



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 99 OF 2012

ARIF BAYUSUF..... PLAINTIFF

=VERSUS=

LUCY TOFANI..... DEFENDANT

RULING

1. Before this court is the Applicant's/ Chamber Summons application dated 10th May 2016 brought under the Provisions of Order 11 of the Advocates (Remuneration) Order and all enabling provisions of the law. The Applicant prays for the following Orders:

i. THAT the Honourable Court be pleased to enlarge time for filing and serving the Chamber Summons application against the decision of the Honourable Deputy Registrar J. Wandia, made on the 29th March 2016;

ii. THAT the Chamber Summons filed as an objection against the decision of the Honourable Deputy Registrar J. Wandia made on the 29th March 2016, be deemed to have been filed and served within time;

iii. THAT the Honourable Court be pleased to set aside the Taxing Officer's Ruling delivered on 29th March 2016 as it relates to the reasoning and determination pertaining to Item 2 of the Plaintiffs Bill of Costs dated 19th August 2014;

iv. THAT this Honourable Court be pleased to adjust the figure, re-assess the fees due and find that the sum due to the Applicant in the taxation cause is as presented in the plaintiff's Bill of Costs dated 19th August 2014; and

v. THAT the costs of this application be provided for.

2. The Application is supported by the annexed affidavit of Reynard Brian Ochieng sworn on 10th May 2016 and is premised, inter alia, on the following grounds:

a.....

b.....

C.....

d. That the Taxing Officer acted contrary to well settled principles of law.

e. That the Taxing Officer misdirected herself on the established principles of law applicable.

f. That the Ruling of the Taxing Officer has no basis in law.

g. That the Taxing Officer failed to give sufficient reasons for or grounds to Justify the departure from the correct valuation of the suit property and how she decided that instructions fees should be Kshs 100,000/

h. That the Taxing Officer misdirected herself on the discretion and awarded a fee that is manifestly low as to justify interference.

i. That the amount awarded by the Taxing Officer failed in respect of Item 2 of the Plaintiff's Bill of Costs dated 19th August 2014 is manifestly, indeed contemptuously low considering the nature of the dispute and the valuation of the suit property.

3. By a Replying Affidavit sworn on 26th September 2016 and filed herein on 27th September 2016, the Defendant opposed the application terming it baseless, devoid of any legal or factual foundation and/or reasonable justification whatsoever. The Defendant contended that the Plaintiff in the suit did not disclose the value of the subject matter of the suit either at the commencement of the suit or at any stage during the trial and the Taxing Master's decision was based on the information that was available at the trial and there was therefore no basis to interfere therewith. It was further the Defendant's position that while in appropriate cases this court can review the decision of the taxing master and remit the matter for re-assessment, this court does not have the jurisdiction to adjust the figure, reassess the fees due and /or accede to the request set out in prayer 4 of the Reference.

4. When the application first came up for hearing before the Honourable Justice Angote on 22nd September 2016, the parties allowed prayer 1 and 2 of the reference by consent and agreed to submit written submissions on the remaining prayers. Thereafter the matter came before me on 20th February 2017 when both sides highlighted their submissions.

5. I have considered the application and the submissions by the Counsel for the parties, Mr. Zahid for the Applicant and Mr. Ole Kina for the Respondent. In my view the issues that arise for determination are the following:

A. Whether the decision of the taxing master was based on settled principles of law; and

B. Whether this court can grant the orders sought by the Applicant.

A. The Decision of the Taxing Master and the Applicable Principles of Law.

6. In the old case of *Premchand Raichand Ltd & Another vs- Quarry Services of East Africa Ltd & Others (1972) EA 162*, the court of Appeal set out some of the principles of taxation as follows:

(i) That costs allowed should not rise to such a level as to confine access to the court to the wealthy.

(ii) That a successful litigant ought to be fairly reimbursed for the costs that he had to incur.

(iii) That the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(iv) That so far as practicable there should be consistency in the awards made.

7. The main bone of contention in the reference before me is on the subject of instruction fees. Under item 2 of the Party and Party Bill of Costs filed on 21st August 2014, the Plaintiff sought an instruction fee in the sum of Ksh 3,000,000. In support thereof, it is the Applicant's case that the subject matter was a large parcel of land measuring 5.9 hectares and the Market Value thereof is in excess of Ksh 100 million. It was further the Applicant's case that this was a very complex matter as displayed by 116 pages of pleadings prepared by the Plaintiffs Advocates when first instructing this suit. Given the said complexity of the matter, the Plaintiff contended that they were compelled to call 5 witnesses, 2 of whom were expert witnesses in different fields. It is the Applicant's case that the taxing officer gave no basis or reasons for the "drastic" reduction and further, that the reduction of the instruction fees from Kshs 3,000,000 to the sum of Kshs 100,000 by the taxing officer was contrary to the settled principles, manifestly low and unjustified in the circumstances.

8. It was however the Defendant/Respondent's position that there was no disclosure whatsoever of the value of the subject matter and that the principle prayer in the suit was only seeking an injunction against the defendant. The defendant submitted that the only time an estimate of the purported value of the land was made was when the Party and Party Bill of costs was filed. It is the defendant's case that the figure of Kshs 100 million given as the value of the land was merely based on speculation as the same was not supported by any documentation.

