



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**MISC. APP NO.196 OF 2015**

**MASORE NYANG'AU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**KENSALT LIMITED.....RESPONDENT**

**RULING**

***(Taxation of Advocate/client bill of costs; taxation where value of the subject matter is not ascertainable in the pleadings, judgment, or order of the court; court at liberty to consider the documents filed in the suit to determine the value or following Rule 13A, call for evidence to determine the value; in the instance of the reference, taxing officer erred in failing to appreciate that the value of the subject matter was ascertainable from the transfer instrument to the suit land; value being noted as Kshs.63,000,000/=; wrong for taxing officer to award Kshs.100,000/= as instruction fees; bill taxed afresh; costs to the applicant).***

1. The applicant, a firm of advocates, represented the respondent in a suit originally filed on 16 November 2012 in the High Court of Nakuru and registered as Nakuru HCCC No. 381 of 2012, which suit was later transferred to the Environment and Land Court and registered as Nakuru ELC No. 257 of 2013. The plaintiff in that case was Akuisi Farmers Company Limited who had sued the respondent as 2<sup>nd</sup> defendant and Milmet Estates Limited as 1<sup>st</sup> defendant. The claim of Akuisi Farmers Company Limited was that sometimes in the year 1979, the plaintiff and Milmet Estates Limited, the 1<sup>st</sup> defendant, entered into an agreement whereby the plaintiff was purchasing from the 1<sup>st</sup> defendant the land described as LR No.11278 comprising of 1,773 acres for Kshs. 5.5 Million. It was averred that the plaintiff paid the full purchase price and took possession but that the 1<sup>st</sup> defendant failed to transfer the title to the plaintiff and instead transferred the land to the respondent. The plaintiff contended that the transfer of the land to the respondent was fraudulent and applied for orders of cancellation of the title of the respondent and transfer of the suit land to the plaintiff.

2. The 1<sup>st</sup> defendant did not enter appearance and did not file any defence in the matter. The respondent (as 2<sup>nd</sup> defendant) appointed the applicant herein to represent its interest and a statement of defence was filed on 26 February 2013 through which the respondent averred inter alia that it is an innocent purchaser of the land vide a sale agreement of 23 July 2003 after which it took possession of the land. The respondent further pleaded that the plaintiff's suit is incompetent and out of time.

3. On 21 March 2013, the respondent filed an application to have the suit struck out for being scandalous, frivolous or vexatious. The application was opposed by the plaintiff, and through a ruling delivered on 9 May 2014, the said application was dismissed with costs, the court reasoning that the suit as framed by the plaintiff could not be said to be frivolous. It does seem that that was the last involvement of the applicant in the said suit. My perusal of the file Nakuru ELC No. 257 of 2013, has not revealed to me any notice of change of advocates, but it is apparent that the law firm of M/s Bonface Masinde & Company Advocates, took over the representation of the respondent from the applicant. The new firm filed a Notice of Preliminary objection to the suit, which was ordered to be canvassed within the hearing of the main suit. The parties were directed to make ready their respective cases and a hearing date for 4 October 2018 given. On that day, the plaintiff withdrew the suit with costs to the respondent and that was the end of the matter.

4. There seems to have been a disagreement on fees payable to the applicant which led the applicant to file an Advocate/Client Bill of Costs for taxation. The said bill was not filed in the suit Nakuru ELC No. 257 of 2013 but through this Miscellaneous Application. The bill was filed on 13 July 2015, and the applicant sought the sum of Kshs. 1,898,799/= as its rightful legal fees. The applicant pegged her instructions fees at Kshs. 1,007,000/= having taken into consideration that the land in dispute was in 1979 worth Kshs. 5.5 Million, and 'currently over Kshs. 63,000,000/= in the year 2003'. This figure of Kshs. 63,000,000/= was lifted from the title of the land which showed that the land was transferred to the respondent at a consideration of Kshs. 63,000,000/=. The respondent appointed the law firm of M/s Bonface Masinde & Company to represent it in the taxation cause. Both the applicant and Mr. Masinde, filed submissions in respect of the taxation, and through a ruling delivered on 8 February 2017, the applicant's bill was taxed in the sum of Kshs. 323,271.12/= inclusive of 16% VAT. For instruction fees, the taxing officer thought that the sum of Kshs. 100,000/= was sufficient.

5. In taxing instruction fees at Kshs. 100,000/= the taxing officer reasoned as follows :-

*'Item 1 : instruction fees. The period to which the Bill refers is majorly between 2013 and April 2014 when the Advocates*

*Remuneration Order of 2009 was in operation and so for this item schedule VI of the same will apply.*

*Instruction fees as observed in the case of **Joreth Limited vs Kigano and Associates, Civil Appeal No. 66 of 1999** is ascertained from the pleadings, judgment or settlement (if any). In this particular matter, the value of the subject matter is not indicated in the pleadings. Since there is no judgment or settlement yet, there is no way it can be ascertained.*

*As such the fall back would be on the discretion of the taxing officer, taking into account the provisions of paragraph 1 (1) of Schedule VI of the Advocates Remuneration Order 2009. In view of the professional services rendered by the applicant up to the end of his service, I consider an award of Kshs. 100,000.00/= reasonable as instruction fees.'*

6. Being aggrieved, the applicant filed a reference to this court pursuant to the provisions of Rule 11 (2) of the Advocates' Remuneration Order. The applicant is aggrieved by the award of Kshs. 100,000/= in instruction fees and wishes to have that decision set aside and for the bill to be remitted for taxation before another taxing officer or before the same taxing officer with appropriate directions. The reference is based on reasons inter alia that the taxing officer failed to appreciate the value of the subject matter and that the award of Kshs. 100,000/= as instruction fees is so manifestly low that it amounts to an injustice to the applicant. There were also orders to have time enlarged for the reference for the same was thought to have been filed beyond the period prescribed under Rule 11 (2) of the Advocates Remuneration Order.

7. In his submissions, the applicant inter alia contended that the determination on instruction fee was arrived at without applying the correct principles. It was submitted that the taxing officer failed to appreciate the value of the subject matter, other relevant considerations, and failed to exercise her discretion judiciously. Counsel submitted that the value of the subject matter was ascertainable from the pleadings, contrary to what the taxing officer held. Counsel submitted that pleadings would include the statements in writing of the claim and the defence and that in the case of **Otieno Omuga & Ouma Advocates vs CFC Stanbic Bank Limited, HCCC No. 75 of 2012**, witness statements, list of documents and a supplementary witness statement were regarded as pleadings. He referred me to paragraph 3 of the plaint, where the plaintiff pleaded to have purchased the suit land in the year 1979 for Kshs. 5.3 Million and the list of documents, particularly the title, which showed transfer of the suit land to the respondent at the consideration of Kshs. 63,000,000/=. He submitted that the value of the subject matter was at least Kshs. 63,000,000/= and calculated what he believed to be the correct instruction fee following Schedule 6A(b) of the Remuneration Order. He came up with the figure of Kshs. 1,338,500/=. He submitted that if it is the position that the value is not discernible from the pleadings, the taxing officer erred by not appreciating that instruction fee is earned once, and is not affected by the stage the suit has reached. He submitted that even if the taxing officer was to rely on her discretion, she did not exercise it judiciously.

8. On the other hand, counsel for the respondent submitted that the reference should be dismissed as it is out of time. In the event that the reference was admitted, he submitted that there was no error by the taxing officer because the value of the subject matter could not be ascertained from the pleadings. He submitted that claims above Kshs. 3,000,000/= attract a standard filing fee of Kshs. 70,000/= yet in the instance of this case, the filing fee was way below Kshs. 70,000/=. He submitted that this court is not entitled to upset a taxation merely because in its opinion the amount awarded was high or low unless there was an error of principle. He believed that the taxing officer exercised her discretion properly.

9. There are two issues in this reference. The first is whether the reference should be dismissed for having been filed out of time, and the second is whether this court should disturb the decision of the taxing officer with regard to the instruction fees.

