



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND
COURT AT NAIROBI
ELC CIVIL SUIT NO. 3009 OF 1983

KARIUKI NJUGUNA & 17 OTHERSPLAINTIFFS/DECREE HOLDER

-VERSUS-

NGATHO KAIRU & 2 OTHERSDEFENDANTS/JUDGEMENT DEBTOR

R U L I N G

By a Notice of Motion dated 12th November 2012 brought under Rule 11(4) of the Advocates Remuneration Order, the Defendants seeks the following orders:-

1. That the taxation order made on 24th February 2006 be set aside.
2. That the taxation of the Bill of Costs be retaxed/or revised as the case maybe
3. That the costs of this application be provided for.

The application is premised on grounds that the reasons given by the taxing master for awarding costs on instruction fees, item (1), was a clear and deliberate misdirection on his part constituting an error in principle and fact. The Defendants contend that the taxation was erroneous and a miscarriage of justice.

The application was canvassed by way of written submissions and the Defendants in submissions dated 19th January 2015 argued that the reasons given by the taxing master for awarding costs on instructions fees item(1) was a clear and deliberate misdirection on the part of the taxing master constituting an error in principle and fact. Counsel for the Defendant submitted that instruction fees is solely based on the prayers sought by the successful party and that in this case, the Plaintiffs sought a declaratory order in respect to LR No. 13166 as well as injunctive orders.

The Defendants Counsel submitted that the issue for determination before the court was whether or not the Plaintiffs owned the suit property as tenants in common and in equal shares with the Defendants, Counsel contended that the court found in favour of the Plaintiffs and held that the suit property was held by the parties as tenants in common and in equal shares. It was submitted that no monetary finding was made in the judgement. Counsel argued that although the suit property is approximately 100 acres no liquidated claim was awarded and therefore the value of the subject matter is irrelevant.

It was further submitted that the bill of Costs puts the number of Plaintiffs as 6 and that the instruction fees was for the 6 Plaintiffs for whom **Ngani & Company Advocates** acted for against the 13 Defendants who were represented by **Muchangi Nduati & Co. Advocates**. Counsel argued that the taxing master erred in adopting the value of 100 million as the basis of calculating the instruction fees since the Plaintiffs were not pursuing the entire parcel of land as their interest was for declaration that they were

tenants in common with the 13 Defendants.

It is the Defendants' submission that even if the taxing master was to consider the value of the subject matter which he should not have considered, the beneficiaries of the 100 acres are 19 persons and therefore, that the 6 Plaintiffs interest in monetary value is for 5.3 acres each. The Defendants contended that according to the valuation conducted by **Lloyd Masika** in 2006 at the value of 1 million shillings per acre, the value of the subject matter sought by the Plaintiffs was only 6 percent of the suit property which would be Kshs 31,800,000/-

Counsel argued that the date of instructions is 15th August 1983 when the suit was filed and that the value of the subject matter ought to have been as at the date of instructions. The taxing master based instruction fees on the value of the entire suit property as at 2005 and in that respect he erred. The Defendants contended that the taxing master erred in basing instruction fees on the entire value of the suit property despite the fact that the Plaintiff was not claiming the entire suit property.

The Plaintiffs in submissions dated 26th January 2015 argued that Schedule VI of the Advocates Remuneration Order provides for fees where the value of the subject matter can be determined from the pleading, judgement or settlement between parties where defence has been filed. It was submitted that the taxing officer in exercise of his discretion is required to take into consideration other fees and allowances to the advocate (if any) in respect of the work which any such allowances applies, the nature and importance of the cause or matter, the amount invested, the interest of the parties, the general conduct of the proceedings, a direction of the trial judge and all other relevant circumstances.

The Plaintiffs referred the court to the case of **Sammy Some Kosgei vs. Grace Jeel Boit E&L No. 411B of 2014** where the court cited the decision in **Joreth vs. Kigano & Associates, Nairobi CA No. 66 of 1999** where the Court of Appeal stated that the value of the subject matter of a suit for purposes of taxation of bill of costs ought to be determined from the pleadings, judgement or settlement (as the case may be) in the absence of which the taxing officer falls back to her discretion and considers all relevant matters.

Counsel for the Plaintiffs submitted that the discretion of the taxing officer is so wide and that the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party as held in the case of **Premchand Rainchand Ltd & anor vs. Quarry Services of East Africa Ltd & another (1972) EA 162**. Reference was further made to the case of **Ouma vs. Warena (1982) KLR 288** where the Court of Appeal held that it was reluctant to interfere with questions of quantum in which taxing officers have greater experience unless a question of principle is involved.

Further reliance was placed on the case of **Nyangito & Company Advocates vs. Doinyo Lessos Creameries Misc. Cause No. 843 of 2013** and it was submitted that the Applicant had not demonstrated that the taxing officer applied wrong principles or that the bill is excessive. While submitting that the bill was taxed on 25th July 2005, the Plaintiff argued that the Defendants had frustrated them from realizing costs. Counsel urged the court to dismiss the application and to order the Defendants to pay the entire sum as taxed with interest at court rates until payment in full. The Plaintiffs made reference to the case of **JP Machira T/A Machira & Company Advocates vs. MDC Holdings Ltd & others HCCC No. 1549 of 2001** to support their submission that the taxing officers discretion cannot be interfered with except for good cause.

The issue for determination is whether the taxing master whether the taxing master made an error of principle in assessing the instructions fees to warrant interference of his decision by this Court.

It is settled law that a court cannot interfere with the taxing master's decision on taxation unless it is shown that either the decision was based on an error of principle, or the sums awarded are manifestly high or low as to lead to an injustice. See **First American Bank of Kenya vs Shah and others (2002) EA 64, Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another (1972) E.A 162**. These principles were re-affirmed by the Court of Appeal in **Joreth Limited vs. Kigano and Associates (2002) 1 E A 92**.

Terred in adopting the value of 100 million as the basis of calculating the instruction fees sinceno liquidated claim was awarded and thatthe value of the subject matter was therefore irrelevant.

In **Joreth Limited vs. Kigano and Associates (2002) 1 E A 92** the Court of Appeal stated that where the value of the subject matter cannot be discerned from the pleadings or judgment, the taxing master has discretion to assess it 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. That is what CK Njai Esq did when he said: ‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.”

In this case, the taxing master exercised his discretion in assessing instruction fees and took into consideration the value of the subject matter. The taxing officer was guided by a valuation report prepared by **LLyod Masika Ltd** placing the value of the suit property at Kshs 100m as at 17th October 2002. A court will not interfere with the award of a taxing officer solely on quantum. See **Ouma vs. Warega (1982) KLR 288** . In **Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another (1972) E.A 162**, the court stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely amatter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other”.

In my view, taking into consideration the value of the suit property, the amount of instruction fees assessed was not too high or too low to amount to an injustice. The taxing master did not enhance the instruction fees although he had discretion to do so under the Advocates Remuneration Order and provided cogent reasons for declining to so exercise his discretion. The valuation of the suit property was carried out in 2002 before this suit was determined in a judgement delivered on 27th July 2005. There is no doubt that as at the time judgement was being delivered, the value of the property had escalated from the Kshs 100m valued in 2002.I therefore find that the Bill of Costs dated 9th August 2005 was properly taxed and the application dated 12th November 2012 is without merit. The Defendants shall bear the costs of this application.

The taxed costs shall be paid together with interest from the date of taxation.

Ruling dated signed and delivered this 27th day of **March**, 2015.

J. M. MUTUNGI

JUDGE

In the Presence of:

Ngani fort the Plaintiffs

N/A for the Defendants