Dacha (Suing as the Administratrix of the Estate of James Romanus Dacha - Deceased) v Opiyo & 3 others (Miscellaneous Civil Application 7 of 2024) [2024] KEELC 6875 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6875 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISCELLANEOUS CIVIL APPLICATION 7 OF 2024

SO OKONG'O, J

OCTOBER 17, 2024

IN THE MATTER OF A REFERENCE FROM THE DECISION OF THE TAXING OFFICER HON. D.O.ONYANGO CM DELIVERED ON 14TH DECEMBER 2023 IN TAXATION OF THE PARTY AND PARTY BILL OF COSTS IN KISUMU CMCELC NO. 55 OF 2018

BETWEEN

ANNE ACHIENG DACHA ..... APPLICANT

SUING AS THE ADMINISTRATRIX OF THE ESTATE OF JAMES ROMANUS DACHA - DECEASED

AND

ROSE ALUOCH OPIYO ..... 1ST RESPONDENT

HIRANI KANJI KURJI ..... 2ND RESPONDENT

COUNTY LAND REGISTRAR, KISUMU COUNTY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

Background

1. The Applicant filed a suit against the Respondents before this court on 1st September 2016 in which she claimed that all that parcel of land known as Kisumu/Kogony/2202 (the suit property) which was at all material times registered in the name of James Romanus Dacha, deceased was fraudulently and illegally transferred to the names of the 1st and 2nd Respondents. The suit was defended by the Respondents. On 16th January 2018, the Applicant fixed the suit for mention on 25th January 2018 for the purposes of being transferred to the lower court. On 25th January 2018, this court on application by the Applicant transferred the suit to the Chief Magistrate's Court at Kisumu for hearing and final determination.

The suit was registered in the lower court as Kisumu CMCELC No. 55 of 2018 (the lower court). The suit was heard and determined by the lower court. The lower court delivered a judgment in favour of the Applicant against the Respondents on 26th January 2023. The Applicant was awarded the costs of the lower court suit.

2. On or about 11th November 2023, the Applicant filed a party and party bill of costs in the lower court for taxation. The bill of cots that had 179 items was drawn in the sum of Kshs. 787,139.81. The Applicant's bill of costs was taxed at a total sum of Kshs. 363,766/-. In taxing the bill, the taxing officer Hon. D.O.Onyango CM applied Schedule 7 of the *Advocates Remuneration Order* 2014. The taxing officer taxed item 1 being instruction fees at Kshs. 150,000/- and taxed off the whole of item 2 which was getting up fees. The taxing officer stated that getting up fees was not payable under Schedule 7 of the *Advocates Remuneration Order 2014*. Items 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62, 66, 166, and 167 were also taxed off wholly for the same reason that the same were not payable under Schedule 7 of the *Advocates Remuneration Order 2014.*

The reference

3. The Applicant was aggrieved with the said taxation and preferred this reference. In her Chamber Summons application dated 1st February 2024, the Applicant challenged the taxation of items 1, 2, 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62, 66, 166, and 167 only. The Applicant urged the court to set aside the taxation of the said items and have the same taxed a fresh as drawn or as the court may direct. The Applicant contended that the taxing officer erred in taxing the instruction fees on the subordinate court scale while the suit was filed before this court before it was later transferred to the lower court. The Applicant contended further that the taxing officer erred in its holding that the costs claimed under items 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62, 66, 166, and 167 of the bill of costs were not payable under Schedule 7 of the Advocates Remuneration Order 2014. The Applicant's application was not opposed by the Respondents. On 8th July 2024, the court directed that the application be argued by way of written submissions.

4. The Applicant filed submissions dated 23rd August 2024. In her submissions in respect of items 1 and 2 of the bill of costs, the Applicant submitted that the instruction fees and getting up fees were claimed under Schedule 6 of the *Advocates Remuneration Orde*r since the suit was filed in this court before it was transferred to the lower court. The Applicant submitted that the taxing officer erred in law by taxing the said items under Schedule 7 of the *Advocates Remuneration Order*. The Applicant submitted that all the services that were rendered and expenses incurred while the matter was still in this court must be charged in accordance with the provisions of Schedule 6 of the *Advocates Remuneration Order*. The Applicant submitted that only the services that were rendered and expenses incurred while the matter was in the lower court were to be charged under Schedule 7 of the *Advocates Remuneration Order*(ARO). In support of this submission, the Applicant cited *N.O.Sumba & Company Advocates v. Piero Cannobio*[2017]eKLR.

