



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**ELC CASE NO. 192 OF 2014**  
**IN THE MATTER OF ADVOCATES ACT,**  
**CAP 16 OF THE LAWS OF KENYA**

**DANIEL GITHIORA GATHUA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KAGAA FARMERS COOPERATIVE SOCIETY LTD ..2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOE KARANJA NJOROGE.....1<sup>ST</sup> DEF/RESPONDENT**

**THE MURANGA DISTRICT LANDS REGISTRAR .....2<sup>ND</sup> DEF/RESPONDENT**

**THE MURANGA DISTRICT LANDS SURVEYOR.....3<sup>RD</sup> DEF/RESPONDENT**

**THE NATIONAL LAND COMMISSION OF KENYA.....4<sup>TH</sup> DEF/RESPONDENT**

**RULING**

1. The notice of motion dated 27<sup>th</sup> July, 2017 seeks review or setting aside of the ruling on the applicant's party and party bill of costs taxed on 15<sup>th</sup> March, 2017.
2. The application is premised on the grounds that the applicant's advocate is dissatisfied with the taxation of the deputy registrar particularly item 1 of the applicant's bill of costs dated 15<sup>th</sup> March, 2017.
3. It is contended that the learned taxing master failed to consider the value of the subject matter being one of the most important considerations in establishing instruction fees due to the applicant in accordance with schedule V Part 1 of the Advocates (Remuneration) Order.
4. The application is supported by the affidavit of Gaylene Makena Mwirichia, Advocate, in which the grounds on the face of the application are reiterated.
5. Besides reiterating the grounds on the face of the application, the deponent of the supporting affidavit points out that they filed a notice of objection of the taxation which was not objected to.
6. Pointing out that the taxing master did not assign any value to the subject matter or arrive at any

estimate of the value of the subject matter, the deponent faults the taxing master for having failed to assign the value of the subject matter and for having deemed the issue of instruction fee to fall under other matter and applying paragraph 1(b) of the charging schedule.

7. Based on the estimated value of the suit property which she estimates to be Kshs. 208 million, the applicant's counsel believes that determination of the instruction fee on the basis of paragraph 1(b) of the Advocates Remuneration Order was erroneous.

8. The applicant also wonders why the taxing officer did not tax the bill as drawn yet it was not opposed.

### **Analysis and determination**

9. As pointed out herein above, the applicant took issue with the taxation of plaintiff/applicant's party and party bill of costs dated 15<sup>th</sup> March, 2015 particularly, item 1 thereof (receiving instructions to defend the action by the plaintiff for declaration of ownership of four blocks of titles as well as permanent injunction against dealings with the parcel all of the approximate value of Kshs.140 million).

10. In respect of that item, the applicant had sought for Kshs. 3,000,000/= based on the value of the subject matter.

11. Concerning that item, the taxing master held that the value of the suit land was neither in issue nor ascertained. As a result, he determined that cause of action fell under the heading "other matters" of Schedule 6 of the Advocates (Remuneration) Order 2014 which provides as follows:

**"To sue or defend in any case not provided above, such sum as may be reasonable but not less than-**

**i. If undefended 45,000/=**

**ii. If defended 75,000/=."**

12. Based on the above order paragraph 1(b) thereof and the fact that the suit was determined preliminarily, the taxing officer awarded Kshs. 75,000/= in respect of that item before proceeding to tax 25% off on account of the matter having been determined preliminarily.

13. That decision was premised on paragraph 1(b) of schedule (vi) to the Advocates (Remuneration) Order which provides as follows:-

**"To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fee chargeable under item 1(b)."**

14. The amount awarded by the taxing master was in tandem with the submissions filed by the plaintiffs in opposition to the applicant's bill of costs.

15. The plaintiff had submitted that the amount of Kshs.3,000,000/= sought by the applicant was exaggerated, without any basis and meant to misguide the court.

16. According to the plaintiffs, because the value of the subject matter was not ascertainable, instruction fee ought to be taxed under other matters.

17. The plaintiff's further submitted that because the suit was determined in a summary manner, the amount awarded for instruction fee must be reduced by 25%.

18. Based on the reasons cited herein above, the taxing master agreed with the plaintiff's submissions.

19. The sole issue for determination is whether the taxing master erred by taxing off the applicant's bill on that item.

20. Concerning that question, it is noteworthy that the applicant admits that there was no material that was placed before the taxing master which could have helped her to determine the subject matter of the suit. In that regard, the issue to determine is whether the taxing master was supposed to base her decision on speculation or was duty bound to assist the applicant in determining the value of the subject matter?

21. In their bill of costs, the applicant contended that the subject matter of the suit was Kshs. 140 million, the burden of proving that fact lay with them. In that regard see **Section 107** of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:-

**“Whoever desires any court to give judgment as to any right or liability dependent on the existent of facts which he asserts must prove that those facts exist”.**

22. Having failed to prove that fact, the applicants cannot be heard to say that the taxing master should have based the instruction fee on their unproven value of the subject matter.

23. That aside, a question also arises as to whether the applicant proved that in the circumstances of their case, it is the value of the subject matter as opposed to the complexity of the matter that would have affected the award of the instruction fees.

24. Being of the view that the amount of instruction fees awardable turned on the complexity of the matter the applicants were retained to defend and the applicant having failed to prove that the matter they were called upon to defend was complex, I find and hold that the applicants have not made up a case for interference with the award of the taxing master as it was within the range allowed by the law. Consequently, I dismiss the reference with no orders as to costs.

**Dated, Signed and Delivered in open court at Nyeri this 23rd day of April, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff and 1<sup>st</sup> defendant

Mr. Nderitu for 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Court assistant - Esther