



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 263 OF 2013

JOHN MICHAEL WANJAO:::PLAINTIFF

VERSUS

GEORGE KIMETTO:::1ST DEFENDANT

ALUBALA ABENAYO ANDAMBI:::2ND DEFENDANT

COUNTY LAND REGISTRAR (UASIN-GISHU):::::::::::::3RD DEFENDANT

RULING

This is a ruling in respect of an application brought by way of Chamber Summons dated 10th April 2017 where the plaintiff/applicant is seeking for the following orders:

1. That this application be certified as urgent.
2. That there be a stay of execution of the Certificate of Costs issued herein pending the hearing and determination of this application.
3. That court be pleased to set aside and or alter the Certificate of Costs together with all the consequential orders thereof.
4. That costs of this application be provided for in any event.

This application was filed under certificate of urgency under Section 48 and 51 of the Advocates Act and rule 11 of the Advocates (Remuneration) Order. It came up for inter parte hearing on 21st June 2017.

Applicant’s Counsel’s Submissions

Mr. Marube Counsel for the plaintiff applicant submitted that the matter was a reference which arose from a Bill of costs. The applicant had issues with items 1 & 2 of the bill of costs being instruction fees and 1/3 getting up fees.

Counsel submitted that the applicant had filed a suit by way of a plaint seeking for a declaration that the purported sale of LR. NO. ELDORET MUNICIPALITY BLOCK 9/2749 and transfer to the 2nd defendant on 20/06/08 was/is fraudulent, illegal and vitiated by law. The applicant also sought for the cancellation of the title and an injunction restraining the defendants from transferring the suit property.

Mr. Marube, Counsel for the applicant further submitted that the respondent filed his bill of costs and put

the instruction fees at Kshs. 150,000/ and the Deputy Registrar awarded Kshs. 100,000/. He submitted that schedule 6 (1) (b) provides for instruction fee of Kshs. 49,000/ and that when the applicant sought for an explanation, the Deputy Registrar did not give sufficient reasons. He stated that there was no basis why the learned Deputy Registrar had come up with the figure of Kshs. 100,000/. Further Counsel submitted that there was no demonstration that the matter was complex.

The second issue that Counsel raised was on getting up fees. He agreed that the same is provided for but submitted that in the current case it was not payable. He stated that the applicant filed a suit, the defendant filed a defence and an application for striking out the said suit.

Mr. Marube further submitted that this matter was not prepared for trial as order 11 of the Civil Procedure Rules were never complied with. There were no pre-trial procedures complied with in this case. He therefore submitted that getting up fees was not payable. He urged the court to consider the reference and award what is fair.

Respondent's Counsel's Submissions

Mr. Momanyi Counsel for the respondent opposed the application. He submitted that in taxation matters the Deputy registrar exercises discretion. He stated that it has not been demonstrated that the discretion was wrongly exercised. Counsel submitted that the Remuneration Order provides for basic minimums which is chargeable, otherwise the Advocates will be guilty of undercutting.

Counsel for the respondent further submitted that the amount is discernable from the plaint which was Kshs. 260,000/ hence the scale that is applicable is schedule 6 (1)(a) as read with (b) as there was a defence filed. He stated that the amount of Kshs. 100,000/ was proper and reasonable. The minimum allowed was Kshs. 49,000/

On the issue of getting up fees and preparing for trial, Counsel submitted that this was tenable as there was denial of liability. The line of defence that the respondent took was that the suit or transaction offended section 3 (30) of the law of contract Act therefore there was no need to comply with order 11 of the Civil procedure rules. Counsel urged the court to dismiss the application as it has no merit.

Mr. Marube in response agreed that the Deputy registrar has discretion but such discretion is not unfettered. He submitted that the Deputy registrar did not exercise the discretion judiciously. He prayed that the application be allowed.

Analysis and determination

The issue for determination is whether the Deputy registrar exercised her discretion as a Taxing Officer judiciously. Did she follow the correct principles of law? Was the amount awarded as instruction fees excessive and was getting up fees payable in this case.

The Court of Appeal **stated** in the case of **Joreth Ltd vs. Kigano & Associates (2002) 1EA 92**, that a Taxing Master in assessing costs to be paid to an advocate in an advocate client bill of costs is exercising judicial discretion. That such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law.

The Joreth case also gave some guidelines or principles to be applied by a taxing officer in exercise of his /her discretion to increase the instructions fees. That the taxing officer must demonstrate in his/her ruling the reasons for increase of fees:-

a) Care and labour required by the advocate.

b) Specify the number and length of the papers to be perused,

c) The nature and importance of the matter ,

d) The value (where ascertainable) of the subject matter

e) Interest of the parties

f) Novelty of the matter.

The Taxing officer had awarded the respondent Kshs. 100,000/ as instruction fees by reducing the figure from Kshs. 150,000/ which was within her discretion. I have perused the reasons given by the Deputy Registrar which was delivered in open court on 30th April 2017 and find that she had adhered to the abovementioned guidelines in taxing the bill of costs. She used her discretion to reduce that instruction fees. She could have also used the same discretion to increase as allowed by the law.

On the issue of getting up fees I agree with the Taxing Master that the respondent was entitled to the same. The Respondent filed the application to strike out the suit. The respondent also filed written submissions including authorities to canvass the application. The Advocate for the respondent also attended court for the hearing of the application. I therefore find that the Respondent is entitled to getting up fees.

In the circumstances, I do find that there was no error of principle committed by the taxing master. Further, the amounts awarded were reasonable and not excessive in the circumstance of the case. I find nothing to permit this court to interfere with the discretion of the taxing master.

Having said that, I therefore dismiss the application dated 10th April 2017 and uphold the award by the Taxing Master and order that each party to bear its own costs.

Dated and delivered at Eldoret on this 25th day of July, 2017.

M.A ODENY

JUDGE

Read in the presence of:

Mrs Khayo holding brief for Mr. Marube for Applicant

No appearance for Respondent

Mr. Koech – Court Assistant.