



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC. CASE NO. 481 OF 2014

MBIGI NJUGUNA & CO. ADVOCATES.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

RULING

Through the application dated 13/3/2015, the Respondent seeks stay of execution of the certificate of taxation dated 5/12/2014 as well as the setting aside of the taxation of the Applicant's bill of costs dated 22/4/2014. It also seeks to have the bill taxed afresh by this court or a different taxing officer. In this ruling the Applicant refers to Mbigi Njuguna & Company Advocates, the Applicant in the bill of costs; while the Respondent refers to the Kenya National Highways Authority.

The application is premised on the grounds that the sum of Kshs. 14,437,884 awarded by the taxing master is excessive and exaggerated, and that the taxing officer applied wrong principles in awarding the Applicant the full instruction fees despite the fact the Applicant opted to cease acting for the Respondent in **HCCC No. 616 of 2010**, which is still pending in court. The Respondent argues that the taxing officer exercised her discretion contrary to the principles of equity, justice and fairness in awarding the full instruction fees.

The reference is supported by the affidavit of the Respondent's Head of Legal and Regulatory Affairs, one Norah Odingo Kajwang'. She deposes that the Respondent instructed the Applicant to act for it in **ELC No. 616 of 2010 Harp Invesco Limited v. NSSF and 3 Others**. The Applicant filed an application to join the Respondent as a party to the proceedings and subsequently filed a defence and counter claim on behalf of the Respondent in the suit. On 6/11/2013, the Applicant filed an application to cease acting for the Respondent.

The Applicant filed its advocate-client bill of costs on 11/7/2014. It was taxed on 27/11/2014. The Respondent instructed another firm of advocates to take over conduct of the suit. The taxing officer delivered her ruling on taxation on 1/12/2014 and issued a certificate of taxation on 5/12/2014 awarding the Applicant costs in the sum of Kshs. 14,437,884. The Respondent sought the reasons for taxation. The taxing officer indicated that these were contained in her ruling delivered on 1/12/2014. The Respondent submits that the taxing officer applied wrong principles and erred in law in awarding the full instruction fees while failing to consider the extent of the actual work done by the Applicant pursuant to the Respondent's instructions.

In her ruling delivered on 1/12/2014, the taxing master noted that the Plaintiff's claim was for an injunction or in the alternative, the sum of Kshs. 650,000,000/= indicated in paragraph 9(a) of the Plaint. She proceeded to tax item 3 of the bill of costs based on this figure and awarded the sum of Kshs. 8,329,500/= for this item. The other items in the bill of costs were agreed upon. The Respondent is aggrieved by the sum awarded for item no.3 of the bill of costs.

The court has looked at the Amended Chamber Summons filed by the advocate on 19/3/2012 seeking to have the Respondent joined as the 4th Defendant to **ELC No. 616 of 2010**. In the application, it is stated that the Respondent is a public corporation mandated to control national roads, road reserves, roadside developments and implement policies in relation to national roads. The application urged that the Respondent was a necessary party since the suit land had been acquired for a road reserve and it was held and managed by the Respondent.

The court has also looked at the defence and counterclaim filed by the Applicant on behalf of the Respondent in that suit which was attached to the bill of costs. Paragraph 3 of the defence admits that 50 acres of land was excised from L.R. No. 11895 vide Gazette Notice No. 3577 of 2006. Paragraph 1 of the counterclaim averred that at the request of the Ministry of Roads, the 1st Defendant agreed to surrender 50 acres of land for Kshs. 41 million for the whole of L.R. No. 11895/24 on 1/3/2006. The Respondent herein sought to have that suit dismissed and a declaration made that it was the lawful owner of L.R. No. 11895/24. It also sought a permanent injunction to restrain the Plaintiff from interfering with this land or the developments on it.

The court has also looked at the advocate's Client Bill of Cost filed in court on 23/4/2014 item number 3 is couched as follows: -

“Instructions to enjoin the client in Nairobi Civil Case No. 612 and safeguard the clients interest concerning a 50-acre parcel of land

in Mlolongo near Nairobi in which the Plaintiff was claiming the land or Kshs. 650 million together with the Kshs. 35 million in special damages. The value of the land was in subsequent meetings claimed at Kshs. 18 to 25 million per acre raising the total claim to Kshs. 934 million. Copies of the pleadings and relevant correspondence are annexed in a bundle annexed hereto.”

It is not in dispute that a different firm of advocates took over conduct of the suit for the Respondent and that the suit is yet to be determined.

The taxing officer only considered the claim in the plaint and failed to take into consideration the fact that the Respondent herein was not sued as a party in that suit but only sought to join the suit to protect its interest.

The court has looked at the submissions filed by both parties. The Respondent relied on the case of **Moronge & Company Advocates v Kenya Airport Authority [2014] eKLR** in which the court stated that the advocate’s pay must be commensurate to his work otherwise it will be termed as unjust enrichment. The pay must be a reasonable compensation for professional work done. The court would interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances. In that case the court found that the sum awarded was manifestly excessive.

In the case of **Muriu Mungai & Co. Advocates v. New Kenya Cooperative Creameries [2010] eKLR** which the Applicant also relied on, where it was contended that the transaction was not completed, the court stated that had the taxing officer addressed her mind to the issue of the amount of work which was done, it would have led her to find out whether the amount of work done by the advocates was worth the amount of fees awarded. The other authority the Respondent relied was the case of **Akhtar Shahid Butt & Another v David Kinusu Sifuna t/a Sifuna & Co. Advocates [2009] eKLR** where the court held that the instruction fees awarded to the Respondent was manifestly excessive, unjust and completely out of proportion for the work carried out by them.

The Applicant submits that the law is settled and that a Judge ought not to interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs as it was held in the case of **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] KLR533**. The advocate argues that the taxing officer not only awarded the minimum amount without any enhancement, but also took a lower figure of the subject matter as the basis for the instruction fees.

The court has considered the submissions of counsels and finds that the taxing officer erred in principle in assessing the costs and the amount she awarded is excessive considering the work done by the advocates.

The court sets aside the taxation of the taxing officer of 1/12/2014 and directs that the bill of costs be taxed before another taxing officer other than L. M. Wachira.

Dated and delivered at Nairobi this 22nd day of May 2018.

K. BOR

JUDGE

In the presence of:-

Mr. Mbigi for the Applicant

Mr. Osiemo for the Respondent

Mr V. Owuor- Court Assistant