



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

MISC. APPLICATION NO. 28 OF 2017

SPIRE PROPERTIES (K) LIMITED

T/A DIANI REEF BEACH RESORT & SPAAPPLICANT

VERSUS

NYACHOTI & COMPANY ADVOCATESRESPONDENT

RULING

Introduction

1. The Applicant instructed the Respondent law firm to defend her in HCCC No. 62 of 2007 at Mombasa which was later transferred to this Court and assigned ELRC No. 79 of 2013. For undisclosed reasons the Respondent ceased acting for the Applicant before the suit was concluded. Subsequent thereto, the Respondent filed Advocate and Clients bill of costs against dated 27.6.2017 claiming from the Applicant a total of Kshs.7,841,384.51. After hearing both parties, the taxing officer of this Court taxed the Bill at Kshs.3,429,909.47.

2. The Applicant was dissatisfied and brought this Reference vide the Chamber Summons dated 11.10.2017. The summons seeks the following:

- (a) Stay of execution pending the hearing and determination of the Reference.
- (b) Vacation and setting aside the said entire ruling by the Taxing Officer.
- (c) The Court to tax the Bill or refer it for fresh taxation by a different Taxing Officer.

3. The Respondent opposed the Reference vide the Replying Affidavit sworn by Mr. Philip Nyachoti Advocate on 22.10.2017. The Reference was disposed off by written submissions. The order for stay is overtaken by events and as such I will not spend time on the submissions made in that respect. I will therefore concern myself with prayer b and c of the summons.

Applicant's Case

4. The Applicant contended that the Taxing Officer erred in law and principle while taxing the bill. Firstly the Applicant submitted that the taxing officer erred in law and fact by failing to reduce the sum taxed by Kshs.1,755,180 and held that the figure had not been proved yet, the Respondent had admitted the advance payment under paragraph 5 of the affidavit by her counsel dated 18.8.2017. In addition the Taxing Officer is alleged to have failed to consider the payment of Kshs.333,733 vide cheque dated 5.5.2014 which was never disputed by the Respondent.

5. Secondly, the Applicant submitted that the taxing officer erred in law and principle by taxing the bill of costs on the basis of the subject value of Kshs.58,103,973 instead of the Kshs.32,457,007 pleaded by the Respondent. It is the applicant's case the value in the Bill of Costs was never amended from 32,457,007 to 58,103,973 before the taxation. According to Court the figure Kshs.58,103,973 was from the Judgment that was delivered after hearing submissions on the bill but before the ruling was given. She therefore accused the taxing officer of failure to follow the principle set by the Court of Appeal in *Joreth Limited Vs Kigano Associates [2002] eKLR* about assessment of the subject value in taxation of Bill of Costs.

6. Thirdly the applicant submitted that the taxing officer awarded exorbitant disbursements of Kshs.52,000 for every Court attendance without supporting evidence despite objection from the Applicant According to the applicant the said disbursed were charged in respect of Air Travel and Accommodation yet the Respondent was represented in Court by Miss Adagi a Mombasa based Advocate according to the

Court records. She submitted that allowing such items without receipts to support was bad in law. She cited *A. M Kimani & Co. Advocates Vs. Trident Insurance Co. Limited [2016] eKLR* and *P. M. Mulwa Vs Mavoko Municipal Council [2009] eKLR* where the Court held that the Taxing officer was right by failing to award disbursement in a Bill of Costs after the Advocate failed to produce receipts to support the same.

7. Finally, the Applicant submitted that the Taxing officer erred in law and principle by taxing the Bill under the wrong Advocates Remuneration Order. According to her the Taxing officer after appreciating that the services rendered in 2007 and 2008 were taxable under the 2006 Advocates Remuneration Order, he went ahead to tax the same under the 2014 order. She therefore prayed for the Reference to be allowed as prayed.

Respondent's Case

8. The Respondent submitted that the Applicant has not laid any basis for interfering with the impugned decision. He submitted that the Court cannot interfere with the decision of the Taxing Officer unless it is established that the decision was based on an error of principle or the fee awarded was manifestly excess. He cited *Thomas James Arthur Vs Nyeri Electricity Undertaking [1961] E.A. 492* and *John Mania Mburu t/a John Maina Mburu & Co. Advocates Vs George Gitari Munene (suing as Administrator of the Estate of Samuel Gitau Munene) & 3 others [2015] eKLR*.

9. The Respondent contended that the Taxing officer taxed the bill properly and correctly in accordance with the relevant and applicable principles. As regards the value of the subject matter, the Respondent submitted that Taxing Officer never committed any error by assessing the subject value of Kshs.58,103,973 because the value of the subject matter is not only derived from the pleadings. He further submitted that schedule VI paragraph 1(b) of the Advocates (Remuneration) Order 2009 provides that the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties. He maintained that the delivery of the Judgment in 8.9.2017 crystallised the value of the subject matter and as such the Taxing Officer was within the law to consider the said Judgment as the subject value while assessing the item instructions fees.

10. He fortified the foregoing submission by citing *D. Njogu & Company Vs Kenya National Capital Corporation [2005] eKLR* where it was held that value of the subject matter is not ascertainable from the pleadings but rather from the Judgment as soon as the Court passes it. He further cited *Joreth Limited Vs Kigano & Associates [2002] eKLR* where the Court of Appeal emphasized that the value of the subject matter for purposes of taxing a bill of costs ought to be determined from the pleadings, judgment or settlement but if not, the Taxing Officer is entitled to use discretion to assess the instruction fees taking into account the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any discretion by the trial Judge and all other relevant circumstances."

11. As regards the failure to deduct the Kshs.1,755,180 and Kshs.333,733 from the bill of costs, the Respondent submitted that the alleged payment was vehemently contested during the taxation and the Applicant failed to produce evidence to prove the same. According, the Respondent maintained that without proof of the alleged payment, the Taxing Officer was right in declining to reduce the said sums from the costs awarded.

12. As regards the award of unmerited disbursements, the Respondent submitted that the Court record bears witness that Mr. Nyachoti personally attended Court on all the occasions when the matter came up for hearing. He therefore contended that it is common knowledge that an Advocate based in Nairobi will obviously require transport and accommodation in Mombasa and money will obviously be expended. He therefore submitted that the failure to produce receipts to prove the same should not be used as a ground to interfere with the impugned decision.

13. In conclusion the Respondent urged the Court to find that the Taxing officer exercised his discretion judicially and in accordance with the relevant principles governing taxation of cost. He further urged that I uphold the sum of Kshs.3,429,909.47 awarded by the Taxing Officer because it is not excessive unjust nor unreasonable taking into account the value of the subject matter being Kshs.58,103,973.

Analysis and Determination

14. The issues for determination herein are:

(a) Whether the Taxing officer erred in principle while taxing the Advocate – Client Bill of Costs dated 27.6.2017 and thereby arrived at excessively high quantum.

(b) Which orders should issue.

Error in Principle

15. The Applicant has cited 4 matters which in her view indicates that the Taxing Officer taxed the Advocates bill of costs unjudicial or through erroneous principle. They include failure to acknowledge and give credit for the sums paid to the Advocate before the bill was drawn, using the wrong subject value in assessing instruction fees, awarding disbursements which were not proved by evidences, and taking the bill based on the wrong Advocates (Remuneration) Order.

Advance fees payments

16. The Applicant indicated to the taxing officer that she had paid to the Respondent Kshs.1,755,180 and Kshs.333,733 as advance fees. The Respondent did not dispute any of the said payment and indeed by the Affidavit sworn by Philip Nyachoti Advocate on 18.8.2017, she admits in paragraph 5 that she was paid Kshs.1,755,180. That in my view corroborates well the Applicants' contention that she made the said

two payments including the Kshs.333,733 which was through the cheque dated 5.5.2015. The finding by the Taxing Officer that there was no prove of the said advance payments to the Respondent was therefore unfounded and failure to reduce the same from the sum awarded was an error of principle.

Wrong Subject Value

17. The Bill of Costs was drawn and prosecuted before the final Judgment in the primary suit was pronounced. The Advocate had therefore pleaded the value of the subject matter as Kshs.32,457,007 but before the ruling on the bill was rendered, Judgment in the primary suit was given in sum of Kshs.58,103,973 and the Taxing Officer in some way got wind of the judgment . Without any amendment to the Bill of costs and without inviting further submissions from the parties, the Taxing Officer relied on the said judgment in assessing instruction fees.

18. According to the numerous precedents cited by both parties and paragraph 1(b) of the Advocates (Remuneration) order 2009, the value of the subject for purposes of assessing instruction fees of an Advocate is determined from the pleadings, judgment or settlement between parties and if not possible, the taxing officer uses discretion to determine the value by considering a number of issues. In this case, however, the subject value was determinable from the pleadings and admission by the Advocate at the time of the taxation. The value pleaded by counsel was Kshs.32,457,007 which was never amended before the ruling by the Taxing Officer.

19. I agree with the Applicant that it was an error in principle to ignore the value pleaded by the Advocate and use the sum awarded in the Judgment without hearing the parties on the same. The Judgment was against several defendants and according to the applicant, the award against her was about Kshs.28,500,000 and not the whole Kshs.58,103,000. In that regard, it is therefore my opinion that the Applicant was condemned unheard when the instructions fees was assessed using the Judgment Kshs.58,103,973 which was entered after the taxation hearing.

Unproven disbursements awarded

20. The Applicant has alleged that an exorbitant sum of Kshs.52,000 for air travel and accommodation was awarded without proof in the form of receipts in support. The applicant also contended that the counsel never travelled from Nairobi on the disputed dates and instead used another counsel madam Adagi, based in Mombasa to hold his brief. The Respondent has denied that he used another counsel based in Mombasa to hold his brief and maintained that he personally attended Court every time the suit came up for hearing. He further contended that it is obvious a lawyer based in Nairobi expended money for travel and accommodation to attend Court in Mombasa. He however did not produce any receipts to support the said expenses.

21. After careful consideration of the submissions by counsel, I find and hold that it was an error in principle for the Taxing Officer to award the said items for disbursements in the absence of any supporting receipts.

The foregoing finding is fortified by *A. M. Kimani & Company Advocate Vs Trident Insurance Company Limited [2016] eKLR*, and *P. M. Mulwa & Co. Advocates Vs Mavoko Municipal Council [2009] eKLR* where the Court held that the Taxing Officer had no right to award disbursement in a Bill of Costs after the Advocate failed to produce receipts to support the same.

Wrong Advocates (Remuneration) Order

22. The Applicant alleged that despite the Taxing Officer acknowledging that the Bill of Costs cut across 2006, 2009 and 2014 Remuneration Orders he applied the 2014 order to award costs for services rendered in 2007 and 2008. However the said allegation was a blanket accusation without specifying which items were assessed using the wrong Advocates (Remuneration) Order. Consequently I dismiss that allegation.

Relief

23. In view of the finding herein above that the impugned ruling was based on error of principle in at least 3 aspects, I proceed to allow the Applicants reference set aside the Ruling by Honourable A. S Lesootia dated 29.9.2017 and direct that the Advocates Client Bill of costs dated 27.6.2017 be taxed afresh taking in to consideration any payments made to the Advocate before the Taxation. Taxing Office shall also refer to the primary file (ELRC No. 79 of 2013) to verify the attendances and disallow any disbursement without supporting receipts.

Disposition

24. The Reference dated 11.10.2017 is allowed subject to the directions given above. The Applicant is granted costs of the reference.

Dated and signed at Nairobi this 13th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE