



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 12 OF 2017

CONSOLIDATED WITH ELC MISC. APPL. NO. 11 OF 2017

ONINDO ONINDO & ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

GATATHA FARMERS CO. LTD.....1ST RESPONDENT

KAITET TEA ESTATES [1977] LTD.....2ND RESPONDENT

RULING

1. The application dated 2/11/2018 and filed in court on the same date has been brought by the applicant seeking the following orders:

(1) That the costs allowed by the Deputy Registrar on taxation of the said Advocates' Bill of Costs in Kitale ELC Misc. Civil Application No. 12 of 2017 between Onindo Onindo & Associates Advocates and Gatatha Farmers Co. Limited and Kaitet Tea Estate [1977] Limited be reviewed and enhanced to Kshs.3,745,141 and or struck out and or remitted with appropriate directions to another Taxing Officer as the court may deem fit for consideration.

(2) That the costs of this application be in the course.

2. The application is premised on 8 grounds set out in the Chamber Summons and is supported by a sworn affidavit, also dated 2/11/2018. It is brought under the *Advocates Remuneration Order, Section 3A and 63 of the Civil Procedure Act, the Constitution of Kenya*.

3. Similar application was made in **ELC Misc. No. 11 of 2017** save that the applicant seeks to have costs allowed by the Taxing officer be reviewed and enhanced to a tune of **Kshs. 18,824,663** and or struck out and or remitted with appropriate directions to another Taxing officer as the court may deem fit for consideration. If not for the sums, the applications and the affidavits in support are word for word the same hence it was necessary that the same be declared as consolidated and that this ruling shall apply to both files. The two application are hereby consolidated.

4. The grounds upon which the applications are made are that the said Bills of Costs was taxed without consideration to the items in the Bills themselves; that the purported taxation is a travesty of justice in that the taxation goes against the agreed remuneration arrangement between the advocates and their clients in the matter instructed; the Bills were taxed without due adherence to the law and record of the case; that the taxation was never tested as against the guiding provisions of the Advocates Remuneration Order; that the taxation was never taken as strictly against the record of the matter for which it was taxed; that the value of the subject matter was never considered in the taxation; that the taxation is well below the value of the subject matter for which the pleadings were taken; that the pleadings of the main suit are before the court and the same must be considered in the taxation especially in so far as the value of the subject matter is concerned; that all the items constituting the Bills of Costs have been assigned amounts on scale to the provisions of the Advocates Remuneration Order; that Item No.1 was taxed at **Kshs. 300,000/=** contrary to **Kshs. 3,75,141/=** and **Kshs. 300,000 /=** contrary to **Kshs. 18,734,618 in ELC Misc. App. No. 11 of 2017** and any other reason that the objectors reserved to raise at the hearing of the application.

5. The applicant has sworn an affidavit dated 2/11/2018 in support of the application.

6. The 1st respondent opposes the application in its grounds of opposition filed on 15/11/2018. It contends that the application herein offends the provisions of **paragraph 11** of the Advocates (Remuneration) Order, it is incurably defective and should be struck out; that the application in as far as it purports to be brought under the provisions of the Civil Procedure Act and the Constitution of Kenya is misconceived; that it is an abuse of court process and should be struck out; that the taxing officer in arriving at her decision in this matter considered the pleadings and judgement herein; that it is clear from the said pleadings and judgment that the subject matter was not all the land owned by the 1st respondent but rather than the portion trespassed on by the plaintiff; that the value of the subject matter cannot therefore be close to Ninety Million Kenya Shillings and the said allegation is not supported either by the pleadings or judgment in **Kitale**

ELC No. 36 of 2013 ; that with respect to **ELC Misc. 11 of 2017**, the value of the subject matter cannot therefore be close to a billion shillings and that the said allegation is not supported either by pleadings or judgment in **Kitale ELC No. 57 of 2011** and that the taxing officer in taxing the Bills of Costs considered the subject matter as disclosed in the pleading and judgment and arrived at a fair award which this court should uphold.

7. Following their respective arguments as above, the parties filed their submissions which I have considered. In my view the issues that arise from the current reference are as follows:

(a) Should the court intervene on the ground that the taxation goes against the agreed remuneration arrangement between the advocates and their clients?

(b) Should the taxation be guided by the law as it is today or as it was at the time of the taking of instructions by counsel?

(c) Was the Bills taxed without consideration of the record in respect of which the matter was taxed?