9. It is apparent that the above or similar arguments were first raised before the taxing officer at the point of taxation of the Bill. In her Ruling on the taxation dated 29th March 2016, the Learned Deputy Registrar Honourable Jaenette Wandia states in her conclusion on the issue of instruction fees as follows:

"Having looked at the pleadings, the bill of costs and the submissions by both counsels, I do agree with the respondent that the sum of Kshs 3 million is excessive and unjustified. The Applicant has also stated that the value of the land was not ascertained and could only be estimated from the acreage. I therefore tax this Item 2 as per Schedule 6(1) (of the Advocates Remuneration Order (2009) but since it is a land matter I enhance the instruction fee to (Kshs) 100,000."

10. A perusal of Schedule 6(1) of the Advocates(Remuneration) Order2009, reveals that the minimum instruction fees allowed as the taxing officer found out is the sum of Kshs 6,300. It is however trite that the value of the suit property is not the sole determinant of the amount to be charged as instruction fees. *In Joreth Limited -vs- Kigano & Another (2002) EA 92*, the court stated that a number of factors need to be taken into consideration in determining the instruction fee. These include the importance of the matter, the general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the Parties. In *republic -vs- Ministry of Agriculture & 2 Others Ex-Parte Muchiri W Njuguna & 6 others (2006) eKLR Ojwang J(as he then was)* stated that the taxation of Advocates' instruction fee is to seek no more and no less than reasonable compensation for professional work done. In this regard it should avoid any prospect of unjust enrichment, for any particular party or parties.

11. In first *American Bank of Kenya -vs- Shah and Others (2002) 1EA 64 Ringera J* (as he then was) outlined the circumstances under which a Judge of the High Court can interfere with the taxing master's exercise of discretion. These were clearly Spelt out as follows:

i. The court cannot interfere with the taxing master's decision unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly so excessive as to justify an inference that it was based on an error of principle;

ii. It would be an error of principle to take into account irrelevant factors and, according to the remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge;

iii. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

iv. It is within the discretion of the taxing officer to increase or reduce the instructions fee and the amount of the increase or reduction is discretionary;

v. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

vi. The full instruction fee to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees

12. I find the above principles quite wide and comprehensive and accordingly I proceed to use them as a guide to a determination of the matters herein.

B. Whether this court should grant the orders sought

13. It is the Applicant's submission that the amount awarded of Kshs 100,000 as instruction fees is so outside reasonable limits so as to be manifestly inadequate to such an extent it could be deemed to be a mockery of the legal representation. It is the Applicant's position that this matter was important and complex and the amount of Kshs 3,000,000 should have been deservedly awarded as instruction fees. Accordingly, it is the Applicant's prayer that this court sets aside the award of the taxing master and award the Applicant the sum of Kshs 3,000,000 as prayed in the Bill of costs.

14. As was said in *Paul Ssemogerere & Another -vs- Attorney General SCCA No. 5 of 2001*, there is really no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful Party must be reimbursed expenses reasonably incurred due to the litigation, and that, as we have seen, the advocates remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts remain accessible only to the wealthy.

15. I have gone through the pleadings and the proceedings in this case. The subject matter was a parcel of land measuring 5.9 hectares in Lamu. As a matter of fact, the issue of the value of the parcel of land did not come up during the proceedings before the trial Court. All that is evident from the proceedings was that a sum of Kshs 400,000 was paid for the land and that it attracts an annual rent of Kshs 42,000. Faced with this scenario; the Learned Deputy Registrar resorted to schedule 6(1) of the Advocates(Remuneration) Order 2009 from where she established that a minimum figure of Ksh 6,300 was chargeable in the circumstance. She then used her discretion to raise the figure to the sum of Kshs 100,000.

16. Taking all matters into consideration, I am unable to fault the decision of the Learned deputy registrar. As was expected of her, she first established the minimum figure chargeable before using her discretion to increase the same to the Kshs 100,000 which she proceeded to award. As was stated in *premichand and Ranichand Limited and Another -vs- Quarry Services of East Africa Ltd & Another (Supra)*,

“The taxation of costs is not a Mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore interfere with the award of taxing officer, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.

17. I concur that questions solely of quantum are matters with which the taxing officers are particularly

sued to deal. This court will interfere only in exceptional circumstances and this case has not, in my view, raised such exceptional circumstances.

18. Finally, in justifying the claim for Kshs 3,000,000 the Plaintiff has particularized the item to include the following:

“That the matter first went for hearing of the application for injunction and the injunction orders were issued against the Respondent and later the matter went for full hearing and all parties and their witnesses testified in the court and submissions done both orally and written. Considering the time taken in preparing the matter for hearing in studying the Pleadings, research in relevant acts of Law and the travelling from Nairobi to Malindi Law Court for attending several hearings till the case was finalized.”

19. In my considered view, items such as the Plaintiffs Advocate travel from Nairobi to Malindi are adequately compensated for elsewhere in the Bill and should not form part of the instruction fees. As was stated by Ringera J in first *America Bank of Kenya -vs- Shah and others(Spra)*, the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.

20. I am equally not persuaded that this was a complex matter that deserved more in terms of instruction fee. Indeed, looking at the pleadings, it is evident that the Plaintiff and the Defendant had prior to the filing of this suit already dealt with 2 other cases in relation to the subject matter, a fact which in my view would have reduced the amount of research required in filing the suit for the injunction granted herein.

21. In the circumstances and for the reasons given this court is reluctant to interfere with the Taxing Officer's decision for the reasons stated above and therefore the Application dated 10th May 2016 is hereby dismissed.

22. Let each party bear their own costs.

23. Orders accordingly.

Dated, delivered and signed in Open Court this 17th day of March 2017.

J. O. OLOLA

JUDGE