



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISCELLANEOUS APPLICATION NO. E005 OF 2020

1. NASHON MUKEKU KATONI.....1ST APPLICANT

2. MATHIAS NZENGU MUUMBI.....2ND APPLICANT

VERSUS

MANSON MUSYOKA KISELE.....RESPONDENT

RULING

1. The application for determination is dated 8th December, 2020 filed by the Applicants under certificate of urgency of even date. It is brought under Rules 11(1) and (2) of the Advocates (Remuneration) Order, 1962, Schedule 6 of the Advocates (Remuneration) Order 2014, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the Law.

2. The Applicant seeks the following Orders:

i. That the decision of the Taxing Officer dated 2nd December 2020 in Makueni ELC No. 451 of 2017, Manson Musyoka Kisele v Nashon Mukeku Katoni and Mathias Nzengu Muumbi on the taxation of the Respondent's Party & Party bill of costs on instruction fees therein dated 12th August, 2020 and any consequential order(s)/certificate(s) arising thereon be set aside/vacated.

ii. Spent.

iii. That the bill of costs be taxed afresh by a different constituted taxing officer.

iv. That during the hearing of this application, the original file of Makueni ELC No. 451 of 2017, Manson Musyoka Kisele -Vs- Nashon Mukeku Katoni and Mathias Nzengu Muumbi be brought to court.

3. The application is supported by the affidavit of Ann M. Munyao Advocate for the Applicants sworn on 8th December, 2020 and a further affidavit sworn on 9th March, 2021. The basis of the application is that the Taxing Officer erred while awarding the Respondent Kshs. 500,000/= as instruction fees after taxing the Party & Party bill of costs at a total sum of Kshs. 744,361/=. That the Taxing Officer erred in principle as she arrived at her decision. That the Taxing Officer misapprehended the principles of taxation and misapplied the law as provided under Schedule 6 of the Advocates (Remuneration) Order, 2014. That the Taxing Officer erred by indicating that the Applicants had not filed a response to the bill of costs when they had filed submissions. That the Taxing Officer erred in awarding the Respondent instruction fees which were manifestly high and unreasonable when the value of the suit property was admittedly, not ascertained. That the taxed amount will cause substantial oppression and injustice to the Applicants.

4. In opposition, the Respondent, Manson Musyoka Kisele, filed the Replying affidavit sworn on 25th January, 2021. The affiant deposed therein that the Applicants have demonstrated no plausible reasons to justify an interference with the Taxing Officer's decision. That while the parties were directed by the Taxing Officer to file responses to the bill of costs on 30th September, 2020, the Applicants failed to comply. That the Taxing Officer's decision was reasonable and just considering the nature of the proceedings and the time which was expended while prosecuting the suit. That the Taxing Officer took consideration of all relevant factors while making her decision and therefore it was in conformity with both the Advocates (Remuneration) Order and the principles of taxation.

5. The Applicants filed their submissions in support of the application on 6th April, 2021. It is their submission that the reference herein is competent and properly before this Court seeing that they wrote to the Taxing Officer, per annexure AMM4, requesting for reasons for the taxation ruling which they are impugning. That even though the letter did not elicit any response, the heading to the ruling specified that reasons were comprised within the body of the ruling. That in any event, the absence of such reasons did not preclude the Applicants from filing a competent reference. On this submission, the Applicants relied on the case of **Mwangangi & Company Advocates -Vs- Machakos County [2018] eKLR**.