8. Regarding the first issue this court notes that the insinuation that there was an arrangement between the advocates and their clients regarding remuneration is not borne out by the evidence in the affidavit either in support of the applications dated 30/8/2017 seeking that the Bills be taxed or in the one supporting the reference. For that reason that ground should fail.

9. On the second issue hereinabove the practice has been that the items in the Bills of Costs are taxed in accordance with the provisions in the remuneration order current at the time of the taking of that action charged for. The applicant has not provided this court with any authority for departing from that practice. For that reason that ground is rejected.

10. Regarding the third issue this court must consider both the dispute regarding the instruction fee and that relating to the individual items rendered subject of the taxation.

11. The first issue is whether the instruction fee should be based on the value of the land parcel owned by the respondent as a whole or on the value of the portion under threat of encroachment by the plaintiff in the main suit.

12. The plaintiff in **Kitale ELC No. 36 of 2013** claimed 38 acres while the entire land parcel was 300 acres. This is reflected in the respondent's submissions on the Bill of Costs filed on 20/11/2017 and the originating summons and the agreement dated 5/8/2011 annexed to the Bill of costs. The affidavit in support of the reference also admits that the entire land in LR 6137 comprised of 300 acres in **ELC Misc. Appl. No. 12 of 2017**.

13. The taxing master took the **38 acres** in **ELC 36 of 2013 (OS)** as the basis of the computation of the instructions fee and this aggrieved the applicant. She stated as follows:

"I have liked (sic) at the pleadings on record and more so the notice of motion dated 26/3/2013 and the supporting affidavit of Peter M.N. Simatwa the plaintiff therein at paragraph 4 and of the said affidavit (sic). The plaintiff /applicant depones. (sic)

"That I personally was allocated 38 acres by my late father during his lifetime which I have been occupying and cultivating for my family's benefit ever since I became of age and got married.

At paragraph 7 the plaintiff depones,

"That the said 38 acres are my only source of livelihood."

It is therefore clear that the subject matter in contention is 38 acres out of the entire LR No 6137."

14. Regarding this ground, I must make reference to the case of **First American Bank of Kenya vs. Shah and others (2002) EA 64** at page 69, the court held that:-

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle (see Steel Construction Petroleum, Engineering (EA) Ltd -vs- Uganda sugar factory (1970) EA 141 (Emphasis added)).

15. The same principle was voiced by Ojwang J (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others eKLR**.

16. No other ground save the value of the entire parcels of land owned by the 1st respondent is relied on in claiming a higher fee. This is contrary to earlier observations of the court in other decisions that other justification must be tabled before court.

17. In the case of **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 Others** (supra), **Ojwang, J**, expressed himself as follows:

“A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated - apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

18. For the above stated reasons I can not subscribe to the applicant’s view that the value of the entire property ought to have been relied on for the reason that not all the land was under threat or that there was any other error on the part of the taxing master relating to assessment of the value of the tasks executed by counsel in the matter.

19. Having detected no evidence of error of principle or manifestation of excessiveness or otherwise of the assessment as to justify my intervention, I find that the reasoning of the Taxing master above was correct and there is no merit in the complaint by the applicant.

20. I have dealt with item number one, the instruction fee in both Bills because it was singled out by the applicant and specifically addressed.

21. However, I must admit difficulty in identifying which of the items were not, in the applicant’s view taxed properly as the applicant has not segregated any for the focus of this court in his supporting affidavit.

22. I would have expected specific items to be singled out in that affidavit to enable the court handle this reference. However, the affidavit of the applicant states that

“...that I wish to state that the bill as drawn is to scale but it looks like the scales of taxation were never considered in arriving at the amount of Ksh 380,000 as shown in the ruling upon taxation...”

23. **Ground 6** in the application reads as follows:

“All the items constituting the bill of costs have been assigned amounts on scale to the provisions of the Advocates Remuneration Order.”

24. This court finds those statements to be rather generalized and quite symbolic of confusion and which do not invoke the court’s power to examine any of the items taxed in the bill.

25. Nevertheless, I observe that regarding the issue as to whether the other lesser items in the bills of costs were considered strictly against the record of the matter for which they were taxed, it is apparent on the face of the rulings made on **1/8/2018** that the taxing master appears to have examined each and every item in the Bills. The applicant’s main question as to whether the taxing master addressed each and every item in relation to the record is therefore answered. She did.

26. For the reasons set out above I find that the two consolidated references before me have no merit and I dismiss them with costs to the respondents.

Dated, signed and delivered at Kitale on this 18th day of July, 2019.

MWANGI NJOROGE

JUDGE

18/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

18/7/2019