10. On the first point, that is whether this reference has been filed out of time, the provisions of Rule 11 of the Advocates' Remuneration Order apply. The same provides as follows :-

### *11. Objection to decision on taxation and appeal to Court of Appeal*

*(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 items of taxation to which he objects.*

*(2) The taxing officer 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 the parties concerned, setting out the grounds of his objection.*

*(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

*(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.*

11. It will be seen from the above that one has 14 days to give notice of the items that he contests. Once this is received, the taxing officer writes to the objector, giving reasons on the contested items. After receiving the reasons, the objector has 14 days to file his reference to the High Court.



plus an additional 1.5%.

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds Kshs.	But does not exceed Kshs.	Kshs.
-	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	20,000,000 fees as for Kshs.	

1,000,000 plus an additional 2%.

fees as for 20,000,000 plus an additional 1.5%.

Over 20,000,000

(c) To defend proceedings where the defendant substantially adopts the defence of another defendant; an instruction fee calculated under sub-paragraph 1(a).

(d) To defend any other proceedings; an instruction fee calculated under sub- paragraph 1(b).

(e) ...not relevant

(f) ...not relevant

(g) ... not relevant

(h) ... not relevant

(i) ... not relevant

(j) ... not relevant

provided that:

(i) the taxing officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances;

(ii) In any case which a certificate for more than one advocate has been given by the judge, the instruction fee allowed on taxation as between party and party and other charges shall be doubled where requisite;

(iii) In any case which a certificate for senior counsel has been given by the judge, the instruction fee allowed on taxation as between party and party shall be increased by one-half and other charges shall be doubled where requisite, the allowance for attendances of senior counsel in court conducting or leading the cause being on the higher scale.

(iv) (not relevant)

(v) ( not relevant)

18. On what is chargeable between Advocate and Client, Part B, of Schedule 6, provides as follows :-

As between advocate and client the minimum fee shall be—
(a) the fees prescribed in A above, increased by 50%; or
(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

19. It will therefore be noted from the above, that what the advocate is entitled to, in respect of instruction fees, is what is considered to be the party to party instruction fees, then increased by 50%. In our instance, the court held that instruction fees could not be ascertainable, and thus she used what she considered to be her discretion under paragraph 1 (i) above.

20. Schedule 6 above, does prescribe how costs should be assessed 'where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties'. The said schedule does not however explicitly prescribe what should be done, where the value of the subject matter is not in the pleadings, judgment or settlement. You could indeed have litigation where the value of the subject matter is not given in the pleadings, judgment or settlement. A common example is in land cases, where say, the plaintiff files suit to cancel the defendant's title claiming that the defendant acquired the title through fraud but the title rightfully belongs to the plaintiff. In such a case, all that may be given in the pleadings is the registration particulars of the said land and no more. Assuming the plaintiff in such a case succeeds, and the court orders the defendant's title to be cancelled, and in place, the plaintiff to be registered as proprietor, what would the plaintiff be entitled to as costs in respect of instruction fees since no actual value may be given in such a judgment ?

21. At the end of the day, costs will need to be pegged on the value of the subject matter, and my own view of the matter, is that the court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, or refer to other documents provided in the course of the case, and which may point at the value of the subject matter. Such documents may include the sale agreement, valuation report, or the consideration noted in the transfer instrument or title. Indeed, Rule 13 of the Advocates' Remuneration Order does allow the court to even call for evidence for purposes of determining a dispute before it. The said provision of the law is drawn as follows :-

13                      A.                      Powers                      of                      taxing                      officer

*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.*

22. It is thus a fallacy to suppose that the court can look at nothing else other than the pleadings, or judgment, or settlement, so as to determine the value of the subject matter. If the court can call for witnesses to determine the matter at hand, a fortiori, the court can certainly refer to documents presented before the court, so as to determine the value of the subject matter, which will then lead to a decision on instruction fees.

23. In the case before hand, the plaintiff did actually give a value of the subject matter as Kshs. 5.3 Million, as at the year 1979. This is the amount that the plaintiff stated it paid as consideration for the acquisition of the land. The suit was filed in the year 2012, and it cannot be that the same land was valued at Kshs. 5.3 Million, more than 30 years later. But there were documents tendered in the file, which pointed at what the value of the subject matter could be. One of these documents was a memorandum of transfer to the respondent, which was annexed by the plaintiff to its list of documents, alongside an extract of the title. These two documents showed that the property in dispute was transferred to the respondent in the year 2003, for the sum of Kshs. 63,000,000/=. The property must have appreciated thereafter, but the applicant was prepared to peg his bill of costs at this sum of Kshs. 63,000,000/=.

24. On my part, I see no reason why the taxing officer did not consider this sum of Kshs. 63,000,000/= as being relevant in the taxation of the applicant's bill of costs. This amount was there in the documents presented in the case, and as I have explained above, nothing barred the court from making reference to such documents for determining the value of the subject matter for purposes of ascertaining what was payable as instruction fees. There was therefore no need to fall back on discretion, and even if the court was falling back on its discretion, this value of the subject matter was still going to be of considerable relevance. I am therefore persuaded that the taxing officer fell into error, in not holding that the value of the subject matter was ascertainable, and in not taking the value of Kshs. 63,000,000/= presented by the applicant, as being the basis for determining the instruction fee payable.

25. I have already held that there was an error by the taxing officer. I have three options, I can remit the bill back for taxation to the same taxing officer, or remit it to another taxing officer, or tax the bill myself. In my view, the most convenient option to take is the last option, as it is clear that it will save judicial time, and also bring closure to this matter. I therefore proceed to tax the instruction fees as follows :-

26. The value of the subject matter is certainly more than Kshs. 63,000,000/= but the applicant is ready to take this value as a basis for taxing instruction fees. Having taken that option, I will tax instruction fees based on the figure of Kshs. 63,000,000/= as the minimum value of the subject matter. The party and party costs on this value for defending a matter will be calculated following the formula laid down in Schedule 6 paragraph 1 (d), which is as follows :-

The fees for a value up to Kshs. 20,000,000/= is what would be paid for the value of Kshs. 1,000,000/= plus an additional 1.5% . The amount payable up to a value of Kshs. 1,000,000/= is Kshs. 75,000/=. and 1.75% on the amount of Kshs. 19,000,000/=. gives you Kshs. 332,500/=. Thus the party and party instruction fee payable upto Kshs. 20,000,000/= is Kshs. 407,500/= (being Kshs. 75,000/= add Kshs. 332,500/=). For the amount in excess of Kshs. 20,000,000/= the instruction fee payable is charged at 1.5%, and for our case, it will be Kshs. 63,000,000/= less Kshs. 20,000,000/= then multiply what you get by 1.5%. What you will get after removing Kshs. 20,000,000/= from Kshs. 63,000,000/= is Kshs. 43,000,000/=. If you multiply by 1.5% you get Kshs. 645,000/=. You need to add this Kshs. 645,000/= to the earlier amount of Kshs. 407,500/= and once you do this, you will get Kshs. 1,052,500/=. You need to remember that this is party and party instruction fees, and to get what is payable to the advocate, you add 50% (as prescribed in part B of Schedule 6) which will give you Kshs. 1,578,750/=.

27. Strictly speaking, the applicant is entitled to the sum of Kshs. 1,578,750. However, in his bill, the applicant asked for the sum of Kshs. 1,007,000/=. It is this sum of Kshs. 1,578,750/= which ought to be the instruction fee payable to the applicant by the respondent. The Advocates' Remuneration Order however bars the alteration of bills once lodged. Rule 71 provides as follows :-

*Bills not to be altered after being lodged*

*71. No addition or alteration shall be made in a bill of costs by the party submitting the same after the bill has been lodged for taxation, except by consent of the parties, or by permission or direction of the Court or taxing officer.*

28. I can only therefore award what was billed in the bill of costs which is Kshs 1,007,000/=. If I award any more than is billed, that will be tantamount to an alteration of the Advocate/Client bill.

29. Following the above, I set aside the decision of the taxing officer which taxed instruction fee payable to the applicant at Kshs. 100,000/=, and substitute it, with the sum of Kshs. 1,007,000/=. VAT shall also be adjusted to reflect that the instruction fees is Kshs. 1,007,000/=.

30. The applicant will also have the costs of this reference.

31. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 26<sup>th</sup> day of June 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr.Musa Machage holding brief for Mr. Masore Nyang'au for applicant.

Mr. Bonface Masinde present for the respondent.

Court Assistants: Nelima Janepher/Patrick Kemboi

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**