



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE No. 34 OF 2013

ISAAC MAINA KAMAU.....PLAINTIFF

VERSUS

RAHAB WANGARE GACHIENGO.....1ST DEFENDANT

NAOMI WAMBUI GACHIENGO.....2ND DEFENDANT

RULING

(An application under Rule 11 of the Advocates (Remuneration) Order; the taxing officer having proceeded under wrong provisions of the remuneration order; application allowed; judge exercises discretion to tax the contentious items so as to bring the matter to an early conclusion)

1. Before the court for determination are two applications: Plaintiff's Chamber Summons dated 7th February 2017 and first defendant's chamber summons dated 20th February 2017. Both applications are brought under Rule 11 of the Advocates (Remuneration) Order.

2. The application dated 7th February 2017 is supported by the affidavit of David K. Kaburu, advocate for the plaintiff and seeks the following orders:

a) That the taxing off of the entire amount in item 1 on the plaintiff's bill of costs dated 12/3/2016 made by the Deputy Registrar (the taxing officer) on 24/1/2017 be set aside.

b) The sum of Ksh.450,000 taxed off by the Deputy Registrar be reinstated and approved as instructions fees legitimately due for payment to the plaintiff objector an [Sic] item 1 of the said bill together with further taxed costs. Alternatively the court do award a fair and reasonable sum on item 1 of the said bill of costs and substitute the same with the sum of Ksh.5,000 awarded by the Deputy Registrar (taxing officer).

c) That costs of this application be provided for.

3. The application dated 20th February 2017 is supported by the affidavit of Rahab Wangare Gachiengo, the first defendant, and seeks the following orders:

a) THAT this honourable court be pleased to vary and/ or set aside the taxing officer's ruling dated 24th January 2017 in relation to item No. 1 of the 1st defendant's bill of costs dated 20th May 2016.

b) THAT this honourable court be pleased to exercise its inherent jurisdiction and allow such fees in item 1 of the defendant's bill of costs as it may deem fit and/or make such other or further orders

as regards the said bill of costs.

c) In the alternative, the bill of costs dated 20th May, 2016 be referred back to another taxing officer for fresh taxation of item 1 of the bill of costs dated 20th May 2016.

d) Costs of this application be provided for.

4. It is necessary to paint a bit of the backdrop that led to the two applications.

Proceedings in this matter were commenced on 20th September 2012 through originating summons dated 19th September 2012 filed by the plaintiff. In the originating summons, the plaintiff sought judgment inter alia to the effect that the defendants' title to Njoro/Ngata Block 4/133 (Rumwe) had become extinguished by virtue of the doctrine of adverse possession.

The Originating summons was heard by L.N Waithaka J. who in a judgment dated 9th May 2014 found for the plaintiff and ordered that costs of the suit be borne by the 2nd defendant.

5. Following the judgment, on 4th April 2016 the plaintiff filed "Plaintiff's Bill of Costs Against the 2nd Defendant". Similarly on 20th May 2016, the 1st defendant filed "1st Defendant's Party & Party Bill of Costs". The two bills of costs were taxed by the Deputy Registrar on 24th January 2017. Both applicants are dissatisfied with the decision of the Deputy Registrar and they duly filed the requisite notices under Rule 11 (1) of the Advocates (Remuneration) Order followed by the present applications as required by Rule 11 (2) thereof. When the applications came up for hearing on 19th April 2017, counsel appearing for both applicants did not make any submissions, opting instead to rely entirely on the applications and the supporting affidavits.

6. Basically, the applicants are dissatisfied with the findings of the Deputy Registrar as regards item No. 1 of each of the bills of costs. Item No. 1 in each bill dealt with instruction fees.

7. In her ruling dated 24th January 2017 the Deputy Registrar stated as follows:

"There are two bills in this matter both against the second defendant. I will begin with the introduction that the bills arise from an application at the High Court made pursuant to a judgment of the same court on 9th May 2014. The applicable Remuneration Order is therefore that of 2014 and specifically schedule 6, paragraph C8 under Appeals titled Other applications not provided for." (Underlining is mine)

8. Having thus guided herself, the Deputy Registrar proceeded to tax item 1 of the bill of costs dated 12th March 2016 as follows:

"Item 1 instruction fees will not be pegged on the value of the subject matter as it was only an application for stay of execution. The fee attracted under such an application is 5,000/= for presenting or opposing it and I allow item 1 at 5,000/=" (Underlining is mine)

9. In regard to the bill of costs dated 20th May 2016 the Deputy Registrar stated:

"Item 1 on this bill being instruction fees is taxed as in the previous one at 5,000/="

10. The applicants have argued that the Deputy Registrar misdirected herself as regards the subject matter of the bills and the relevant provisions of the advocates (Remuneration) order and that as a result, the sum of Ksh.5,000 awarded under item 1 of both bills of costs is so low that it is unreasonable and unjust.

11. Item 1 of plaintiff's bill of costs dated 12th March 2016 was pleaded as follows:

“Instructions to file suit for recovery of Njoro/Ngata/133 (Rumwe) (Valued 16 million)”

12. In 1st defendant's bill of costs dated 20th May 2016, item 1 was pleaded as follows:

“Instructions to defend originating summons dated 19th September 2012 where subject matter is valued at 12,000,000/=”.

13. I have considered the two applications. Looking at item 1 in each of the bills of costs, it is clear that the said item in plaintiff's bill of costs dated 12th March 2016 was in respect of instructions to file the originating summons while the said item in the 1st defendant's bill of costs dated 20th May 2016 was in respect of instructions to defend the originating summons. The taxation ought to have proceeded under Schedule 6, Part A, paragraph 1 (b) of the Advocates (Remuneration) Order, 2014. Instead, the Deputy Registrar proceeded under paragraph (c) (viii) of Schedule 6, Part A.

14. The learned Deputy Registrar therefore misdirected herself and fell into error when she proceeded to base taxation of item 1 in each of the bills of costs on the basis of instructions on an application for stay of execution instead of instructions to present or oppose the originating summons, a suit. The decision of the Deputy Registrar was based on an error of principle and law and this court can and will therefore interfere with her findings.

15. The applicants have urged me to set aside the decision of the Deputy Registrar and award them such instruction fees as are just. Such an action would entail me taxing the bill as regards the items on instruction fees. There is no doubt that I have jurisdiction to do so. I will accede to the applicants' request. In opting to do so I take into account that there is no dispute on any other items in the bills of costs other than the items on instruction fees. I am of the view that it would be more pragmatic and better use of judicial time and resources to deal with the matter once and for all. In **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR** the Court of Appeal stated as follows:

The second issue upon which counsel made arguments and which we think we should consider in some detail is whether the learned Judge of the High Court had jurisdiction to tax the contentions bill himself rather than remit it to the High Court for taxation. In our view, the issue of the jurisdiction of High Court Judge to tax a contested taxation on a reference is settled. Indeed all the authorities cited to us by counsel for the appellant are unanimous that a judge of the High Court has jurisdiction to tax the bill himself.

In D'sonza v Ferrao [1960] 602, it was stated at page 605 as follows: -

“Though the general practice is as indicated in the foregoing passages the reviewing judge can and sometimes does deal with the matter (taxation) himself.”

In James v Nyeri Electricity [1961] 492, it was stated at pages 492 – 293 as follows:-

*“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of **Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim (4) 1956, 23 E.A.C.A. 313**, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles,”*

*And in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [Civil Appeal No. 220 of 2004] (UR)**, this Court, differently constituted, said:-*

“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that

would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – *D'Sonza v Ferrao* [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel (No. 2)* [1978] KLR 243.”

In view of the decisions in the above cases, we must reject the argument that the learned Judge of the High Court had no jurisdiction to tax the contentious bill himself.

16. Instruction fees should be based on the value of the subject matter in dispute as determined from the pleadings, judgment or settlement. The Court of Appeal stated in **Eastland Hotel Limited v Wafula Simiyu & Co. Advocates** [2014] eKLR as follows:

*This Court’s decision in **JORETH LIMITED v KIGANO & ASSOCIATES** (supra) which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from either the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.*

Was the taxing officer able to determine the value of the subject matter from the “pleadings” on record? What are “pleadings”? Under Section 2 of the Civil Procedure Act, pleading includes:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

An affidavit is not a pleading, it is evidence.

17. The dispute in this matter involved title to the parcel of land known as Njoro/Ngata/133 (Rumwe). The subject matter of the dispute is the said parcel of land and its value will therefore be the basis of determination of instruction fees. Whereas the plaintiff and the 1st defendant have mentioned the figures of KShs 16 million and KShs 12 million respectively in their bills of costs as the value of the land, those amounts are not proven and are not supported by either pleadings or judgment. I note however that it is noted in the judgment that the plaintiff purchased the suit property at KShs 990,000 on 13th October 1988. At the time the suit was filed and instructions were taken to prosecute or defend it some four or so years had lapsed since the purchase. I note further that in plaintiff’s bill of costs dated 12th March 2016 the date of instructions is stated at item 1 thereof as 19th September 2012 while in the 1st Defendant’s bill of costs dated 20th May 2016 the date of instructions is stated at item 1 thereof as 7th December 2012. Taking into account a measure of appreciation in value, I therefore put the value of the subject matter at the date instructions in the year 2012 at KShs 1,500,000.

18. Applying Schedule 6, Part A, paragraph 1 (b) of the Advocates (Remuneration) Order, 2014, I award each of the applicants KShs 150,000 under item 1 of their respective bill of costs. The other items of the bills of costs remain as taxed by the Deputy Registrar.

19. The total amount awarded under plaintiff’s bill of costs dated 12th March 2016 is therefore KShs 297,725 while the total amount awarded under 1st defendant’s bill of costs dated 20th May 2016 is KShs 329,263. The applicants are also awarded costs of the applications.

20. It is so ordered.

21. Dated, signed and delivered in open court at Nakuru this 10th day of May 2017

D. O. OHUNGO

JUDGE

In the presence of:

Mrs. Oliech holding brief for Mr. Kaburu for the plaintiff

Mrs. Oliech holding brief for Mr. Wachira for the 1st defendant

No appearance for the 2nd defendant

Court Assistant: Gichaba