



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

MISC CIVIL APPLICATION NO.31 OF 2018

Formerly HC MISC.APPL.NO.155 OF 2018

IN THE MATTER OF ORDER 51 AND ORDER 25 RULE 3

OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OS SECTION 44,48 AND 51 OF THE ADVOCATES

ACT CAP 16 LAWS OF KENYA AND THE ADVOCATES

(REMUNERATION ORDER) AMENDMENT ORDER 2014

AND

IN THE MATTER OF PARTY AND PARTY COSTS PURSUANT

TO THE BILL OF COSTS DATED 22ND JUNE 2018

AND

IN THE ATTER OF THE ENVIRONMENT AND LAND COURT,

ELC CASE NO.368 OF 2016 REBECCA MINING VS. DAVID MINING

AND

DAVID MINING.....APPLICANT

VERSUS

REBECCA MINING.....RESPONDENT

RULING

This ruling is in respect of an application dated 14th December 2018 brought by way of notice of motion by the applicant herein seeking for the following orders:

- a) That the decision of the Taxing Officer (Deputy Registrar) vide the Ruling dated 7th December 2018 and any consequential order(s)/certificate(s) arising thereon in the Environment and Land Court at Eldoret ELC No. 368 of 2016' Rebecca Mining Vs. David Mining be set aside/vacated;
- b) The said Bill of costs dated 22nd June 2018 be taxed afresh by a differently constituted Taxing Court/Master.

c) In the alternative and in the interest of justice this Honourable Court be pleased to assess/tax the costs contained in the said Applicant's Party and Party Bill of Costs dated 22nd June 2018 lawfully payable to the Applicant.

d) This Court do issue such other orders/directions as it may deem fit and just to issue to serve the ends of justice in the circumstances herein

e) Costs of this application be provided for.

Counsel agreed to canvass the application by way of written submissions. Counsel for the applicant submitted that the instant application is a reference to this Honourable Court in view of the taxation ruling delivered by the Deputy Registrar/Taxing Officer on 7th December 2018 in relation to the Party and Party Bill of Costs dated 22nd June 2018 in respect of the Environment and Land Court Case (ELC) No. 368 of 2016; REBECCA MINING VS. DAVID MINING where this Honourable Court awarded the Defendant costs upon the withdrawal of the said suit by the Plaintiff.

Counsel further submitted that in the ruling delivered on 16th November 2018, the Deputy Registrar taxed the said Party and Party Bill of Costs at Kshs. 132,455 (Kenya Shillings One Hundred and Thirty Two Thousand Four Hundred and Fifty Five) against the presented amount of Kshs. 1,284,615.00 (Kenya Shillings One Million Two Hundred Eight Four Thousand Six Hundred and Fifteen).

It was Counsel's submission that the main contention relates to the item number 1 of the said Party and Party Bill of Costs which is in respect of the instruction fees whereby

the applicant had submitted a fee of Kshs. 1,254,000.00 (Kenya Shillings One Million Two Hundred and Forty Five Thousand) which was purportedly pegged on the value of the subject matter estimated at Kshs. 75,000,000.00 (Kenya Shillings Seventy Five Million). That the Taxing Officer taxed the instruction fee at Kshs. 100,000.00 (Kenya Shillings One Hundred Thousand) and justified the foregoing award by giving the following reasons; that the value of the subject matter (the suit land) was not disclosed in the plaint and that the suit was withdrawn and that no judgment or settlement by the parties.

Counsel listed two issues for determination of the court as follows:

- a) Whether this Honourable Court should interfere with the Taxing Officer's award.
- b) Whether the Honourable Court should tax the bill or remit it back to a different Taxing Officer for fresh taxation.

On the 1st issue as to whether this Honourable Court should review the Taxing Officer's Award, Counsel submitted that the principles for reviewing the Taxing Officer's decision are now settled.

Counsel cited the case of **KTK Advocates v Baringo County Government [2017] eKLR at Nairobi Misc. Cause No. 1 of 2017** where Mativo J. analyzed various case law that establishes principles that guide the Honourable Court in interfering with the Taxing Officer's decision. In the foregoing case, the learned judge, at paragraph 20 of the holding cited the decision in the **Bank of Uganda vs. Banco Arabe Espanol SC Civil Application No. 23 of 1999**, and reiterated as follows;

20. The principles of taxation of costs were restated by the Ugandan Supreme court as follows (10)

"Save in exceptional cases, a judge does not interfere with the assessment of what the Taxing Officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the Taxing Officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the Taxing Officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the Taxing Officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the Taxing Officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties." [Emphasis added]

Counsel further stated that in the same case of **KTK Advocates, mentioned above** at paragraph 21 of the judgment, Mativo J. cited the holding in **Republic Vs. Ministry of Agriculture & 2 Others Ex-Parte Muchiri W'njuguna & 6 Others [2006]eKLR** where Ojwang J. (as he then was) opined that;

"Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved (Emphasis added). (See the holding by Mativo J. in the KTK Case at paragraph 21)

Counsel further submitted that in answering the question as to whether the Taxing Officer exercised or applied wrong principles in arriving at an award of Kshs. 100,000/ in respect of the instruction fee, one must ask whether the instruction fee was correctly assessed, whether the value of the subject matter was ascertainable, and finally what step was to be taken by the Taxing Officer in order to ascertain the value of

the subject matter.

It was Counsel's submission that they had presented the value of the subject matter to be Kshs. 75,000,000.00 (Kenya Shillings Seventy Five Million). He also cited the case of Mwangangi & Company Advocates v Machakos County [2018] eKLR, Misc. Civil Application No. 318 of 2016, where Nyamweya J. cited the holding in Joreth Limited Vs. Kigano & Associates [2002]eKLR, and reiterated as follows;

"The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in The Joreth Case as follows:-

"We would at this stage point out that the value of the subject matter of a suit 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 discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and 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".

The Taxing Officer is thus not only limited to the pleadings, judgment and settlement in determining the value of the subject matter of a suit, and is granted such discretion by paragraph 13A of the Advocates (Remuneration) Order which provides as follows;

"For the purpose of any proceeding before him, the Taxing Officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him". [Emphasis added]

Counsel therefore submitted that the Taxing Officer ought to have discerned the value of the subject matter from either the pleadings, judgment and or settlement and that in the current case neither the plaintiff nor the defence disclosed the value of the subject matter. He submitted that the value of the subject matter was ascertainable in Eldoret Succession Cause No. 29 of 2017 where the Petitioner (Rebecca Jelagat Mining) who is the Plaintiff/ Respondent in her pleadings (Form P & A 5) stated the value of the land in question to be Ksh. 75,000,000.00 (Kenya Shillings Seventy Five Million).

Counsel faulted the Taxing Officer for not awarding the instruction fees as prayed and therefore urged the court to either remit the bill for taxation of deal with the reference.

Respondent's Submissions

Counsel for the respondent faulted the process and procedure of the current application as being defective. Counsel further submitted that Paragraph 11 of the Advocates Remuneration Order is clear on how appellate jurisdiction of this court may be invoked in taxation proceedings. That the instant application did not comply with the mandatory requirement of the law as provided under paragraph 11 (2) of the Advocates Remuneration order due to absence of recorded reasons for the taxing master decision delivered 7th December 2018 on the disputed item No. 1 of the Applicant's party and party costs.

Counsel also submitted that the law provides that it upon receipt of recorded reasons from the Taxing Officer that the objector may within fourteen days apply to a Judge by Chamber Summons. Counsel stated that in this instant case, the Applicant did not even wait to receive recorded reasons from the Taxing Officer and hurriedly proceeded to file a reference which is premature and incompetent.

Further that Paragraph 11 (2) of the Advocates Remuneration Order also provides that objection to decision of a Taxing Officer shall be commenced by way of Chamber Summons while the instant application herein dated 14th December 2018 has been commenced by way of Notice of motion which in itself is a procedural defect that is incurably defective. Counsel submitted that the Deputy Registrar was right in awarding the instruction fees as there was no valuation report to support the amount claimed under Item No. 1 by the Applicant and that the plaintiff dated 7th December 2016 was for a prayer for a permanent injunction restraining the applicant from encroaching on the suit land.

Counsel submitted that it was not right for the applicant to refer to a Succession Cause which was not part of the suit and that there was no valuation report. Counsel therefore urged the court to dismiss the application with costs.

Analysis and determination

This is a reference filed seeking the court's intervention on the issue of item 1 in respect of instruction fees for the applicant. The brief background to the case as was captured in the supporting affidavit by the applicant shows that the matter was filed vide ELC No. 368 of 2016 with an application under certificate of urgency for injunction.

That the applicant herein filed a preliminary objection to the suit and when the same came up for hearing the plaintiff who is the current respondent elected to withdraw the suit with costs to the applicant. This is the genesis of this current application.

The respondent faulted the application for being defective as it was brought by way of notice of motion instead of Chamber Summons as provided for. The procedure of filing a reference is by way of Chamber summons.

The issues for determination in this case are as to whether the Taxing Officer applied the wrong principles in arriving at the taxed amount and whether the court should interfere with the discretion of the Taxing Officer and remit the bill for taxation. In most cases a Judge would not ordinarily interfere with the Taxing Officers' assessment of the fees unless he or she is satisfied that there was wrong principle applied in the process.

A Taxing Officer is well versed with taxation matters which they deal with on a day to day basis and are also in a position to call additional material or submissions to ascertain certain unclear issues.

Even though instruction fees are items that are the basis of a case, it should not be lost that each case has to be determined on its own merit and cases are classified as contentious, non-contentious, complex and non-complex. That is why classification of cases as fast track and multi-track was introduced to show the complexity of cases. Litigants who are not represented sometimes take the advice from people who are not well versed with the meaning and purpose of the classification but copy from what they find in the registry. The case was filed by a party who was not represented.

This matter never proceeded for hearing and the respondent saved the applicant's and court's time by withdrawing the case. This does not mean that the applicant is not entitled to instruction fees but it should be noted that the court should not just sit and tax an unconscionable figure all in the name of awarding costs. The court has to be a fair arbiter and that is what the Taxing Officer was in this case. I therefore find that there is no good reason why I should interfere with what the Taxing Officer did after assessing the bill of costs.

It is trite law that where the value of the subject matter is not ascertainable in the pleadings or the judgment or settlement of the parties the Taxing Officer has discretion on the instruction fees taking into account the complexity of the matter, the importance of the subject matter and work done by the advocate. If I were the Taxing Officer in this matter, I would have arrived at the same decision or even lower figure as the matter was neither complex nor protracted. The matter was withdrawn before the advocate had expended much time and money on the case. I find that the figure that was presented as instruction fees is unconscionable and that the Taxing Officer did not use wrong principles of law in arriving at the taxed amount.

I have considered the application which should have been brought by way of Chamber Summons, the submissions by Counsel and authorities cited and come to the conclusion that the application lacks merit and is therefore dismissed with costs to the respondent.

Dated and delivered at Eldoret on this 21st day of May, 2019.

M.A. ODENY

JUDGE

RULING READ in open court in the presence of Mr.Kagunza for Respondent and in the absence of Mr.Nabasenge for Applicant.

Mr. Mwelem – Court Assistant