



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 143 OF 2013

FRANCIS K. C HEPKURUIPLAINTIFF

VERSUS

PATRICK NOLAN NEYLAN1ST DEFENDANT

KEVIN IAN NOLAN NEYLAN.....2ND DEFENDANT

JOSEPH KAMIRA WANJAU.....3RD DEFENDANT

RULING

(Reference arising out of a decision of the taxing officer; plaintiff having filed suit and claiming to have purchased land in the year 1993 at Kshs. 250,000/=; suit filed in 2012 quoting the value of the subject matter at Kshs. 20,000,000/=; applicant losing the case; applicant now arguing that what ought to have been considered in taxation was the purchase price of Kshs.250,000/= and not the value of the subject matter at the time of filing suit; such argument flawed for what is prescribed is the value of the subject matter at the time the suit is filed; taxation reviewed on the value of the subject matter)

1.This is a reference filed pursuant to the provisions of Rule 11 of the Advocates Remuneration Order. By way of background, this suit was commenced through a plaint filed by the applicant on 23 July 2012. In his plaint, the applicant contended that on 27 May 1993, the 1st and 2nd defendants sold to the applicant and one M.K. Kuguru, the land parcel LR No.4730/144 at a consideration of Kshs.500,000/=, where each purchaser was to contribute Kshs.250,000/=. This land was later subdivided into two portions identified as Plots No. 169 and 170, with the plaintiff claiming that he was designated to get the plot No. 170 with Mr. Kuguru getting the plot No. 169. He pleaded that the value of the land at the time the suit was filed was over Kshs.20 Million. He averred that despite paying the purchase price the 1st and 2nd defendants transferred the Plot No. 170 to the 3rd defendant who became the registered proprietor. In the suit, he wanted the title of the 3rd defendant cancelled, specific performance to compel the 1st and 2nd defendants transfer the title to him, mesne profits from 1993, or in the alternative the current market value of the Plot No. 170. At the time of filing suit, the applicant was represented by the law firm of M/s Onyinkwa & Company Advocates.

2. The 1st and 2nd defendants appointed M/s Mukite Musangi & Company Advocates to act on their behalf whereas the 3rd defendant instructed M/s Karanja Mbugua & Company Advocates to act on his behalf. In their joint statement of defence, the 1st and 2nd defendants admitted that in the year 1992, the applicant and Mr. Kuguru wished to purchase LR No. 4730/144 measuring 2 Ha at Kshs.1,000,000/=. There was an understanding that each purchaser was to pay 50% of the purchase price but that they only received payment from Mr. Kuguru. The land was subdivided into two equal portions and they transferred to Mr. Kuguru one portion. They contended that the applicant failed to make payment for his portion and they thus sold it to the 3rd defendant.

3. In his defence, the 3rd defendant admitted that the suit property is worth more than Kshs.20 million but denied that it was fraudulently transferred to him. He pleaded that he purchased the suit land in December 1997 and the same was transferred to him in April 2000. He further pleaded that the suit is time barred.

4. In my judgment delivered on 24 January 2018, I did find that the 1st and 2nd defendants had offered to the applicant and Mr. Kuguru the land parcel LR No. 4730/144 measuring 5 acres for the consideration of Kshs.500,000/=. I found that Mr. Kuguru paid his share of Kshs.250,000/= but that the applicant failed to pay his share. The only evidence that I found was payment of Kshs. 50,000/= and I found no fraud in the sale to the 3rd defendant. I proceeded to dismiss the case of the applicant with costs.

5. Following the judgment, the defendants presented their bills of costs for taxation. In respect of instruction fees, the 1st & 2nd defendants billed Kshs.1,200,000/= as instruction fees but did not disclose the basis for this amount. On the part of the 3rd defendant, the sum of

Kshs.1,380,000/= was billed, the basis being that the suit property was worth Kshs.20,000,000/=.

6. In resisting these figures, the applicant's counsel argued that it is the buying price of Kshs. 500,000/= which should be used to compute instruction fees and he submitted that the amount to be charged should thus be Kshs.49,000/= following Schedule VI 1 (b) of the Advocates Remuneration Order, 2006.

7. The learned taxing officer taxed the instruction fees at Kshs.600,000/=. In arriving at this figure, the taxing officer reasoned that there was no valuation report to give the current value of the land. She however dismissed the applicant's argument that the basis of taxation should be Kshs.500,000/= , reasoning that the land must have appreciated in value from the year 1993 and she also looked at the work done and believed that counsel must have taken time to prepare and complete this suit.

