



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 97 OF 2015

EGLYN CHEPCHIRCHIR.....1ST PLAINTIFF

CHRISTIAN CHOGE.....2ND PLAINTIFF

BENJAMIN KICHWEN CHOGE.....3RD PLAINTIFF

JOSEPH ANG'ANG'A.....4TH PLAINTIFF

(All suing as the administrators of the Estate of the late SIMON KIPTUM CHOGE – Deceased)

VERSUS

MOHAMED KHALID.....1ST DEFENDANT

KEN MUYUNDO..... 2ND DEFENDANT

ROBERT SUGUT.....3RD DEFENDANT

RULING

1. The application dated 16/2/2017 by the plaintiff seeks the following order :-

“That there be a reference to this court from the taxation by the Deputy Registrar as a Taxing Master of this court and the court be pleased to hear the objections by the plaintiff/objector herein on taxation of Bill of Costs dated 24/4/2016 given on 2/2/2017 and do make decisions on items 1,3,4,5 and 14 and the total costs assessed out of the said Bills of Costs and make a proper decision”.

2. In brief the plaintiffs’ case is that the suit was filed in order to stop the defendant from cutting trees on land administered by the plaintiffs. The 2nd defendant is said to have beseeched the 1st plaintiff to cause the case to be withdrawn whereupon the 1st plaintiff conceded and instructed the plaintiffs advocate to withdraw the case; however, the 2nd defendant changed his mind. Nevertheless, the case against the 2nd defendant was withdrawn and the suit was to proceed against the rest of the defendants. The suit against the 3rd defendant was also subsequently withdrawn without costs on the basis that the 3rd defendant ceased his offending nuisances.

3. The plaintiff avers that the taxation was done and ruling was to be delivered on 25/8/2016, but it was not. It was delivered on 2/2/2017 for a sum of Kshs.2,200,000/=. It is this amount that the plaintiff says has no basis.

4. The plaintiff avers that among the grounds he relies on are the following:-

(a) **The costs were taxed on 23/6/2016 and ruling reserved for 25/8/2016.**

(b) **That the matter came to court subsequently when the suit against defendant was withdrawn with no order as to costs.**

(c) **Notice under Rule 11(1) of the Advocates Remuneration Rules.**

(d) **There is a danger of the 2nd defendant proceeding to execute the certificates of costs.**

(e) **The 2nd defendant intends to overreach.**

(f) **That the said amount allowed has no basis whatsoever under the Advocates Remuneration Order.**

5. The plaintiff requested the court, and the court issued reasons for its decision under **Rule 11(2) of the Advocates Remuneration Rules.**

6. The 2nd defendant responded to the application vide his replying affidavit sworn on 18/7/2017 and filed on 19/7/2017. The gist of that response is that the 2nd defendant was wrongly sued and it is therefore entitled to costs; that he had filed a defence; that a valuation report gave the value of the subject matter of the suit; that the plaintiff withdrew the case against him and the court ordered he be paid costs; that he never beseeched the 1st plaintiff to withdraw the case against him and that the costs were properly assessed by the Deputy Registrar and the assessment is in accordance with the scale.

7. The 2nd defendant avers that the reference is fatally defective and lacks any triable issues. The 2nd defendant also averred that he was entitled under the law to file a Valuation Report as he had done, just as the plaintiffs were entitled, in order to enable the court to determine the value of the subject matter.

8. However, in a further affidavit sworn by the 1st plaintiff it is averred that the value of the property was not in issue but the cause of action was trespass by the defendants and cutting down of tress. The plaintiff avers that the Valuation Report used was obtained by the 2nd defendant alone and that it was not part of the pleadings. She also states that there was no court order allowing the valuation report after the conclusion of the suit.

THE PLAINTIFF'S SUBMISSIONS

9. The plaintiff submitted that the Deputy Registrar erred in failing to accurately discharge her mandate, and she awarded the 2nd defendant an unreasonable amount based on the impugned Valuation Report yet the cause of action lay in trespass. The value of the subject matter, urged the plaintiff, was to be sourced from the pleadings, judgment or settlement between the parties and use of the valuation report, which she refers to as an extraneous source, was erroneous. The plaintiff's position is that the Advocates Remuneration (Amendment) Order requires that the value is to be ascertained from the pleadings. The plaintiff also avers that the matter was settled before it proceeded to hearing and there was no value pleaded in the pleadings and no court order permitting use of the Valuation Report.