5. On whether the taxing officer exercised his discretion properly when he reduced the instruction fees from the claimed sum of Kshs. 330,000/- to Kshs. 150,000/-, the Applicant cited *Joreth Limited v. Kigano & Associates* [2002]eKLR, and submitted that the 1st and 2nd Respondents had claimed that the value of the suit property was Kshs. 8,000,000/- in 2015 and that it was on this value that the taxing officer should have based his assessment of the instruction fees. The Applicant submitted that if the taxing officer had adopted the said sum of Kshs. 8,000,000/- as the value of the subject matter, the scale instruction fees would have come to Kshs. 260,000/-.The Applicant submitted that it claimed a sum of Kshs. 330,000/- owing to the importance of the matter to the parties. The Applicant submitted that the claim of Kshs. 330,000/- as instruction fees was justified. On getting up fees, the Applicant

submitted that the same was payable under Schedule 6 Part 2(ii) of the ARO once the suit that was defended was confirmed for hearing. The Applicant submitted that the suit was fixed for hearing and that it was on the hearing date that it was transferred to the lower court. The Applicant submitted that she was entitled to getting up fees in the circumstances. As concerns items 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62, 66, 166, and 167 of the bill of costs which were disallowed on the grounds that the same were not payable under Schedule 7 of the *ARO*, the Applicant submitted that the services in respect of which costs were charged under these items were rendered while the suit was before this court and as such the fees was not chargeable under Schedule 7 of the *ARO* that was applied by the taxing officer but under Schedule 6 of the *ARO*. The Applicant submitted that the taxing officer applied the wrong Schedule of the *ARO* and as such made an error of principle. The Applicant submitted that all the items should have been taxed as drawn. Concerning items 166 and 167, the Applicant submitted that the same were disbursements and not fees. The Applicant submitted that these were actual expenses incurred and were payable whichever Schedule of the *ARO* was applied. The Applicant submitted that the taxing officer did not direct the Applicant under Paragraph 74 of the *ARO* to produce receipts or vouchers in support of these items and as such the claims could not be defeated for lack of supportive documents. The Applicant submitted that even if the receipts and vouchers were required and not produced, the taxing officer still had the discretion under Paragraph 16 of the *ARO* to allow the items if the same were necessary and proper for the attainment of justice or for defending the rights of a party and were reasonably incurred. In conclusion, the Applicant urged the court to allow the application.

Analysis and determination

6. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows:

> " On reference to a Judge from the Taxation by 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."

7. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited* Civil Appeal No. 206 of 2006[2015]eKLR, the court stated as follows:

> " .. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside"

8. In *Joreth Limited v Kigano & Associates* (*supra*) the court stated that:

> " C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:
>
> "Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money

value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1)."...

....In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation..."

...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...

...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle."

9. I have considered the Applicant's application together with the submissions by the Applicant's advocates. The Applicant had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court.

10. The Applicant has challenged the taxing officer's taxation of the bill of costs dated 11th November 2023 on various grounds which I have set out above. I will consider each ground separately. The first ground was that the taxing officer used the wrong Schedule of the ARO to tax the items in the Applicant's bill of costs for the services rendered and costs incurred while the suit was still before this court(ELC). The Applicant contended that the costs in respect of those items accrued when the suit was still before this court and as such were correctly charged under Schedule 6 of the *ARO* which applies to matters in the High Court and Courts of equal status. The Applicant contended that the taxing officer erred in taxing those items under Schedule 7 which is applicable to subordinate court matters. The Applicant contended that the items in the bill of costs that related to services rendered and costs incurred up to 25th January 2018 when the suit was transferred to the lower court ought to have been taxed under Schedule 6 of the ARO. It was on these grounds that the Applicant challenged the taxation of items 1, 2, 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62 and 66, of the bill of costs dated 11th November 2023. I have considered the Applicant's argument on this issue. I have also perused *N. O. Sumba & Co Advocates v. Piero Cannobio* [2017] KEHC 544 (KLR) cited by the Applicant in support of the Applicant's submissions on the issue. My view on this matter is as follows: The Applicant's suit was filed before this court(ELC) improperly. Due to the value of the subject matter and the reliefs sought, the suit should have been filed in the lower court. The Applicant noted this mistake and applied to this court to transfer the suit to the lower court where it belonged. Once the suit was transferred to the lower court it was for all intents and purposes a lower court suit as far as the parties inter se were concerned. The suit was heard fully and determined by the lower court. I am of the view that as between the parties, the costs awarded by the lower court could only be taxed under Schedule 7 of the ARO that provides for the fees for matters in the subordinate court. The taxing officer could not tax party and party bill of costs under two schedules; Schedule 6 and Schedule 7. The suit was either in the lower court or the ELC. Even if the matter was heard and determined by this court, since it should have been filed in the lower court in the first place, the taxing officer could still have taxed the bill of costs under Schedule 7 in accordance with paragraph 58 of the ARO. The mere fact that the matter was filed before

this court does not therefore entitle the Applicant to fees under Schedule 6 of the ARO. It is therefore my finding that since the Applicant's suit should have been filed in the lower court and was rightly transferred to the lower court and determined by that court, the Applicant is not entitled as between the Applicant and the Respondents to costs under Schedule 6. The authority relied on by the Applicant is not helpful. The facts that led to the filing of the reference are distinguishable from the facts of the case before me. The matter also concerned the taxation of advocate and client bill of costs. I therefore find no misdirection in the taxing officer's decision to tax instruction fees under Schedule 7 of the ARO. I also find no error in the taxing officer taxing off or disallowing items 2, 9, 10, 11, 12, 13, 23, 32, 33, 35, 42, 44, 46,47, 49,55,57,62 and 66 which concerned getting up fees, and fees for writing letters, perusal of documents, attending court registry and drawing of documents not provided for under Schedule 7 of the ARO. Items 166 and 167 of the bill of costs concerned travelling costs which were claimed in the sum of Kshs. 81,363.81 and Kshs. 20,000/- respectively. The burden was on the Applicant to prove that she incurred these expenses. These expenses were just claimed and nothing was placed before the taxing officer in proof thereof. I have noted the Applicant's interpretation of paragraphs 16 and 74 of the ARO. My understanding of those paragraphs is that they do not absolve a party who has claimed disbursements in the nature of travelling expenses from proving such expenditure. The fact that the taxing officer disallowed the claim means that he required proof of the same through the production of receipts and vouchers which were not provided by the Applicant when she filed her bill of costs. I therefore find no error in the taxing officer's decision to disallow items 166 and 167 of the bill of costs.

11. The Applicant had also contended that the taxing officer erred in taxing the instruction fees at Kshs. 150,000/- down from Kshs. 330,000/- that was claimed by the Applicant in the bill of costs. As was held in *Joreth Limited v Kigano & Associates* (*supra*), the value of the subject matter of a suit for the purposes of taxation of a bill of costs should be determined from the pleadings, judgment or settlement if any and if the said value cannot be ascertained in that manner, the taxing officer would use his discretion to assess such instruction fee as he considers just.

12. I have perused the pleadings in the lower court suit and the judgment of the court. The value of the subject matter of the suit was not ascertainable from the pleadings or judgment. Since the value of the subject matter of the lower court suit could not be ascertained from the pleadings and the judgment, the taxing officer was supposed to use his discretion to assess such instruction fee as he would consider just taking into account, the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings, and any direction given by the court. This in my view is what the taxing officer did when he assessed the instruction fees at Kshs. 150,000/-. I am not persuaded that this award of Kshs. 150,000/- was manifestly low as to amount to an error.

13. In the final analysis and for the foregoing reasons, it is my finding that the taxing officer did not commit an error of principle in the taxation of the Applicant's bill of costs dated 11st November 2023.

Conclusion

24. In conclusion, I find no merit in the Applicant's Chamber Summons application dated February 1, 2024. The application is dismissed with no order as to costs.

DATED AND DELIVERED AT KISUMU ON THIS 17TH DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Otieno D. for the Applicant

N/A for the Respondents

Ms. J. Omondi-Court Assistant