8. The applicant is aggrieved by this decision hence this reference. To argue this reference, he dismissed his previous counsel and appointed new counsel in Mr. Nathan Tororei. He contended that the amount of Kshs. 600,000/= was excessive. He reasoned that the value of the subject matter was not adjudicated upon and thus the taxing officer was required to estimate the basic instruction fee.

9. Ms. Nasimiyu, learned counsel who appeared in the matter for the 1st and 2nd defendants, swore a replying affidavit, where she averred that the amount of Kshs. 600,000/= was commensurate with the services rendered considering that the subject matter was valued at Kshs. 20,000,000/=. I did not see any replying affidavit from the 3rd defendant or his counsel.

10. I invited counsel file written to submissions. Mr. Tororei and Ms. Nasimiyu did file their submissions. Mr. Karanja Mbugua, for the 3rd defendant, did not file submissions but stated that he relied on the submissions filed by Ms. Nasimiyu. In his submissions, Mr. Tororei correctly pointed out that this court would not ordinarily interfere with the discretion of the taxing officer unless there was an error in principle. He believed that in this case, there was an error, as the value of the subject matter was stated to be Kshs.500,000/=. He maintained that instruction fees needed to be Kshs.49,000/=. He argued that the taxing officer applied an irrelevant factor in considering issues such as the amount of time and effort put in by counsel.

11. Ms. Nasimiyu in her submissions averred that the plaint set out the subject matter's value at over Kshs. 20,000,000/= at the time the suit was filed and did not see what error the taxing master made.

12. I have considered the matter. The applicant's main contention is that the taxing officer ought to have taxed instruction fees on the sum of Kshs.500,000/= which he avers was the value of the subject matter. I do not agree.

13. In his plaint, he did mention that the land was purchased at Kshs.500,000/= with himself and his partner contributing Kshs.250,000/= each. But this cannot be taken to be the value of the subject matter at the time of filing suit. This is merely what was claimed to be the purchase price in the year 1993. What matters in a suit such as this, is not the purchase price at the time of sale, but the value of the subject matter at the time of filing suit. If this was not the case, then people would be fishing out sale agreements made in the colonial days, where money was not of the value that it is now, and argue that the consideration therein should be considered as the value for purposes of taxation. That would be a wrong approach, for what is critical is the value of the subject matter at the time of filing suit. Indeed, this is what the Advocates Remuneration Order provides. The applicable schedule in our case is Schedule 6 1 (b) which applies in cases where there has been a defence. It provides as follows :-

(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.	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%.

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

14. In our case, there was never any difficulty in determining the value of the subject matter, because this is in the plaint itself at paragraph 9, where the applicant averred that the current value of the property is over Kshs.20 Million. This value was agreed to by the 3rd defendant in his defence. If the applicant thought that he was mistaken on the value, he could have asked for a valuation to be done, before the matter

proceeded on taxation. If in his plaint he wished that the subject matter be considered at Kshs.20 Million, and he in fact had an alternative prayer for compensation at the current value of the property, he cannot now, because he has to pay costs, claim that the value is much less. If I am to ask the plaintiff, would he really have been satisfied if judgment had been entered in his favour, and in lieu of the property, it was ordered that he gets paid Kshs.500,000/= because that was the purchase price ? I am sure that if this was done, he would have cried foul. I am certain that he would have insisted that he deserves Kshs.20 Million as the value of the suit property. He cannot now cry foul when the amount that he quoted as reasonable value, i.e Kshs.20 Million, is now used against him.

15. What the taxing officer ought to have done was use this value, i.e Kshs.20 Million, as the value of the subject matter because it was in the pleadings. If this value was used then the correct amount as instruction fees to the defendants after my calculation, ought to have been Kshs.520,000/= being, fees as for Kshs. 1,000,000/= (which is Kshs.120,000/=) add 2%, and 2% of Kshs.20,000,000/= is Kshs.400,000/=. The taxing master thus erred to award Kshs.600,000/= as instruction fees.

16. Following this position, I will tax off Kshs.80,000/= from instruction fees for both the 1st and 2nd defendant, and the 3rd defendant. The instruction fees will read Kshs.520,000/=. This may of course affect other costs such as getting up fees, which may be adjusted accordingly.

17. I make no orders as to the costs of this reference.

18. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Kabalika holding brief for Mr. Tororey for the applicant/plaintiff.

Mr. Opondo holding brief for Ms. Nasimiyu for 1st and 2nd respondents.

Ms. Karuga present for 3rd respondent.

Court Assistant: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU