



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MISC. APPLICATION NO. 293 OF 2015**

**BISHOP REV. JOSEPH MEMBA SYUMA**

**BISHOP ELIJA MULELA**

**BISHOP JOEL KIJIRU**

**THOMAS MWANGANGI**

**THOMAS MUTUSE**

**ISAAC BETT (All applying on behalf and as**

**Registered Trustees for and on behalf of GOOD**

**NEWS CHURCH OF AFRICA and THE GOSPEL**

**FURTHERING BIBLE CHURCH TRUST (Registered Trustees)**

**GOOD NEWS CHURCH OF AFRICA and THE GOSPEL**

**FURTHERING BIBLE CHURCH TRUST ..... APPLICANTS**

**VERSUS**

**OKONG'O WANDAGO & CO. ADVOCATES.....RESPONDENT**

**RULING**

What is before me is a reference brought under Rule 11 of the Advocates Remuneration Order 2009 from a taxation of Advocate/Client Bill of costs by the Deputy Registrar (Hon. S. Mwayuli) on 28<sup>th</sup> October 2015 in Misc. Application No. 65 of 2013, Okong'o Wandago & Co. Advocates vs. Bishop Rev. Joseph Memba Syuma & 5 Others. The Respondent herein had acted for the Applicants in Nairobi ELC No. 507 of 2009, Bishop Rev. Joseph Memba Syuma & Others vs. Darasa Investment Limited (“**the suit**”) which concerned a dispute over the ownership of all that parcel of land known as L.R No. 38/VII/586 I.R 2394114 (“**the suit property**”). The suit was compromised by the parties and a consent recorded in court settling the same on terms. There were two consents. The first consent was filed in court on 14<sup>th</sup> February 2011 and was executed by the Respondent as advocates for the Applicants and P. K. Kamau and Company advocates for the defendant in the suit. According to this consent, the suit was settled at Kshs.250,000,000/=. A dispute arose between the parties to the suit after this consent as a consequence of which the consent was set aside and the parties entered into a new consent on 2<sup>nd</sup> December 2014. As

at this time, the Respondent had ceased to act for the Applicants who were now represented by another firm of Advocates. Under the new consent, the suit was settled in favour of the Applicants as follows:-

Principal sum	-	Kshs.350,000,000/=
Legal costs	-	Kshs. 4,000,000/=
Total	=	Kshs.354,000,000/=

After this second consent, the Respondents filed its Advocate/Client Bill of Costs for taxation against the Applicant. The itemised Bill of costs came to Kshs.20,309,625 of which a sum of Kshs.20,000,000/= constituted instruction fees. When the Bill of Costs came up for taxation before the Deputy Registrar, the Applicant contested only the instruction fees and that is what the taxing master was called upon to determine. The Respondent in its submission before the Deputy Registrar in support of the instruction fees of Kshs.20,000,000/= argued that the value of the subject matter of the suit on which the instruction fees should be based was Kshs.465,000,000/=. In support of this submission, the Respondent relied on the valuation report which the Applicant had annexed to the affidavit it had filed in the suit in which the value of the suit property was put at Kshs.465,000,000/=. On their part, the Applicants submitted that the instruction fees should be based on the value of the subject matter of the suit as indicated in the first consent that had been filed in court by the parties on 14<sup>th</sup> February, 2011 in which the value of the subject matter of the suit was put at Kshs.250,000,000/=. In a well reasoned ruling, the Deputy Registrar held that the value of the subject matter of the suit was Kshs.354,000,000/= which was the amount at which the suit was settled by the parties through the second consent that was recorded in court on 2<sup>nd</sup> December 2014. On the basis of this holding, the Deputy Registrar taxed the instruction fees at Kshs.4,535,000/=. The Applicants were aggrieved with that decision by the Deputy Registrar and brought this reference to challenge the same. The decision of the Deputy Registrar has been challenged on the following main grounds:

- (i) The Deputy Registrar erred in assessing Advocate/Client costs.
- (ii) The Deputy Registrar erred in holding that the value of the subject matter was Kshs.350,000,000/= and not Kshs.250,000,000/=.
- (iii) The amount awarded to the Respondent was manifestly excessive and amounted to an error of principle.

The reference was opposed by the Respondent through a replying affidavit sworn by Amos Ogutu Wandago on 17<sup>th</sup> December 2015. In its response, the Respondent supported the decision of the Deputy Registrar contending that the same was made on sound principles. The Respondent contended that the Deputy Registrar was justified in using the second consent in assessing the value of the subject matter of the suit.

The application was argued by way of written submissions. The Applicants filed their submissions on 24<sup>th</sup> February, 2016. The Respondent did not file any submission but indicated to the court that it wished to rely on its replying affidavit. I have considered the Applicant's application and the opposition thereto by the Respondent. I have also considered the written submissions by the Applicants together with the authorities cited in support thereof. What I have been called upon to do by the Applicants is to interfere with the discretion of the Deputy Registrar who was the taxing officer. In the case of **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] IKLR 528**, the Court of Appeal stated as follows at page 533;

**“On a reference to a judge from the taxation of the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur vs. Nyeri Electricity Undertaking (1961) E.A, the predecessor of this court said at page 492 paragraph 1:**

**“Where there has been an error of principle the court will interfere but questions solely on quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.”**

**An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an interference that the taxing officer acted on erroneous principles-See Arthur vs. Nyeri Electricity Undertaking (Supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji vs. Kanji Naran Patel (No. 2) (1978) KLR 243”.**

From the foregoing, the onus was upon the Applicants to satisfy the court that the Deputy Registrar erred in principle in assessing the instruction fees payable to the Respondent. I am not satisfied that the Applicants have discharged this burden. What was contested by the parties before the Deputy Registrar was the value of the subject matter of the suit on which the instruction fees was to be assessed. Whereas the Applicant had contended that the value of the subject matter was Kshs.250,000,000/= which was given as the value of the suit property in the consent dated 11<sup>th</sup> February 2011 and filed in court on 14<sup>th</sup> February 2011, the Respondent argued that the value of the suit property was Kshs.465,000,000/= and that the instruction fees should be assessed based on the same. The Deputy Registrar after considering the rival submissions held that the value of the subject matter of the suit on which the instruction fees was to be based was Kshs.354,000,000/= being the amount at which the suit was settled in favour of the Applicant. In arriving at this decision, the Deputy Registrar relied on the Court of Appeal case of **Joreth Limited vs. Kigano & Associates [2002]1 E.A 92** where it was held that for the purposes of taxation of Bill of Costs, the value of the subject matter ought to be determined from the pleadings and judgment or settlement and if the same is not ascertainable on the foregoing, the taxing officer is to use his discretion in assessing instruction fees. The Deputy Registrar noted that the suit was settled on terms which provided among others that the Applicants were to be paid Kshs.350,000,000/= as the principle sum and Kshs.4,000,000/= as legal fees. It is on the basis of this settlement amount that the Deputy Registrar determined the value of the subject matter of the suit as Kshs.350,000,000/= and on which she assessed the instruction fees payable. The Deputy Registrar rejected the contention by the Applicants that the instruction fees should have been based on the earlier consent that was entered into by the parties when the Respondent was acting for the Applicant. I am unable to fault the Deputy Registrar on her holding that the value of the subject matter of the suit was to be based on the final consent that was entered into by the parties in the suit and not the earlier consent that was set aside. It was not contested before the Deputy Registrar and before this court that the consent that the parties had entered into on 14<sup>th</sup> February 2011 was contested and was ultimately set aside. I am of the view that the said consent having been set aside, it could not form a basis for determining the value of the subject matter of the suit more particularly after the parties entered into a new consent. I am in agreement with the Deputy Registrar that it was the second consent that was recorded on 2<sup>nd</sup> December 2014 that could form a basis for determining the value of the subject matter of the suit. I cannot fault the Deputy Registrar for rejecting the sum of Kshs.250,000,000/= that was proposed by the Applicants as the value of the subject matter of the suit and the sum of Kshs.465,000,000/= that was proposed by the Respondent. On the face of a settlement by the parties through which the amount payable to the Applicants was put at Kshs.354,000,000/= inclusive of legal costs, I can see no basis for these alternative figures that were put forward by the parties as a basis for determining the value of the subject matter of the suit. I find no basis or authority for the Applicants' contention that the value of the subject matter of the suit should have been based on the value of the suit property as at the time the Respondent was instructed and not the value that was agreed upon when the suit was settled. I have reviewed all the cases that were cited by the Applicant. None supports this contention.

Although I am in agreement with the Deputy Registrar's decision to determine the value of the subject matter of the suit on the settlement amount that was agreed upon by the parties on 2<sup>nd</sup> December 2014, I am of the view that the Deputy Registrar erred in adding the legal costs as part of the value of the subject matter of the suit. The suit was settled at Kshs.354,000,000/= which comprised of the principal amount of Kshs.350,000,000/= and the legal costs of 4,000,000/=. I am of the view that in determining the value of the subject matter for the purposes of assessing instruction fees, the legal fees of Kshs.4,000,000/= should not have been taken into account. Save as aforesaid, I see no merit in the reference before me.

In conclusion, I would allow the reference in part. I am of the view that in the circumstance of this case, it is not necessary for me to refer the matter back to the Deputy Registrar so that she may assess the instruction fees based on the sum of Kshs.350,000,000/= as the value of the subject matter of the suit. Public policy demands that the business of the court be conducted with expedition. This will not be achieved if this matter is taken back to the Deputy Registrar. I would therefore set aside the sum of Kshs.4,537,000/= that was assessed by the Deputy Registrar as instruction fees payable to the Respondent based on the sum of Kshs.354,000,000/= as the value of the subject matter and in place thereof substitute it with the sum of Kshs.4,399,000/= as the instruction fees based on Kshs.350,000,000/= as the value of the subject matter calculated as follows:-

• The value of the subject matter	Kshs.350,000,000/=
• The 1 <sup>st</sup> Kshs.1,000,000	- Kshs.77,000,000/=
• The next Kshs.19,000,000	- Kshs.362,000/=
• The last Kshs.330,000,000	- Kshs.3,960,000/=
• _____	
Total instruction fees	- Kshs.4,399,000/=
_____	

The Respondent Bill of Costs dated 22<sup>nd</sup> October 2012 is therefore taxed at Kshs.4,708,625 made up as under:-

• Item 1	- Kshs.4,399,000/=
• Items 1 – 6	- Kshs. 212,859/=
• Disbursements	Kshs. 96,766/=
• _____	
Total	Kshs.4,708,625/=
_____	

Since the ground on which I have varied the decision of the taxing officer was raised by the court on its own motion, each party shall bear its own costs of the reference.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Benji h/b for Otieno for the Applicants

Mr. Njogu h/b for Wanonyo for the Respondent

Kajuju Court Assistant