REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 411 'B' OF 2012

Formerly HCC 20 OF 2008

SAMMY SOME KOSGEI.....PLAINTIFF

VS

GRACE JELEL BOIT.....DEFENDANT

(Reference on taxation; taxation of costs where value is not in pleadings, judgment or settlement).

RULING

This ruling is in respect of a reference made by the plaintiff/applicant under Rule 11 (2) of the Advocates (Remuneration) Order of the Advocates Act, CAP 16, Laws of Kenya. The applicant is dissatisfied with the taxation of his costs by the Deputy Registrar hence this reference.

In this suit, the applicant as plaintiff, contended that he purchased two parcels of land from the defendant's husband one Abraham Kimitei Boit (deceased). The defendant is the legal representative of the late Boit. The two parcels of land are Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343. After hearing the suit, I entered judgment for the plaintiff and made the following final orders :-

a. *That a declaration is hereby issued that the plaintiff is the owner through purchase of the land parcels Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 .*
b. *That an order of specific performance is hereby issued directing the defendant to execute all the necessary documents to vest upon the plaintiff the land parcels Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 and in default the Deputy Registrar of this Court to execute the said documents.*
c. *That the plaintiff shall shoulder all conveyance and transfer fees and all charges required for purposes of effecting the transfer of the two parcels of land to himself.*
d. *Costs of this suit shall be borne by the defendant.*

The plaintiff then filed a bill of costs for taxation which bill sought the sum of Kshs. 1, 620,675/=. The bone of contention was in the amount of instruction fees through which the applicant had initially sought the sum of Kshs.877,000/= which he amended to Kshs. 6,000,000/=. The taxing master after considering the arguments of the parties, taxed this sum at Kshs. 107,000/=. In her reasons, the taxing master stated that she arrived at this amount after taking into consideration Schedule VI paragraph 1 (b) of the Advocates Remuneration Order, 2006. According to her, the value of the subject matter from the pleadings and judgment was Kshs. 3,000,000/=. The taxing master also allowed a sum of kshs. 35,667/=

(being 1/3 of kshs. 107,000/=) as fees for getting up and preparing for trial.

In his supporting affidavit, the plaintiff has averred that the subject matter of the suit properties is Kshs. 30,000,000/= each, hence a total sum of Kshs. 60,000,000/= for the two properties, and he annexed a valuation report, which valuation report had been relied upon at the taxation. It is the contention of the applicant that the amount awarded to him is too low and not in accordance with the rules. In his submissions, Mr. Onyinkwa for the applicant argued that the taxing master ought to have applied proviso (iv) (a) and (b) of Schedule (VI) as it was his argument that the claim was one of specific performance of two leases. He argued that the instruction fees is to be the annual rent, or 1/10th of the capital value of the premises, whichever is higher. He stated that since the value of the properties is Kshs. 60 million, then the instruction fees should have been Kshs. 6 million. He submitted that what the taxing master did was to take the purchase price as the value of the subject matter, which to him was erroneous, and gave no reasons for not using the valuation report. He submitted that if the taxing master failed to take the valuation into account, then she had to fall back on her discretion, and the sum ought to have been much higher than what was taxed, as the matter was quite involving. He relied on the case of ***Joreth Ltd vs Kigano & Associates, Nairobi Civil Appeal No. 66 of 1999.***

Miss. Ngelechei for the respondent, was of the view that the valuation report could not be relied upon as it was filed after judgment. She submitted that the valuation is not in the proceedings and the respondent has had no opportunity to contest the same. She submitted that the taxing master was correct in taking the sum of Kshs. 3 million as the value of the subject matter as this was what was identified as the purchase price. She was further of the opinion that the suit was not one touching on a lease.

It is with the above arguments that I need to decide the matter.

There is no question that the operative schedule of the Remuneration Order is Schedule VI of the 2006 Advocates Remuneration Order, Legal Notice No. 159 of 2006. Rule 1 (b) provides the fees in a suit where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties where a defence has been filed. The fees are graduated depending on the value of the subject matter and are as follows :-

That value exceeds	But does not exceed	
Sh.	Sh.	Shs.
-	500,000	49,000
500,000	750,000	63,000
750,000	1,000,000	77,000
1,000,000	20,000,000 fees as for Sh.1,000,000 plus an additional cent.	1,000,000 plus an additional 1.5 per cent
Over 20,000,000	Fees as for 20,000,000 plus an additional 1.25 per cent	

There is a proviso which inter states as follows:-

Provided that -

(i) the taxing officer, in the exercise of this discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the

nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances;

(ii) (iii) … (not relevant)

(iv) for the purposes of assessing an instruction fee in any suit -

(a) for the possession of premises, with or without a claim for arrears of rent; or

(b) for specific performance of a lease, the value of the subject matter shall be taken to be the arrears of rent or mesne profits, if any that may be found due, increased by sum equivalent to the annual rental value of the premises or to one-tenth of the capital value of the premises, whichever is higher;

It is the contention of Mr. Onyinkwa that the proviso (iv) above applies. On my part, I am not convinced. In my view, proviso (iv) deals with cases covering a landlord/tenant relationship in which there could be a claim for possession of premises, a claim for rent, and an order for specific performance of a lease. The case herein was not one that touched on a landlord/tenant relationship and it is for that reason that I do not think that proviso (iv) is operative.

The other bone of contention is whether or not the taxing master could have relied on the valuation report to tax the plaintiff's bill. It is not denied that that valuation report which gives the sum of Kshs. 60 million as the value of the two properties in issue, is not in the pleadings, proceedings or judgment, as it was filed after judgment was delivered, and in my view, was done for the purposes of taxation of the plaintiff's bill of cost. The question whether an extraneous valuation can be utilized for purposes of taxation was addressed in the case of ***Joreth v Kigano***. In the matter the court of appeal frowned on the practice of its utilization in place of the value in the pleadings, judgment or settlement. The court stated 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."

As noted in proviso (i) to Schedule VI, the taxing officer 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 the case of ***Sarah Chepkosgei v Tito Tarus, Eldoret E&L No. 916 A of 2012*** I held that the taxing master ought to take into account all relevant circumstances when taxing the bill. At the end of the day, it is upon the taxing master to decide what he/she thinks is a relevant circumstance and the discretion on this point is very wide. At times, the value of the subject matter as stated in the pleadings, proceedings or judgment may not be much, yet the suit itself may involve fairly complex questions of law. The suit may have numerous witnesses, may cover a considerable length of time, or may be absolutely involving and absorbing. Thus solely taking into account the value of the subject matter in the pleadings, judgment or settlement, may at times not do justice to the parties when it comes to the taxation of the bill of costs. All relevant matters need to be taken into account so as to arrive at a figure that is fair in the peculiar circumstances of each case. It could also be that an external valuation is considered as a relevant matter in the instance of the case.

When taxing the instruction fees, the taxing officer made the following record :-

"In regard to item No. 2, the same is allowed at Kshs. 107,000/= as per paragraph 1 (b) of Schedule VI of ARO. The value of the subject matter from the pleadings and judgment of the court is Kshs. 3,000,000/=."

Rule 1(b) of the Remuneration Order provides for the figures to be utilized *where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties.* In this case, the

pleadings did not place any value on the subject matter and neither did the judgment. There was of course no settlement. The amount of Kshs. 3 Million used by the taxing master must have been derived from the proceedings (not the pleadings, judgment or settlement) where the plaintiff testified that he purchased the suit properties at a consideration of Kshs. 3 Million which money was paid between the years 1997 and 2001.

Following the dictum of ***Joreth v Kigano***, which I have set out earlier, I am of the opinion , that it was wrong for the taxing master to use the figure of Kshs. 3 Million, as the sole measure in taxing the bill of costs, since that figure was not in the pleading, judgment or settlement of the parties.

In my view, the bill needed to be taxed pursuant to proviso (i) of Rule 1 of Schedule VI of the Advocates Remuneration Order. The taxing officer, in absence of a value in the pleading, judgment or settlement, needed to fall back to her discretion, and consider all relevant matters. She could of course, in exercise of her discretion, consider the amount of Kshs. 3 Million as a relevant matter, but it will be seen that she considered the amount of Kshs. 3 million as forming part of the pleading, judgment or settlement (which was not the case) and not as a relevant matter being considered in exercise of the discretion in proviso (i). Therein lay the error as I have said before.

What then should I proceed to do with the matter ? I have two options. I can remit the matter back to the taxing officer for taxation or I can proceed to tax the bill myself. In the case of ***Joreth v Kigano***, the court of appeal was of the following opinion :-

"If the judge comes to the conclusion that the taxing master erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done". But I do not think that the court of appeal was asserting the position that a judge can never tax a bill in appropriate circumstances for in the same decision, the court of appeal cited and approved the dictum of Spry JA in the case of Steel Construction & Petroleum Engineering (EA) Ltd v Uganda Sugar Factory Ltd where it was stated as follows :-

"Counsel for the appellant submitted, relying on D'Souza v Ferao (1960) EA 602 and Arthur v Nyeri Electricity Undertaking (1961) EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."

I have debated whether to remit the matter back to the taxing master or to tax the bill myself. This is upon the discretion of the judge. In the case of ***Orion East African Ltd vs Permanent Secretary of Agriculture & Another, Nairobi High Court, Petition No. 100 of 2012 (2013) eklr,*** Majanja J. stated thus at Para 17:-

"Should I remit the matter to the Deputy Registrar for taxation? Both parties have cited authorities to support the position that the judge in finding an error ought to refer back the matter to the taxing master. In this regard and in the circumstances of this case, I prefer to adopt the position taken by Hon. Justice Ringera in ***First American Bank (First American Bank of Kenya Ltd v Gulab P Shah & Others*** *[2002]1 E.A. 61**)** where the court stated as follows, "I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees … I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality." I adopt these sentiments".*

I am in agreement with the above dictum and I will proceed to tax the bill myself.

As I stated earlier, the correct provision to have been utilized was proviso (i) of Schedule VI, since the value of the subject matter was not in the pleading, judgment or settlement of the parties. The issues that I am to take into account include the nature and importance of the cause or matter, the amount involved,

the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances.

The suit was no doubt important to the parties and the subject matter is extremely valuable. The parties had to engage the services of handwriting experts who testified as expert witnesses. I am not in doubt that this was an involving litigation over a valuable subject matter. I am of the view that I need to disturb the taxation of the sum of kshs. 107,000/= as to me the same is too low an instruction fee in a matter such as this. I have weighed all these factors which I consider to be relevant and I have also considered the dictum in the case of ***Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another (1972) EA 162*** where the court set the following principles :-

(i) (a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) that a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;

(c) That the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made

(ii) 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;

(iii) in considering bills taxed in comparable cases allowance may be made for the fall in value of money.

In my view, the sum of Kshs. 270,000/= will more or less be a fair figure in instruction fees. I proceed to tax item 2, instruction fees, in the sum of Kshs. 270,000/=. This figure has a bearing on fees for getting up which is 1/3rd of the instruction fees. This sum is taxed in the sum of Kshs. 90,000/=.

I further award the costs of this reference to the applicant.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. I.J. Onyinkwa present for the applicant.

Miss J.J. Ngelechei present for the respondent.