) *That the honourable court be pleased to set aside the decision of the taxing officer delivered on the 16th January 2019 as far as the same relates to taxation of the objector's Bill of Costs dated 2nd August 2018, the quantum awarded thereon and the reasoning with respect to the said award.*
- b) *That this honourable court be pleased to re-tax the said Bill of Costs.*
- c) *That in the alternative to prayer b) above, this honourable court be pleased to remit the Bill of costs dated 2nd August 2018 for re-taxation before a different taxing officer with appropriate directions thereof.*
- d) *That the costs of this application be provided for.*

2. The application is premised on the grounds inter alia that the learned Taxing officer erred in law and principle by failing to take into account the fact that the Advocate/ Client Bill of Costs in the matter had been taxed vide Kericho High Court Miscellaneous Civil Application No. 21 of 2018 at Kenya Shillings Three Million, Five Hundred Thousand (Kshs. 3,500,000) and a Certificate of costs dated 13th July 2018 issued to that effect; Secondly that the Taxing Officer erred in law and principle by failing to take into account the provisions of schedule 6 part B of the Advocates (Remuneration Amendment), Order 2014 which provides inter alia that the Advocate/ Client costs shall be the fees prescribed in A above (that is Party and Party costs) increased by 50% and therefore since the Advocate/Client costs had been assessed at Kshs. 3,500,000, Party and Party costs ought to have been taxed at 50% less in line with paragraph (a) of part B of the Advocates Remuneration Order, 2014.

Background

3. The application which seeks to challenge the decision of the taxing officer dated 19.1.2019 is supported by the affidavit of Caleb Cheruiyot Koech in which he restates the above grounds and further deposes that from the Client Advocate Bill of Costs dated 30.5.2018 it was acknowledged that the value of the subject matter herein was about Kshs. 60,000,000 hence the instruction fee of Kshs. 5,000,000 charged by the Respondent's advocate which is considerably higher than the fee of Kshs. 1,420,000 charged in the Applicant's Bill of costs dated 2.8.2018. He deposes that the taxing officer erred in awarding Kshs. 150,000 as instruction fees on the grounds that the value of the subject matter herein could not be ascertained from the pleadings, judgment or settlement between the parties. He faults the Taxing Officer for taking into account irrelevant factors and failing to take into account relevant factors in taxing the Objector's Bill of Costs. In particular, he deposes that the Taxing officer erred in law and principle by failing to take into account the proviso under schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 which requires the taxing officer to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties, as well as the general conduct of the proceedings.

4. The application was opposed by the Respondent through his Grounds of Opposition dated 27th February 2019. In the said grounds the Respondent states that that the Reference is incompetent and incurably defective as the it does not state which items of the bill form the basis of the objection contrary to paragraph 11 (1) and 2 of the Advocates Remuneration Order 2014.

5. He further attacks the Reference on the ground that it is based on the provisions of schedule 6 part B of the Advocates (Remuneration) (Amendment) Order 2014, yet the bill being for Party and Party costs was based on Schedule 6 part A hence it is based on the wrong provisions of the law and suffers from a serious misapprehension of the law.

6. The application was canvassed by way of oral submissions which I have considered.

Issues for determination

1. Whether the taxing officer erred in principle in assessing the Party and Party costs.
2. Whether the decision of the taxing officer ought to be set aside.

Analysis and determination

7. The principles that guide the court is dealing with a reference are well settled. A judge sitting on a Reference will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See the case **of Joreth v Kigumo & Another EA 92**.

8. What I need to determine is whether the taxing officer made an error of principle to warrant interference with the exercise of his discretion.

9. The taxation of a Party and Party Bill of costs is governed by Schedule V1 A of the Advocates Remuneration Order which provides that the fees shall be as prescribed in schedule V1B. Schedule V1 paragraph 1(b) stipulates that instruction fees are to be calculated on the basis of the value of the subject matter which is determined from the pleadings, judgment or settlement between the parties . The Taxing officer found this inapplicable as the value of the subject matter could not be determined from the pleadings or judgment. He then proceeded to tax the bill in accordance with schedule V1 1 (j) which relates to "Other matters" The said provision states as follows:

"To sue or defend in any case not provided for, such sum as may be reasonable but not less than

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| i) | <i>If undefended</i> | <i>Kshs. 45,000</i> |
| ii) | <i>Defended</i> | <i>Kshs. 75,000</i> |

10. He then went on to state that he found nothing to suggest that the matter was complex and taking into account the time and labour that was expended in the matter he awarded Kshs. 150,000 as instruction fees.

11. Counsel for the Applicant has taken issue with the fact that the Taxing officer failed to consider that the Client Advocate Bill of Costs had been taxed at Kshs. 3,500,000. He bases his objection on Schedule V1 Part B of the Advocates Remuneration Order, 2014 which provides inter alia that the Advocate Client costs shall be fees prescribed in A above that is Party and Party costs increased by 50% I agree with counsel for the Respondent that this is an erroneous interpretation of the law as the said provision refers to a situation where one is taxing a Client Advocate Bill of costs and not Party and Party costs. Be that as it may, Schedule 6 requires the taxing officer to consider **the nature and importance of the matter, the amount involved, the interests of the parties, the general conduct of the proceedings, any direction by the judge and all other relevant circumstances.** Additionally, rule 13A provides that;

“For the purpose of any proceedings before him, the taxing officer shall have the power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and direct and adopt any such other proceedings as may be necessary for the determination of any matter in dispute before him.”

12. The instruction fee in the Party and Party bill of costs was hotly contested by the Applicant on the basis that the in the Client Advocate Bill of costs the value of the subject matter had been placed at Kshs. 60,000,000 with the result that the fee charged thereon was Kshs, 5,000,000 which was eventually taxed at Kshs. 3,500,000. Although the taxing master was not obliged to rely on the instruction fee taxed in the Advocate Client Bill of costs, at the very least he ought to have sought to ascertain the value of the subject matter so as to be seen to have taken all relevant circumstances into consideration as he is enjoined to do.

13. To the extent that the taxing master confined himself to considering the complexity (or lack thereof) of the matter as well as the time and labour expended in the matter, and failed to consider all relevant circumstances and also to the extent that he failed to exercise his discretion under rule 13A of the Advocates Remuneration Order, which would have enabled him to arrive at a just and reasonable fee, it is my finding that he erred in principle.

Disposition

14. Having found that the taxing officer erred in principle, I set aside the decision of the taxing officer dated 16th January 2019. I direct that Party and Party Bill of costs dated 2nd August 2018 be placed before a different taxing officer for re-taxation of item 1 only as regards the instruction fees. The Applicant shall file a valuation report of the subject matter which shall guide the taxing officer in determining the value of the subject matter. This will be taken into account together with the applicable principles for purposes of re-taxation. The said valuation report shall be filed in court within 21 days. The matter shall be mentioned before the Chief Magistrate on 23.4.2019 for directions.

15. Each party shall bear their own costs.

Dated, signed and delivered at Kericho this 22nd day of March, 2019.

J.M ONYANGO

JUDGE