



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 34 OF 2017

S.G. MBAABU & CO. ADVOCATES.....APPLICANT

VERSUS

JOSEPH MUOKI KAKENYI.....1ST RESPONDENT

MATHEW MWEU KAKENYI.....2ND RESPONDENT

ANNAOUNCEATAH MARITIA KITETA

(Sued on their own behalf and as administrators of the Estate of

PETER MWIKYA KAKENYI (deceased).....3RD RESPONDENT

RULING

1. In the Chamber Summons dated 3rd April, 2017, the Applicant is seeking to set aside the decision of the Deputy Registrar in the following terms:

a. That the decision of the Deputy Registrar dated 6th March, 2017 in Machakos High Court Misc. Civil Application No. 216 of 2015: S.G. Mbaabu & Company Advocates versus Joseph Muoki Kakenyi & 2 others and any certificate of taxation arising thereon be set aside/vacated.

b. That the Applicant's advocate/client Bill of Costs dated 29th October, 2015 and filed on 29th October, 2015 in the said Machakos High Court Misc. Civil Application No. 216 of 2015 be taxed afresh by this Honourable Court in as far as items No. 16 and 48 are concerned or as this court may direct.

2. The Application is supported by the Affidavit of the Applicant who has deponed that on 4th May, 2016, the parties appeared before the Deputy Registrar and agreed that the Applicant cause the property to be valued for the purpose of getting a valuation for taxation; that the said valuation was to be filed within 45 days and that the Respondents were at liberty to apply.

3. According to the Applicant, they valued the land at Kshs. 1,335,000,000 while the Respondents gave a valuation of Kshs. 650,220,000; that the valuations were part of the submissions and that the Deputy Registrar erred when she held that the two valuations were inapplicable.

4. In his reply, the 1st Respondent deponed that the Applicant has not sufficiently demonstrated any failure on the part of the taxing officer to exercise her discretion appropriately in the taxation of the Bill of Costs and that the taxing officer applied her mind properly on the matter.

5. It is the Respondents' case that there is no error in fact and law in the decision of the taxing officer and that the Application should fail.

6. The Plaintiff's counsel submitted that the value of the property in the suit was ascertainable from the pleadings and valuations by the parties by their own consent and that the minimum value should be Kshs. 650,220,000.

7. Counsel submitted that the taxing officer misdirected herself by ignoring the evidence that was placed before her and that the decision was unreasonable, unjust and without basis in law.

8. The Respondents' advocate submitted that matters of taxation by a Taxing officer involves the exercise of discretion as set out in ***Mbogo and Another vs. Shah (1968) E.A 93*** and that in any event, this court is not well suited to tax the Bill of Costs as submitted by the Applicant.

9. The only issue that I am supposed to deal with in this reference is whether the Taxing officer erred by not relying on the two valuation reports when she taxed instruction fees.

10. It is not in dispute that it is the Applicant who filed the Originating Summons dated 17th July, 2014 on behalf of the Plaintiffs (*Respondents*) in Machakos ELC. No. 79 of 2014. In the said Originating Summons, the Plaintiffs sought for a declaration that they are entitled to parcel of land being a portion of L.R. No. 7590/6. However, before the suit could be heard, the Respondents retained the services of another advocate. Having filed the Originating Summons, the Plaintiffs' advocate is entitled to instructions fees.

11. In the Bill of Costs that was filed by the Applicant, he had sought for instructions fees of Kshs. 30,120,000 which was based on the value of the property of Kshs. 2 billion. However, the Originating Summons and the subsequent pleadings in ELC. No. 79 of 2014 does not provide for the value of the suit land.

12. The record in High Court Miscellaneous Civil Application number 216 of 2015 shows that by the consent of the parties herein, they agreed to engage their respective valuers to value the suit land, which valuation reports were filed in court. According to the Applicant's valuer, the suit land was worthy Kshs. 1,335,000,000 while the Respondents' valuer gave the value of the land as Kshs. 650,220,000.

13. Although the two valuation reports were placed before the learned taxing officer, she did not rely on them while arriving at her decision. In her opinion, and relying on the Court of Appeal decision in *Joreth Limited vs. Kigano and Associates (2002) eKLR*, she could not rely on the two valuation reports because the value of the subject matter can only be determined from the pleadings, judgment or settlement.

14. The question of how the taxing officer is supposed to arrive at the value of a suit property was analyzed by the Court of Appeal in the case of *Joreth Limited vs. Kigano & Associates (2002) eKLR*. In the said case, the court held as follows:

“On the face of it, this is a completely wrong method of assessing the instruction fees and basis of taxing instruction fees.”

15. The court in the case of *Safaris Unlimited (Africa) Limited vs. Muchanga Investments Limited (2017) eKLR* declined to direct the taxing officer to look at the various valuation reports that had been annexed on the litigants' Affidavits when the matter came up for taxation. The court held as follows:

“I have noted from the Affidavit of Gordon Barnard Anthony Church sworn on 13th July, 2009 that the accuracy of these valuation reports was contested. I am in agreement with the Plaintiff in its submissions that the issue as to whether or not the suit property we are unable to agree with the learned judge... We would at this stage point out that the value of the subject matter of a suit for the purposes of Taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just...”

16. The above holding by the Court of Appeal has being the guiding principle in taxing the Bills of Costs. It does not matter that during the Taxation of the Bill of Costs, the parties present to the taxing master the valuation reports, unless they agree that the valuation reports should be the basis of assessing the instruction fees.

17. I have looked at the Application before me. The Applicant has not annexed the consent that was entered into between himself and the Respondent to enable the court ascertain if such a consent can amount to “a settlement” for the purposes of taxing the Bill of Costs. Suffice to say that even where the two valuation reports are produced by consent, unless the valuation reports settled the matter with finality, they cannot form the basis of assessing instruction fees. It follows from the foregoing that the taxing officer could not ascertain the value of the subject matter of the suit from the pleadings or decision of the court.

18. Indeed, the filing of valuation reports for the purpose of guiding the taxing officer in taxation ought to be discouraged for the simple reason that such a value was never the basis of the suit in the first place. If the value of a suit property is so important to a litigant, then it should form a basis of his claim and should be specifically pleaded.

19. Consequently, the taxing officer was entitled to reject the two valuation reports during Taxation. For those reasons, I uphold the decision of the taxing officer of 6th March, 2017. The Chamber Summons dated 3rd April, 2017 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE