



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 100 OF 2013

JACINTA GATHONI.....PLAINTIFF

- VERSUS -

- 1. JULIA WANGUI WAWERUA**
- 2. KARURA FARMERS CO. LTD.**
- 3. COMMISSIONER OF LANDS**
- 4. DISTRICT LAND REGISTRAR, NAIROBI**
- 5. THE ATTORNEY GENERAL.....DEFENDANTS**

RULING

The plaintiff brought this suit against the defendants on 21st January, 2013 seeking among others the following reliefs:

1. A declaration that the alienation of Plot No. 191A, Njiru Kasarani Block 141 and the registration of a portion thereof as parcel Nairobi Block 141/170 in the name of the 1st defendant by the 1st and 2nd defendants was irregular, fraudulent, illegal, null and void.
2. An order for the cancellation of the lease and certificate of lease in respect of Nairobi Block 141/170 and the delivery of the same to the 3rd and 4th defendants.
3. An order for the re-conveyance of Nairobi Block 141/170 and the merger of the same with Nairobi/Block 141/173 and for a title to be issued for the merged parcel in the name of the plaintiff.
4. An order of indemnity from the 2nd defendant for any claim that may be brought by the 1st defendant.
5. A mandatory injunction to compel the 1st defendant to vacate the suit property and immediately remove at her own cost all the illegal structures she had put up thereon.
6. An order for general damages against the 1st defendant.
7. A permanent injunction to restrain the 1st and 2nd defendants from entering, encroaching on , alienating or otherwise dealing with the suit property in any way that would be prejudicial to the

plaintiff.

8. Costs and interest.

The 1st defendant raised a preliminary objection to the suit on the ground that the same was *res judicata* the issues raised in the suit having been raised and conclusively determined by a court of competent jurisdiction in a previous suit between the parties. The 1st defendant's preliminary objection was upheld by the court in a ruling that was delivered on 20th January, 2014. The suit was dismissed with costs to the defendants. Following the dismissal of the suit, the 1st defendant filed her Party and Party bill of costs for taxation. The 1st defendant's bill of costs which had 32 items was drawn at a sum of Kshs.789,809/-.

The 1st defendant's bill of costs (hereinafter referred to as "the bill") was taxed at Kshs. 286,644/- on 20th June, 2016 by the taxing officer, Hon. I. N. Barasa. The main item in the bill was instruction fees in respect of which the 1st defendant had claimed Kshs.750,000/-. The taxing officer taxed off a sum of Kshs.500,000/- from that amount and taxed the item at Kshs. 250,000/-. From the record, the advocates for all the parties were notified of the ruling date of 20th June, 2016 by the taxing officer. The ruling was however delivered in the absence of all the parties.

What is now before me is the plaintiff's application dated 16th December, 2016 seeking leave for the firm of Okemwa & Co. Advocates to come on record on behalf of the plaintiff and an order setting aside the decision of the taxing officer that was made on 20th June, 2016 and directing a fresh taxation of item 1 of the bill relating to instruction fees by a different taxing officer. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 16th December, 2016. The plaintiff contended that the costs that were awarded by the taxing officer to the 1st defendant were excessive, punitive and unjustified. The plaintiff contended that the award that was made by the taxing officer had no basis in the pleadings, the evidence that was tendered and the submissions of counsel. The plaintiff contended that the award by the taxing officer was speculative and amounted to erroneous exercise of discretion. The plaintiff contended that she was not aware of the ruling by the taxing officer until she was notified of the same by the 1st defendant. The plaintiff contended that the taxing officer had not responded to a letter dated 5th December, 2016 that was addressed to her by the plaintiff's advocates asking for the reasons for the taxation.

The application was not opposed by the 1st defendant. When the application came up for hearing on 22nd March, 2017, the plaintiff's advocate informed the court that the plaintiff would only pursue prayers 2 and 4 of the application. The plaintiff submitted that she was only contesting the instruction fees which the taxing officer had assessed at Kshs.250,000/-. The plaintiff submitted that during the taxation, the plaintiff had proposed a sum of Kshs.60,000/- for instruction fees. The plaintiff submitted that the taxing officer did not give any reason for the said award of Kshs.250,000/- for instruction fees. The plaintiff submitted that the suit property was purchased at Kshs.72,460/- and as such that is the amount on which the taxing officer should have based the instruction fees. The plaintiff submitted that the taxing officer has no discretion in the matter. The plaintiff urged the court to set aside the decision of the taxing officer on instruction fees.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the submission by the plaintiff's advocate. I am of the view that the manner in which the present application was brought was irregular. As I have mentioned earlier, the ruling on taxation was made by the taxing officer on 20th June, 2016 with notice to the parties. The taxing officer cannot be blamed for the parties' failure to attend court for the ruling. Paragraph 11 (1), (2) and (4) of the Advocates Remuneration Order provides as follows:-

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision

on those items and the objector may within fourteen days from the receipt of the reasons, apply to a judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.

(3)

(4) The high court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any steps, application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

From the foregoing provisions of the Advocates Remuneration Order, any party who was dissatisfied with the decision of the taxing officer was supposed to serve the taxing officer within 14 days from the date of ruling with a notice of objection setting out the items in respect of whose taxation such party was not satisfied. The court has power under paragraph 11(4) of the Advocates Remuneration Order ("the Remuneration Order") to extend time for filing a notice of objection. In this case, the plaintiff purported to give a notice of objection on 5th December, 2016 over 5 months from the date of the ruling. The plaintiff did not seek leave of the court to file the notice of objection out of time. The notice was also served by Okemwa & Company Advocates who were not on record for the plaintiff at the material time. The plaintiff thereafter filed this reference before the taxing officer had given her reasons for the decision complained of. There is no communication from the taxing officer to the effect that her reasons for the award of Kshs.250,000/- as instruction fees is contained in her ruling which is annexed to the plaintiff's affidavit in support of the application. For the foregoing reasons, it is my finding that the application before me is irregular and incompetent. That finding should have been sufficient to dispose of the application which in my view should be struck out. In view of the fact that the application was not opposed, I wish to bring finality to the matter in case I am wrong in my finding above. I will therefore consider the application on merit on the assumption that a notice of objection was given properly and that the reasons for the taxing officer's decision are contained in the ruling dated 20th June, 2016.

The principles that guide the court when dealing with a reference are well settled. A judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See, Joreth vs. Kigano & Associates (2002) EA 92 and Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board (2005) 1 KLR 528. What I need to determine in the reference before me is whether the taxing officer made an error of principle to warrant interference with her exercise of discretion.

The plaintiff had challenged the taxing officer's taxation on one item only which related to instruction fees. In assessing the instruction fees, the taxing officer found that the value of the subject matter of the suit could not be ascertained from the pleadings and the ruling of the court which struck out the suit. The taxing officer then exercised her discretion in assessing what she thought was fair and reasonable instruction fees. To arrive at a reasonable assessment of the instruction fees, the taxing officer considered the reliefs that were sought by the plaintiff, the interlocutory application that was brought by the plaintiff, the length of time it took to dispose of the suit and the fact that the suit did not proceed to trial. Taking all these factors into account, the taxing officer assessed instruction fees at Kshs. 250,000/-. The 1st defendant had claimed a sum of Kshs.750,000/- under this item. A sum of Kshs.500,000/- was taxed off. The plaintiff has contended that the sum of Kshs.250,000/- that was awarded to the 1st defendant was based on speculation. The plaintiff has contended that the value of the subject matter could be ascertained from the pleadings. Before the taxing officer and this court, the plaintiff contended that the value of the subject matter was Kshs. 72,260/-. This amount was not based on any valuation report. The plaintiff simply added what she claimed to have paid for the suit property in the year 1991 and additional payments that she was allegedly asked to pay by the 2nd defendant subsequently. The suit herein was filed in the year 2013 after the plaintiff had allegedly purchased the suit property. Whatever the plaintiff had paid for the suit property in the year 1991 could not therefore have been the value of the property when the suit was filed. I am in agreement with the taxing officer that the value of the subject matter of this suit

could not be ascertained from the pleadings and the ruling of the court that determined the suit. It was therefore proper for the taxing officer to use her discretion to determine the instruction fees. The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in the case of Joreth vs. Kigano & Associates (supra) as follows:-

“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 (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

See also the case of Eastland Hotel Limited vs. Wafula Simiyu & Co. Advocates (2014) eKLR where the Court of Appeal stated that:-

“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 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.”

I am of the view that the taxing officer considered all relevant factors when assessing instruction fees. I am not satisfied that the taxing officer committed any error of principle that would justify interference with her exercise of discretion. The plaintiff’s application would therefore fail even if the same is considered on merit.

In conclusion, save for the limb of the application seeking leave for the firm of Okemwa & Company Advocates to come on record for the plaintiff which is allowed, the Notice of Motion dated 16th December, 2016 is without merit and the same is accordingly dismissed with no order as to costs.

Delivered and Signed at Nairobi this 13th day of October 2017

S. OKONG’O

JUDGE

Ruling read in open court in presence of:

No appearance	for the Plaintiff
No appearance	for the 1 st Defendant
No appearance	for 2 nd Defendant
No appearance	for the 3 rd , 4 th and 5 th Defendants
Catherine	Court Assistant