



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 243 OF 2016

SHURISHCHANDRA BHARMAL SHAH.....PLAINTIFF

VERSUS

PRAFULCHANDRA BHARMAL SHAH.....DEFENDANT

RULING

The Plaintiff withdrew this suit on 2nd May, 2013. On 6th November, 2013 the court ordered that the Plaintiff was liable to the Defendant for the costs of the suit save for the costs of the interlocutory applications that were awarded to the Plaintiff. Following the said decision of the court, the Defendant filed his Party and Party Bill of Costs on 31st March, 2014 for taxation.

The Bill of Costs came up for taxation before Hon. A. K. Ndungu, Deputy Registrar (hereinafter referred to as “the taxing Officer”) on 16th July, 2014. On that day, the Defendant whose Bill of costs was coming up for taxation was represented by Mr. Mureithi while Mr. Gekonge appeared for the Plaintiff. From the proceedings of that day, Mr. Mureithi who appeared for the Defendant told the taxing officer that he wished to have the taxation of the bill argued by way of written submissions. On his part, Mr. Gekonge for the Plaintiff told the court that he left the issue to the court. Without hearing any further representations from the two advocates on the Bill of Costs, the taxing officer proceeded to tax the Defendant’s Bill of Costs as drawn in the sum of Kshs.470,206/=. The taxing officer commented that the sum of Kshs.437,000/= that was claimed by the Defendant as instruction fees was below the scale fees provided in the Advocates Remuneration order.

What is now before me is the Plaintiff’s reference brought under Rule 11(2) and 79 of the Advocates (Remuneration) Order seeking the setting aside of the decision of the taxing officer made on 16th July, 2014 and the taxation of the Defendant’s Party and Party Bill of Costs or in the alternative the resubmission the Bill of Costs for taxation by a different taxing officer. The Plaintiff’s reference was brought on several grounds. The Plaintiff contended that the taxing officer taxed the Defendant’s Bill of Costs as drawn without hearing the Plaintiff. The Plaintiff averred further that the instructions fees that the taxing officer taxed as drawn in the sum of Kshs.437,000/= was based on a purported value of the subject matter of the suit that was not contained in the pleadings. The Plaintiff contended that the ownership of the property that was the subject of the suit was not in dispute and that the taxing officer failed to appreciate that the plaintiff’s claim was for a liquated sum of kshs.4,738,945.05. The Plaintiff contended further that the taxing officer failed to appreciate that the suit was withdrawn before hearing and that the Plaintiff had been awarded the costs of the interlocutory applications.

The Plaintiff’s application was opposed by the Defendant through a replying affidavit sworn by the Defendant on 7th December, 2015. The Defendant contended that the Plaintiff’s application was incompetent, bad in law and amounted to an abuse of the process of the court. The Defendant contended that the application was brought out of time and in a wrong form. The Defendant contended that the Plaintiff was represented during the taxation and that the Plaintiff’s advocate did not contest any item in the Defendant’s Bill of Costs. The Defendant supported the taxing officer’s assessment of the instruction fees. The Defendant averred that following the taxation of his Bill of costs, a warrant of arrest was issued against the Plaintiff when he failed to show cause why he could not be committed to civil jail for nonpayment of the said costs. The Defendant averred that to avoid going to jail, the Plaintiff agreed to pay the costs which he paid in full on 28th October, 2015.

The Plaintiff’s application was argued by way of written submissions. The Plaintiff filed his submissions and further submissions on 27th January, 2016 and 11th February, 2016 respectively while the Defendant filed his submissions in reply on 1st February, 2016.

I have considered the Plaintiffs application together with the supporting affidavit. I have also considered the Defendant’s affidavit in reply to the application. Finally, I have considered the written submissions by the advocates for the parties and the authorities that were cited in support thereof. The following is my view on the plaintiff’s application. From the material before me, I am satisfied that the taxing officer did not give the parties an opportunity to address him on the Defendant’s Bill of Costs before he taxed the said bill as drawn. This explains why in his ruling, he did not give any reasons as to why he assessed instruction fees at Kshs.437,000/= and also why he awarded costs to the Defendant even for the interlocutory applications in respect of which the Plaintiff had been awarded costs. I am not in agreement with the Defendant that the Plaintiff’s advocate left the Bill for the taxing officer to assess as he deemed fit and that the Plaintiff’s advocate did not raise objection to any item in the Bill of Costs. The explanation given by the Plaintiff seems more reasonable to me. From the record, the

advocate who appeared for the Defendant before the taxing officer when the Defendant's Bill of Costs came up for taxation told the court that he wished to argue the Bill of Costs by way of written submissions. It is to this request that the Plaintiff's advocate responded that he will leave the decision on how to dispose of the Bill of Costs to the court. There is nothing on record to support the Defendant's contention that the taxing officer "stated that there was no need to delay taxation and asked Mr. Gekonge to point out the items he was objecting to, and Mr. Gekonge informed the taxing master that he was leaving it to the court to tax." Nothing would have been easier than for the taxing officer to put it on record that the Defendant's advocate had no objection to any particular item in the Bill of Costs and that he was leaving the Bill of Costs to the taxing officer to tax as he deemed fit.

Since, I have reached a finding that the Plaintiff was not given an opportunity to address the taxing officer on the Defendants Bill of Costs, I do not wish to express any views on whether the taxing officer was right in basing instruction fees on the sum of Kshs.25,000,000/= that was alleged to be the value of the subject matter of the suit. These are some of the issues in respect of which the parties would address the new taxing officer if the matter is remitted to the taxing officer for taxation afresh. I would not wish to usurp the powers of the taxing officer by determining the issue.

In the case of S. R. D' Souza and others v C. C. Ferrao and Others (1969) E. A. 602, it was held that;

"The general practice in England, where there is an error in principle on taxation, is to remit the question of quantum for the decision by the same or another taxing master in the light of the decision of the judge on the point of principle."

In this case, I am satisfied that the taxing officer committed an error of principle by proceeding to tax the Defendant's Bill of Costs without hearing the Plaintiff who was duly represented before him.

The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 17th November, 2015 is allowed in terms of prayers 1 and 3 thereof. The Defendants' Bill of Costs dated 28th March, 2014 is remitted to the taxing officer of this court for taxation. The Plaintiff shall have the costs of the application.

Delivered and Dated at Nairobi this 1st day of November, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mutinda for the Plaintiff

No appearance for the Defendant

Catherine - Court Assistant