10. The plaintiff referred the court to the case of *Nyangito & Co. Advocates -vs- Doinyo Lessos Creameries Ltd [2004] eKLR (HC Misc. No. 843 of 2013)*, the case of *Joreth Ltd -vs- Kigano & Associates Civil Appeal No. 66 of 1999 [2002] EA 92*, and *Nairobi HCCA No. 34 of 2015 - A.M. Kimani & Co. Advocates -vs- Trident Insurance Company Ltd*. The plaintiff averred that the taxing officer did not give reasons in her ruling for exercising her discretion even when asked by the plaintiff to do so.

11. On the specific items challenged, the plaintiff averred that **items 3 and 4** should be regarded as the

same and they should be evidenced by receipts. **Item 14**, the plaintiff urged, was not a properly incurred expense in the suit. Since there was no order for a valuation and no basis for payment of valuation fees incurred after the suit was withdrawn.

THE 2ND DEFENDANT'S SUBMISSIONS

12. The 2nd defendant quoted **Schedule 5 Part 11** of the Advocates Remuneration Order 2014 which provides for alternative methods of assessment of costs. He relied on the case of **Nyangito & Co. Advocates** (supra) as having stated that some of the relevant factors to be taken into account in taxation include “*the nature and importance of the case or matter, amount or value of the subject matter involved*”. He therefore states that since the defendant had demonstrated to the taxing officer that the value of the subject matter was Kshs.159,000,000/= and that the assessment by the taxing officer was correct and in accordance with **Part 6** of the Advocates Remuneration Order 2014.

ISSUES FOR DETERMINATION

13. The main issue for determination in this application is :-

(1) Whether in accordance with Advocates Remuneration Order 2014 Schedule 6(1) (b) the instruction fees should be 75% of the fee chargeable.

(2) Whether the taxing officer erred in principle in taking into account the value of the subject matter.

(3) Whether the taxing officer erred in relying on a valuation report that was not obtained through an order of the court, and which had been obtained at the instance of one party only.

(4) Was the taxing officer wrong in her assessment of Items 3, 4, 5, and 14?

(5) What orders should issue?

(1) Whether the instruction fee in the matter should be 75% of the fee chargeable.

14. On this issue, the rules are clear: Schedule 6(1)(b) of the Advocates Remuneration Order provides for instructions fees to sue or defend in a suit which is determined in a summary manner without going to full trial shall be 75% of the fee chargeable. In this case the suit was evidently withdrawn before the hearing commenced. The rule cited hereinabove is therefore applicable to the letter.

2. Whether the taxing officer erred in taking into account the value of the subject matter.

15. On this issue parties are in agreement that the value of the subject matter may be referred to for the purpose of taxation of costs. The question remains whether the Taxing Officer was right in taking into account the value of the subject matter in this case where the cause of action lay in trespass by the defendants. The plaint seeks a declaration that Simeon Kiptum Choge is the owner of the suit land, that an order of injunction do issue against the defendants to restrain them from trespassing into the suit land, and an order of injunction to restrain the defendants jointly and severally from cutting any trees, collecting, skidding, pruning, wasting, loading, debarking or in any way interfering with the plaintiffs quiet possession of the land, mesne profits and costs. The mesne profits are not specified. This is quite indicative of why there occurred use of a valuation report later on.

16. It is true that **Schedule 5** of the Advocate Remuneration Order is titled “***Fees in respect of business the Remuneration for which is not otherwise prescribed or which has been the subject of an election under Paragraph 11.***”

17. **Paragraph 22** is in respect of liberty to an advocate to elect, in matters involving advocate and client Bill of Costs. It suffices to state that the **Paragraph** and **Schedule 5** are both not applicable to the present

matter as it involves party and party costs.

18. Schedule 6 is the proper Schedule to apply in this instance as it is in respect of party and party costs. Instructions fees therefore have to be assessed as provided thereunder. In this case I find that the computation of costs should have been conducted under **Schedule 6(1)(b)**. That sub-paragraph provides as follows:-

“(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and...”

