REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC REFERENCE APPLICATION NO. 8 OF 2022

VINCENT KIBIWOTT RONO.....APPLICANT

-VERSUS-

ABRAHAM KIPROTICH CHEBET &

LORNA JEPCHIRCHIR KIPROTICH

(Suing as representatives of the estate

of PRISCILLAH KOMEN KIPROTICH (DCD).....RESPONDENT

Coram: Hon. Justice R. Nyakundi

M/S Mwinamo Lugonzo & CO. Advocates

Kimondo Gachoka & CO. Advocates for the applicant

R U L I N G

What is before this court is a chamber summons application expressed to be brought under sections 1A, 3B, 3A of the Civil procedure act, Rule 11 of the Advocates Remuneration Order and Order 21 Rule 9A of the Civil Procedure (Amendment) Rules, 2020 (Legal Notice 22). The applicant seeks the following orders;

1) Spent

2) Spent

3) That the decision of the Taxing Officer as evidenced in the ruling delivered on 17th January 2022 with respect to items 1 (c), (f), (g), (h) and (r) in the bill of costs dated 5/8/2021 be set aside and taxed afresh by this honourable court.

4) That in the alternative, the Honourable court be pleased to order that the respondent's bill of costs with respect to items 1 (c), (f), (g), (h) and ® be taxed afresh by another taxing master.

5) That the costs in the application be provided.

The application is based on the grounds therein and the annexed affidavit of Amihand Anthony. It is the applicant's case that there was a suit in the lower court being Iten SPMCC No. 17 of 2019 – Abraham Kiprotich Chebet & Lorna Jepchirchir Kiprotich (Suing as representatives of the estate of Priscillah Komen Kiprotich) versus Vincent Kibiwott Ruto. The respondent was awarded general and special damages, costs of the suit and interest thereon. The applicant disputes items 1©, (f). (g), (h) and (r) on the basis that the taxing master gave awards for amounts pertaining to the items therein without proof of receipts from process servers.

The bill of costs was not accompanied with any documents as outlined under Order 21 Rule 9A of the Civil Procedure (Amendment) Rules, 2020. There is no basis or documentation in support of the award. The sums awarded were excessive as to be indicative of error in principle and warrants setting aside.

The application is opposed vide a replying affidavit sworn in 14th February 2022 and filed on 15th February 2022 by the respondents' advocate. It is the respondent's case that they filed and served the party and party bill of costs upon the applicant on 17th December 2021 as per annexure DM1. When the matter came up for assessment of the bill of costs the appellant was given an opportunity to respond and a ruling date of 17th February 2022 was five where the bill was assessed at kshs. 241,222/-.

The respondent contends that the court has no jurisdiction to hear the reference as there is no provision for a reference of assessment of the party and party costs in the subordinate court to the high court. Further, the trial magistrate was not exercising his jurisdiction while assessing the bill as a taxing officer but as a trial magistrate and does not fall within the meaning of a taxing officer. There is no provision for assessment following an assessment in the subordinate court.

The respondent deponed that the application is premature and offends the provisions of rule 11(1) of the Advocates (Remuneration) Order. The applicants are in contempt of the court order having failed to pay the taxed costs as ordered by the court on 27th November 2021 and undeserving of the exercise of the courts discretion.

Upon perusing the application and the response to the same I have identified the following issues for determination;

1) Whether the court has jurisdiction to determine the reference

2) Whether the reference is premature

3) Whether the decision of the taxing officer should be set aside

WHETHER THE COURT HAS JURISDICTION TO DETERMINE THE REFERENCE

The Court of Appeal in **Owners** of **Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1** where the Court of Appeal (per Nyarangi JA ……. held as follows: -

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction***, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

What is before the court is a reference of the decision delivered on 17th January 2022. A reading of the decision shows that it is a ruling on the taxation of the bill of costs dated 5th August 2021. The trial magistrate was exercising his jurisdiction as a magistrate and not a taxing officer. Rule 10 of the advocates remuneration order provides;

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

The court in **Bernard Gichobi Njira v Kanini Njira Kathendu & another [2015] eKLR** held;

A magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether "assess" or "tax" is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology "taxation" to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order. To make a different finding in my view would be unconstitutional in view of Article 159 (2) (d) of the Constitution.

It is therefore evident that the trial magistrate fulfilled the purpose that was determination of the total amount of costs payable. The next bone of contention is the process a party disputing the assessment should follow. I note that there are no provisions for challenging assessments made by magistrate's courts therefore, in the interests of justice, the high court which has jurisdiction to tax bills of costs can intervene.

In **Donholm Rahisi Stores (firm) V EA Portland Cement Ltd [2005] eKLR** Waweru J held:

"Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.

It was stated, **in Bernard Gichobi Njira vs. Kanini Njira Kathendu & another [supra]**, as follows:

On the question of jurisdiction, there is no dispute from both sides in this reference that magistrates or indeed subordinate courts in Kenya have jurisdiction to determine costs payable in cases filed before those courts. The Applicant conceded that magistrates also have jurisdiction to assess costs but on the same breath contended that they lacked jurisdiction to tax costs presented to them by way of Bill of Costs. For me this is simply a question of semantics because 'taxation of costs' and 'assessment of costs' means one and the same thing.

Having established that taxation and assessment mean basically the same thing, it is therefore in order that the dispute as to the assessment is brought before this court by way of reference. In the premises, this court has jurisdiction to entertain this matter.

WHETHER THE REFERENCE IS PREMATURE

Rule 11 of the Advocates Remuneration Order provides;

11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

The taxation ruling was delivered on 17th January 2022. The applicants wrote to the taxing officer on 19th January 2022 notifying him of the items that he wished to object to. There are no reasons that have been presented by the taxing officer as per the provisions of Rule 11(2) of the Advocates (Remuneration) Order. However, it is a judicial principle that a ruling contains reasons for the decision given. I associate myself with the reasoning of the court in **Bernard Gichobi Njira v Kanini Njira Kathendu & another [supra]** where the court was of the opinion that the paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill. I do not find the failure of the magistrate to give these reasons fatal to the reference as the same would be more or less a duplication of the ruling.

In **Ahmed Nassir –Vs- National Bank of Kenya Ltd [2006] E.A** the court held: -

Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

WHETHER THE DECISION OF THE SUBORDINATE COURT SHOULD BE SET ASIDE/TAXED AFRESH

In **First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69** by Ringera J. (as he then was) stated as follows;

“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

The applicant contends that there was an award for items 1(c), (f), (g), (h) and (r) which was improper as kshs. 20,000/- (c) was awarded without proof of service and kshs. 10,000/- was awarded pursuant to items (f), (g), (h) and (r) without proof of a receipt from the process server. Further, that the bill of costs was not accompanied with any support documents.

Order 21 Rule 9A of the Civil Procedure Rules provides;

A party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought.

A perusal of the statement of costs that was filed by the respondent reveals that indeed there were no supporting documents filed by the respondent. Further, there was no proof of receipt from the process server for items 1(c), (f), (g), (h) and (r). In the premises, each of the items are assessed at kshs. 5,000/- and therefore kshs. 15,000/-, kshs. 5,000/-kshs. 5,000/-, kshs. 5,000/- and kshs. 3,000/- are taxed off items 1(c), (f), (g), (h) and (r) respectively. The ruling delivered on 17th January 2022 is hereby set aside and taxed at kshs. 208,221.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 25th DAY OF MARCH, 2022.

.....

R. NYAKUNDI

JUDGE