



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 17 OF 2017

KHATIB & COMPANY ADVOCATES.....APPLICANT

= VERSUS =

SWAHILI BEACH RESORT.....RESPONDENT

RULING

1. For determination is the Chamber summons application dated 19/9/2018 seeking for orders *inter alia*:

1) This Honourable Court be pleased to set aside and or vacate the decision and consequential orders of the Taxing Officer dated 24th August 2018 and the Bill of Costs be taxed afresh by a different Taxing Officer. In the alternative this Honourable Court do assess/tax the Bill of Costs.

2. The parties filed written submissions to argue the application. The Applicant argued that they wrote to the Deputy Registrar before filing the reference in compliance with paragraph 11 of the Advocates Remuneration Order. Secondly that their application is merited because the amount awarded under item 1 & 2 of the bill was disproportionate and inordinately low because:

- a) The case was of great importance to the Respondent considering that it was challenging their land title.*
- b) The Respondent had a lot of interest on the matter.*
- c) The value of the subject matter is over 500,000,000/= assessed from the pleadings.*
- d) Importance and complexity of the matter as well as the labour expended and responsibility undertaken.*

3. The Respondent on his part submitted that the Applicant did not comply with the mandatory provisions of paragraph 11 of Advocates Remuneration Order because he filed the reference before receiving a response from the Deputy Registrar. On the merit of the application, the Respondent cited the case of ***Shella Sheikh Vs Ms Shella Sheik & Associates Pentecostal Assemblies of Canada (2016) eKLR*** where the Court dealt with instances when a court can interfere with the decision of the taxing master.

4. The Respondent states that the Deputy Registrar correctly held that the Applicant was not entitled to getting up fee as the matter was struck out at the preliminary stage. He relied on the case of ***John Kimundu t/a Lawrence Mwangi & Co. Advocates (2017) eKLR*** where it was held thus;

“The taxing officer ought not to have allowed the getting up fee as of Kshs.45,951/= as the suit was struck out at preliminary stages where no issues were framed and no pre-trial directions were taken”.

5. On instruction fees – the Respondent submitted that there was no evidence on how the Applicant arrived at the value of the suit property to be Kshs.500,000,000. Further that it was not ascertained that the suit property actually belonged to the Respondent. The Respondent contends that the application lacks merit and should be dismissed with costs to him.

6. To begin with, I will analyse whether or not the preliminary objection raised by the Respondent is merited. The Applicant’s annexure **MFK-1** is a letter dated 31/8/2018 addressed to the taxing master. The letter bore court receipt stamp of 3/9/2018. The Applicant submitted that when he did not get a response within the stipulated period under paragraph 11, he filed this reference. The contention by the Respondent that the Reference ought not to have been filed unless the Deputy Registrar responded to this letter is unfounded in the Rules. The Applicant cannot in law compel the Deputy Registrar to reply to the letter therefore to this extent, I find the preliminary objection dated

4/12/2018 to be without merit and dismiss it.

7. In relation to the merit of the application, the Applicant contends that the Deputy Registrar erred when he failed to award him getting up fee. From the parent file, the Applicant moved the court vide a notice of motion dated 13/6/2012 wherein he sought for orders that the suit against the 14th defendant be struck out. Mukunya J. (R.I.P) on 23rd August 2013 agreed with him that there was nothing to connect the 14th defendant to the suit and struck out the plaintiff's suit as against the 14th defendant with costs.

8. The contested bill of costs relate to the party and party costs awarded to the 14th defendant. It is indeed clear from the record that no preparation for trial was undertaken to justify the Applicant to charge getting up fee since the suit was struck out even before pre-trial directions was given. For this reason I cannot fault the taxing master in not awarding him any sum under this item.

9. The second reference was on how much was awarded as instruction fee. The Deputy Registrar found in his ruling that the value of the suit property could not be ascertained from the pleadings, the judgement or settlement therefore the Court was entitled to exercise its discretion by taking into account the nature and importance of the matter; the interest of the parties and the general conduct.

10. Indeed a reading of the plaint filed on 6th October, 2010, it was not possible to ascertain the value of the property. The plaintiff/respondent sought declaratory orders for nullification and cancellation of the titles Kwale/Diani Beach/155, 157 and 346 in the defendant's name. It also prayed for general damages and costs/incidentals to the suit. The Applicant denied the claim vide a statement of defence filed on 18th November 2010 stating that they were not in possession of any fake title deed as alleged. He further pleaded that the plaint as drawn does not disclose any reasonable cause of action and ought to be struck out.

11. Since the suit against the 14th defendant was struck out before parties complied with order 11 of the Civil Procedure Rules, there was nothing to guide the taxing master in gauging the value of the subject matter other than the plaint and the defence. No valuation report was attached to the amended advocate-client bill of costs to support the Applicant's submission that the suit properties were valued at Kshs.500 million. Consequently the taxing master was within the law to tax the instructions fees under the paragraph on other matters where no value is provided for.

12. In light of the foregoing, it is my finding that the amended bill of costs dated 5/5/2017 was taxed to the scale provided under the Advocates Remuneration Order. I find no basis to interfere with the decision of the taxing master. The result is my finding that the Chamber Summons dated 19/9/2018 is without merit and dismiss it with costs to the Respondent.

Dated and signed at Busia this 12th day of November, 2019.

A.OMOLLO

JUDGE

Delivered at Mombasa this 25th Day of November, 2019

C. YANO

JUDGE