However, it is **sub-paragraph 1(d)** of the **6th Schedule** that applies the mode of computation in **sub-paragraph 1(b)** to instructions to defend.

It is clear that **Schedule 6(1)(b)** envisages the ascertainment of the value of the subject matter during the process of assessment of costs.

19. It is not clear from the plaintiff’s submission how the costs should be assessed in the absence of any value stated in the plaint. The fees must be assessed somehow. I do not see any wrong committed by the taxation officer in her decision to take into account the value of the subject matter. It can be deciphered that her dilemma only lay in the absence of a value in the pleadings which led her to consider a valuation report filed by the defendant in her taxation.

(2) Whether the Taxation Officer erred in relying on a Valuation Report that was not obtained through an order of the court and at the instance of one party.

20. The case of **Nyangito** (supra) is distinguishable from the instant case. In that case a specific sum had been demanded by the Kenya Revenue Authority hence the suit. One of the grievances raised in the Nyangito case was that the taxing master never considered that amount: The respondent in that case argued that even assuming that costs should have been pegged on the subject matter the same could only be pegged on the amount that was arrived at as the settlement sum. In the current case there was no settlement sum. It is true that there was no claim that the defendants had asserted themselves as the owners of the suit land.

21. In the case of **Kyalo Mbobu T/A as Kyalo Mbobu & Associates Advocates -vs- Jacob Juma [2015] eKLR** the court stated as follows:-

“The other reason for dismissing that contention by the advocate is that the value of the subject matter of a suit for purposes of the taxation of a bill of costs whether party and party or advocate client under the Advocates Remuneration Order ought to be determined from the pleadings, judgment or settlement. But if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instructions fees as he considers just, 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, as espoused in Schedule V1A 1 of the Advocates Remuneration Order.”

22. In the case of **Sammy Some Kosgei -vs- Grace Jeel Boit [2014] eKLR** the court (*Munyao J*) stated as follows:-

“As noted in proviso (i) to Schedule VI, the taxing master is not strictly obliged to tax a bill only on the basis of the value of the subject matter assuming that the value is in the pleading, proceeding or judgment.....”

In that case the Court also noted that the Court of Appeal frowned on the practice of utilization of a Valuation Report.

23. In my view, the Taxation Master *solely* relied on the Valuation Report and I find this to be improper. In the case of **Nyangito & Co. Advocates** (Supra) the Court stated as follows:-

“The circumstances under which a judge interferes with the taxing officer’s exercise of discretion are well known”. These principles are:- (1).....

(2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and 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.”

24. I hardly think that the amount of mesne profits, had they been specified, would have equalled the full amount of value assigned the land in the valuation report, even assuming that the Valuation Report could be solely relied on. Yet if the amount of mesne profits had been found payable, it is most likely that the judgment sum would have been relied on to compute the costs. Of course this would have been only one of the factors to be considered and the taxing master ought to have avoided basing the exercise of her discretion on the Valuation Report alone. On this ground alone, I am inclined to believe that the decision was based on an error of principle.

4. Did the taxing officer err in her assessment of Items 3, 4, 5, and 14?

25. As to the specific objections regarding **Items 3, 4, 5, and 14**, I find that the Taxing Officer did not err. The only real issue would have arisen in respect of **item number 14** if this court had ruled out completely the possibility of relying on a valuation report. However, in view of the fact that a valuation report is one of the things that may be referred to in taxation, I find that the assessment was correctly done.

(5). What orders should issue?

26. The principle has already been stated in the Nyangito case (supra) that when a judge identifies an error of principle in a taxing officer’s decision, the normal practice is to remit it back to the taxing master 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 simply because in its opinion the amount awarded was high. I also observe that where an error of principle has been identified, the degree of materiality may vary depending on the circumstances of each case. In my view, there may be a variation in this case, but that is up to the taxation officer to deal with.

I therefore remit the Bill of Costs dated 25/4/2016 back to the Deputy Registrar for a re-assessment in respect of **Item 1**.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017**.

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Mr. Analo for holding brief for Nyamu for 2nd defendant

N/A for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017