6. Additionally, the Applicants submitted that the Taxing Officer failed to appreciate the value of the subject matter as at the time of filing the suit, the location of the suit property and the size thereof as relevant considerations in the exercise of her judicial discretion. According to the Applicants, the above factors were raised in their submissions which have been marked as annexure AMM3 and as such, the final assessment of instruction fees by the Taxing Officer was not justified. On their submission that the Taxing Officer erred in noting that the value of the suit property was not ascertainable from the pleadings, the Applicants relied on the case of **Otieno-Omuga & Ouma Advocates -Vs- CFC Stanbic Bank Limited [2015] eKLR**. Moreover, while the Taxing Officer noted that the value of the suit property was not ascertainable from the pleadings, she still had powers under Rule 13A of the Advocates (Remuneration) Order to call for the production of any such document necessary as to aid in the determination of the disputed items which powers, she disregarded. Finally, it was submitted that the Taxing Officer fell into error after only applying the Advocates (Remuneration) Order, 2014 in a dispute which was filed in 2007 hence calling for the application of the Advocates (Remuneration) Order, 2006.

7. The Respondent filed his submissions to the application on 28th April, 2021. He asserted that the value of the suit property was not provided during the trial of the main suit and that question ought to have been raised by the Applicants for determination at the trial stage. The Respondent submitted that the Taxing Officer correctly applied her discretion in line with the principles stated in the case of **Joreth Limited -Vs- Kigano & Associates [2002] eKLR**. The Respondent further submitted that the reference is not properly before court for failing to comply with paragraphs 11(1) and (2) of the Advocates (Remuneration) Order. That the Applicants gave the Taxing Officer very short notice on the items they were objecting and, therefore, the application is premature in the absence of reasons for the Taxing Officer's decision. Lastly, the Respondent submitted that the reference herein is incurably defective and an abuse of the court process.

8. It is common ground from the parties' submissions that the Taxing Officer's discretion in assessing instruction fees based on the value of the subject matter must be determined from the pleadings, the judgment or settlement. And if the same is not ascertainable, the Taxing Officer's discretion is guided *inter alia*, by the nature of the matter, the general importance of the matter, the interest of the matter to the parties, the general conduct of the proceedings as well as any direction by the trial judge. The aforesaid considerations were the findings of the Court of Appeal in **Joreth Limited -Vs- Kigano & Associates [2002] eKLR**. The question for determination would then be whether the Taxing Officer properly exercised her discretion after considering the said factors.

9. I have perused the pleadings filed in the main suit and the judgment herein. It was this Court's finding in favour of the Respondent that indeed he purchased the suit property measuring 19 metres by 62 metres and the total purchase price of Kshs. 73,800/= was fully paid per the sale agreement of 28th December, 2005. Even though the said purchase price may not have been the actual market valuation for the suit property, I am unable to agree with the Respondent's Counsel's valuation under Item No. 1 of the bill of costs (marked annexure AMM1) that the value of the suit property is in excess of Kshs. 20,000,000/=. The suit property is agricultural land situate in rural Kilungu and thus instruction fees based on an improbable valuation was always likely to be erroneous.

10. I am convinced that the most appropriate course of action would have been for the Taxing Officer to direct the production of a valuation report for the suit property as at the time the suit was filed. Paragraph 13A of the Advocates (Remuneration) Order empowers the Taxing Officer to make such directions so as not to occasion an injustice to any one of the parties and also to ensure the dispute is determined with some measure of finality. I, therefore, find the assessment of Kshs. 500,000/= as instruction fees to be

insupportable. I have also perused the Plaintiff and taken note of the fact that it was filed on 2nd April, 2009. The applicable advocates remuneration orders would be that of 2009 and the subsequent 2014 remuneration order for items done from that year until delivery of the judgment.

11. I am unconvinced by the Respondent's submission that the reference is defective for want of compliance with paragraph 11 of the Advocates (Remuneration) Order. I have seen that the Taxing Officer properly marked her ruling to also encompass her reasons thereof.

12. For the above reasons, I shall allow the reference in terms of prayers 1 and 3 of the chamber summons dated 8th December, 2020. For purposes of expediency, I further direct that a valuation report for the suit property as at the time of filing the suit be prepared by a licensed valuer to be agreed on by the parties or in default of agreement, one shall be nominated by the court. This matter will be mentioned for compliance and directions before the learned Senior Resident Magistrate in charge of lower Court No. 2 who shall be the new taxing officer at the lapse of 45 days.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 14TH DAY OF JULY, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi



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