REPUBLIC OF KENYA

IN THE ENVIRONEMNT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION NO. 8 OF 2018

GEOFFREY NJUGUNA MUNGA……..……..……APPLICANT

VERSUS

GEOFFREY KARONGO & 9 OTHERS…….RESPONDENTS

MATTER ARISING IN

(The Ruling of Hon. V. Kachuodho (DR) delivered on 22nd March 2018 at Thika Law Courts)

BETWEEN

GEOFFREY NJUGUNA MUNGA……..…….APPLICANT

VERSUS

GEOFFREY KARONGO & 9 OTHERS……..…….RESPONDENTS

RULING

The matter for determination is the Reference dated **20th April 2018** brought by the Applicant herein seeking for orders that;

> ***1. The decision of the Taxing Officer delivered on 22nd March 2018 on the bill of costs dated 23rd October 2017 on item 1 be set aside.***
>
> ***2. This Honourabe Court be pleased to tax item 1 as drawn in the Applicant's written submission to the bill of costs dated 23rd October 2017.***
>
> ***3. In the alternative of prayer 2 above, the party and party bill of costs dated 23rd October 2017 be remitted for taxation afresh on item 1 with appropriate directions.***
>
> ***4. The costs of this Application be provided for.***

The Application is based on the grounds that the taxing officer erred in law in applying the wrong principles in assessing the instructions fees hence arrived at the wrong sum. That further the taxing officer erred in law in failing to exercise her discretion judiciously by taxing the bill at an inordinately high sum against comparable awards in similar matters and as such her decision is not consistent with awards is similar matters which amount to an error in principle. Further that the amount awarded by the taxing officer is not commensurate with the work undertaken by the Advocate and thus amounting to improper exercise of the taxing officer's discretion. The taxing officers having erred in principle in arriving at her decision, this Honourable Court has jurisdiction to interfere with her decision rendered on **22nd March 2018** in the circumstances.

In his **Supporting Affidavit**, **Mutundu W. Chege,** the Applicant's Advocate averred that the party and party bill of costs dated **23rd October 2017,** arose from the Applicant's Application seeking to appeal out of time, which Application was dismissed with costs to the Respondents. That while the Respondent's Advocate drew instructions fees at **Kshs.75,000/=** the Applicant submitted a figure of **Kshs.20,000/=** being a simple Application that was heard and determined within a short period of time. He averred that the taxing officer delivered a ruling on **22nd March 2018** taxing the instruction fee at **Kshs.75,000/=** without considering the submissions of the Applicant and in the said ruling erred in law in applying the wrong principles.

The Application is opposed and the Respondents filed **Grounds of Opposition** dated **4th July 2018** and averred that the Deputy Registrar correctly and judiciously applied the law in relation to the instruction fees. He further averred that the Applicant has not demonstrated how the Deputy Registrar erred. It was further averred that the Application was initially filed in Nairobi and transferred to Thika necessitating additional work in terms of attendance and travel. Further that the Application was instituted as a standalone proceeding akin to a suit and as such cannot be taken to be an interlocutory proceeding. It was their contention that the instruction fees are provided in law under **Schedule 6** and as such a statutory provision cannot be taken as inordinately too high. They further averred that the Deputy Registrar duly considered the submissions of the Applicant and agreed on them on some aspect and disagreed on the issue of instruction note and therefore the Applicant is dishonest to claim that their submissions were not considered.

They therefore contended that the Applicant has failed to demonstrate sufficient cause to warrant the Court interfering with the Ruling and finds of the Deputy Registrar.

On the **29th October 2018,** the Court directed parties to file written submissions and in compliance with the said directive, the parties filed submissions to which the Court has now carefully read and considered.

Having now carefully read and considered the Application and

submissions of the parties this Court therefore finds that the issue for determination is **whether the Taxing Officer used the wrong principle in arriving at the taxed costs**.

It is apparent from the submissions of the parties that the bone of contention is whether or not the proceedings filed by the Applicant to file an Appeal out of time was an Application or a standalone suit. This Court must therefore be able to distinguish between a suit and an Application. In this regard this Court will be able to find whether or not the taxing master used the correct principles in taxing the bill of costs and therefore the instruction fees. This is so as this Court can only interfere with the discretion of the taxing master if is shown that he or she did not exercise her discretion judiciously and as such used the wrong principle in arriving at her decision. See the case of **Republic…Vs…Kenyatta University & Another, Ex parte Wellington Kihato Wamburu [2018] eKLR,** wherein the Court held that:-

> ***"The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court[18] as follows:-***
>
> ***"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion***
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> ***that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."***

Having the above in mind, it is therefore this Court's opinion that to be able to hold and find whether the taxing master used the right principles in taxing there should be a finding as to whether or not the Application to file the appeal out of time is an Application or a standalone suit.

The **Blacks Law Dictionary** defines a '**suit'** as a;

> ***"A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues the remedy that the law affords for the redress of an injury or the enforcement of a right, whether at law or in Equity***.

The **Blacks Law Dictionary** also defines to '**Apply'** as;

> ***"To make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion.***

From the above definition of a suit and to Apply to which the word Application would stem from, It is this Court's opinion that in a suit the Party would be pursuing a remedy or the enforcement of a right while in an Application the party would be pursuing a favour. In the Application brought by the Applicant herein, being an Application to file an appeal out of time, it is this Court's opinion that the Applicant herein was seeking for favour and not pursuing a remedy or an enforcement of a right. This is so as the decision whether or not to grant the Application was within the Court's discretion. Further from the Jurat of the said proceedings it is clearly indicated as a **"Miscalleneous Application"** .This Court holds and finds that the bill of costs to be taxed was with regards to an Application

and not a suit.

It is clear that the Deputy Registrar while taxing the Bill of costs considered the Miscellaneous Application as a suit as opposed to considering it as an Application. While this Court will disagree with the Applicant that its submissions were not considered as the Taxing master in her ruling clearly indicated that having considered the submissions by both parties, this Court holds and finds that in coming to a conclusion and taxing the bill of costs, the taxing master used the wrong principle as such regarded the Application as a suit. This would

therefore warrant this Court to interfere with the ruling of the taxing master as it is shown that she did not use her discretion judiciously. See the case of **Republic…Vs…Kenyatta University & Another, Ex parte Wellington Kihato Wamburu (supra)** where the Court held that;

> ***"In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles. Restating these established principles of taxation of costs, the Ugandan Supreme court stated as follows:-[25]***
>
> > ***"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. (emphasis mine)***
> >
> > ***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."***

This Court has already held and found that the taxing officer used the wrong principle in arriving at her decision as she considered the proceedings as a suit as opposed to an Application this therefore led to the axing of the bill of cost at an inordinately high granting the instructions fees at **Kshs.75,000/=.** With this regard this Court finds that there is need for the bill of costs to be remitted back to the taxing officer for taxation. See the case of **Republic…Vs…Ministry of Agriculture & 2 Others, Ex parte Muchiri W'njuguna & 6 Others(2006)eKLR;**

> ***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other…. The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And***
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> ***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, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment… 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……."***

Having now carefully read and considered the Application, the Affidavits of the parties and the annextures thereto together with the written submissions, the Court finds that the Reference dated **20th April 2018** by the Applicant is merited and the same is allowed and the Court

makes the following orders:

> *1) **The decision of the taxing officer to allow Kshs.75,000/= on Item 1 of the bill of costs dated 22nd March 2018 is hereby set aside.***
>
> *2) **The bill of costs dated 23rd October 2017 is hereby remitted for fresh taxation by the taxing officer who will be guided by the principles enumerated in this Judgment, and more particularly by the following principles:–***
>
> > *i. **The proceedings in question was an Application and not a stand alone suit.***
> >
> > *ii. **The nature of the Application, length of the trial and complexity of the matter should be taken into account.***

The Upshot of the above is that the Reference is merited and the same is allowed in terms of **prayer No.1 & 3** with costs to the Applicant.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***4th day of October, 2019***.

L. GACHERU

JUDGE

4/10/2019

In the presence of

No appearance for Applicant

Mr. Murgor holding brief for Mr. Muchiri for Respondents

Lucy - Court Assistant

Court – Ruling read in open.

L. GACHERU

JUDGE

4/10/2019