



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISCILLENIOUS APPLICATION NO. 5 OF 2018

GICHARU KIMANI & ASSOCIATES.....APPLICANT/ RESPONDENT

VERSUS

WACHU RANCH (D.A) COMPANY LIMITED.....RESPONDENT/APPLICANT

RULING

1. By this Chamber Summons application dated and filed herein on 25th October 2018, Messrs Wachu Ranch(D.A) Company Ltd objects to the Ruling of the Taxing Master dated 19th October 2018 in regard to the Plaintiff's Bill of Costs dated 12th March 2018 and prays that the same be set aside.

2. The said Objection is supported by an affidavit sworn by Ms Martina Kemunto Onchangu Advocate is premised on the grounds:-

a) That the Learned Taxing Master erred in taxing the instruction fees at Kshs 54,415,000/-;

b) That the Learned Taxing Master erred in not considering any of the objections raised by the Defendant with regard to the amount charged by the Plaintiff in drawing pleadings, Court attendance, correspondences, perusals and services thereby taxing the Bill of Costs on these items at an overly exaggerated amounts; and

c) That the Learned Taxing Master erred in not considering the submissions presented before her and/or treating the(m) superficially thereby taxing the entire bill of costs at Kshs 126,595,454.80/- as drawn by the Applicant.

3. On 11th December 2018, the Respondent Gicharu Kimani & Associates Advocates filed Grounds of Opposition challenging the competence of the said Application.

4. In addition, vide a Replying Affidavit filed herein on the same day through Advocate Erastus Gicharu Kimani the Respondents aver that they were appointed by the Applicants on 10th September 2014 to institute a suit against Alex Mwalimu Baya & 549 Others who had invaded the Applicant's parcel of land known as LR No. 13600 measuring approximately 28,911 Ha in Tana River County.

5. It is the Respondents Advocates' case that in accordance with the Applicant's instructions, they instituted ELC Case No. 207 of 2013 on 23rd August 2013 by way of a Plaint which was subsequently amended on 13th November 2013. They aver further that the matter proceeded to full hearing and that

Judgment was delivered therein on 25th November 2016 in favour of the Applicant.

6. The Respondent Advocates further aver that the Applicant herein thereafter refused to pay their legal fees thereby necessitating filing of their Advocate client Bill of Costs through Miscellaneous Civil Application No. 5 of 2018. A Ruling on the same was delivered on 19th October 2018 and the present application should be dismissed as the Applicant has not given reasons as to why the taxation ruling should be set aside and merely contends that the amounts as taxed were exaggerated.

7. I have considered the application and the response thereto. I have equally considered the submissions of the Learned Advocates for the parties. The application before me concerns a dispute over taxation of an advocate client's bill of costs by a taxing master. Paragraph 11 of the Advocates Remuneration Order that deals with objections to decisions on taxation and reference to this Court 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 item of taxation to which they object.

2. The Taxing Master 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 parties concerned setting out the grounds of his objection."

8. From the material placed before me, it is evident that on or about 12th March 2018, the Respondent Advocates lodged herein, an advocate-Client Bill of Costs seeking to be paid a sum of Kshs 126,765,454.80/- as fees for services rendered to the Applicant Company. The Respondents had been instructed to file a suit in 2013 for the eviction of about 550 squatters who had invaded the Applicants parcel of land known as LR No. 13600 measuring approximately 28,911 Ha and situated Tarasaa Orcha Area in Tana River County.

9. It is evident that after the filing of the Advocate bill, the Applicant objected thereto and parties were given time to file submissions in regard thereto. Thereafter on 19th October 2018 the Taxing Master the Honourable J.N Wandia DR rendered a six page hand-written decision in which she found that the Bill had been drawn to scale and thus taxed it as drawn.

10. Aggrieved by the said decision the Applicant hurriedly moved to this Court six days later on 25th October 2018 and filed the present application. I say hurriedly because while the said application is said to be brought under the Provisions of Rule 11(1) and (2) of the Advocates Remuneration Order, the four-paragraph supporting Affidavit sworn by Ms Martina Kemunto Onchangu is as sketchy as they can ever get.

11. From a perusal thereof it is evident the Applicants never gave notice to the Taxing Officer indicating the items of taxation to which they object as envisaged under Rule 11 of the Advocates Remuneration Order aforesaid. Neither does it contain a record of the Taxing Officer's reasons for the decisions being challenged. According to the Respondent, such an omission is fatal and renders the application before me incurably defective.

12. However while I agree that the drafters of the said application ought to have done more in terms of bringing out their case, I have heard occasion to consider the record of proceedings before the Taxing Officer. The entire Ruling by the Learned Taxing Officer as gleaned from the proceedings is a full six (6) handwritten pages. Before that Ruling was prepared and delivered, both parties had had occasion to file written submissions on the Bill of costs that was before the Taxing Officer.

13. That being the case, I am prepared to accept that the Applicants were aware from the time of the delivery of the said Ruling as to both its tenor and purport. That Ruling gives the taxing officer reasons for the decision and that was probably the reason the Applicants did not bother to ask the taxing officer to

give her reasons for the same more so given that the Bill had been taxed as was drawn.

14. In the Application before me, the Applicants clearly state that they object to the said Ruling in regard to the decision on instructions fees and the alleged failure of the taxing officer to take into consideration the objections they made in regard thereto as well as the other items. As the Court of Appeal stated in **Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board(2005) KLR 528:-**

“Although there was no strict compliance with rule 11(2) of the Order, we are nevertheless satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed we are of the view that if a taxing officer totally fails to record any reasons and to forward them to the objector as required, then that would be a good ground for a reference.....”

15. That being the case, I am satisfied that regardless of its flaws this Application is properly before me. In considering whether I would set aside or interfere with the decision of the taxing officer, I have had regard to the proceedings herein and the Ruling on record as delivered on 19th October 2018. As it were, it is my duty to consider whether the taxing officer followed the correct principles of law, whether she entertained irrelevant matters or failed to consider relevant matters and ultimately, whether the sums awarded were manifestly excessive as contended by the Applicants.

16. It is contended in submissions by the Applicants that the Taxing Officer proceeded in error of principle as she relied on the value of the subject matter as filed by the Respondents yet the value was not in issue in the subject pleadings giving rise to the taxation. A perusal of the Ruling of the Learned Taxing Officer reveals that she took into consideration the objections of the Applicant herein after which she states as follows from the last paragraph of page two of her hand-written Ruling:-

“In their submissions, the Applicants argued that the Respondent ranch measured approximately 28,911 Ha. They valued it to be worth Kshs 3,572,000,000/-. That is approximately Kshs 123,552 per Ha. In justifying their reasons for filing the Valuation Report they relied in the case of Desani, Sarvia & Dallan –vs- Jambo Biscuits(2014) eKLR where Kimondo J stated:-

“Taxation of a Bill of Costs, like all other aspects of litigation is based largely on evidence. It is also an adversarial process. As the bill was contested, it behoved the applicant to present to the taxing master all documents and materials in support of its claim.

17. The Learned Taxing Master further went on to state as follows in conclusion:-

“Having looked at the Mother file ie ELC 207/2013, I find that the Applicant while acting for the Respondent, in their submissions dated 16th June 2016 did state that the land was 28,911 Ha. The claim of the Plaintiff (now respondent) was against some 550 defendants who were to be evicted from the said property. I also found a receipt for payment of rates from the County Government of Tana River dated 31/1/2015 amounting to Kshs 150,000/-.

This property is indeed a large property. Though the value of the same is not stated from the proceedings, its vastness and the number of defendants sued showed that it was a large property.

I will allow the valuation report, as the Respondent stood to lose his property had the applicant not represented him. Further, no other evidence has been tabled to dispute the value of the said property....”

18. Arising from the above summary of the taxing mater’s Ruling it is evident that the value of the suit property had not been pleaded and that she got the same from a copy of a Valuation Report filed herein by the Respondents. As was stated by the Court of Appeal in **Joreth Limited –vs- Kigano and Associates(2002) EA 92:-**

“The value of the subject matter of a suit for the purpose 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 ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters, the nature and importance of the cause or matter, the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge and all other relevant circumstances.”

19. The Learned Taxing Officer in the present circumstances appears to have gone outside those perimeters as was outlined herein above. Besides, it was not clear to me when the Valuation Report was filed in Court and whether the Applicants herein had occasion to consider and respond to the same either in submissions or by offering an alternative valuation of the land in question.

20. From the record before me it is evident that the parties appeared for the last time before the Learned Taxing Master on 28th May 2018. On that date the Applicants before me were granted upto the close of business on that day to file submissions and the Ruling on the taxation was reserved for 3rd August 2018. Apparently, the Ruling was not ready on that date and it was eventually delivered on 19th October 2018.

21. That record does not make any reference to the Valuation Report and/or whether or not its admissibility was a matter in issue for consideration by the Learned Taxing Officer. That she chose to admit it at the last minute in the course of preparing her Ruling does not appear to have given room for the Applicant to be heard thereon.

22. In the circumstances I am satisfied that this application has merit. I allow the same and direct that the subject Advocate-Client Bill of Costs be re-submitted for taxation before another taxing master other than the Honourable J.N Wandia.

23. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 9th day of April, 2019.

J.O. OLOLA

JUDGE