



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**MISCELLANEOUS (REFERENCE) APPLICATION NO. E002 OF 2020**

**ANDREW KIPKOECH BON.....1<sup>ST</sup> APPLICANT**

**HELLEN CHEPKIRUI BON.....2<sup>ND</sup> APPLICANT**

**RAYMOND KIPYEGON BON.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**ELIZABETH KORIR.....RESPONDENT**

**RULING**

1. Before me for determination is an Application by way of Chamber Summons dated the 27<sup>th</sup> October 2020, brought pursuant to the provisions of Sections 89 of the Civil Procedure Act, schedule 6 and Order 11(4) of the Advocates (Remuneration Order (2014) in which the Applicant herein seeks orders staying the execution of the certificate of costs arising from the Deputy Registrar’s ruling on taxation dated 30<sup>th</sup> September 2020. The Applicant further seeks that the decision of the Deputy Registrar dated 30<sup>th</sup> September 2020 with respect to item 1 on his instructions fee on the Defendant’s party and party Bill of costs dated 17<sup>th</sup> March 2020 be set aside and taxed afresh by this honorable court.

2. The said Application was supported by the grounds on its face and the Affidavit, sworn by the M/s Andrew Kipkoech Bon the 1<sup>st</sup> Applicant, on the 27<sup>th</sup> October 2020.

3. The Application was opposed by the Respondent’s grounds of opposition dated the 26<sup>th</sup> April 2021 to the effect that it lacked merit, was actuated with malice and was filed to circumvent the enforcement of the certificate, the Defendant having fully participated in the proceedings which culminated into a judgment which was never appealed against.

4. The application was canvassed by way of written submissions to which the Applicant filed their submissions dated 24<sup>th</sup> January 2022 on the 3<sup>rd</sup> February 2022 to the effect that upon the Respondent having filed their party and party bill of costs dated 17<sup>th</sup> March 2020, they had particularized the receiving instructions under item 1 as Ksh 463,125/= wherein the Taxing Officer in his ruling dated 13<sup>th</sup> September 2020 taxed of Kshs.163,125/-and awarded instruction fee at Ksh. 300,000/=

5. The Applicant’s complaint therefore is that the Taxing Officer did not strike an equitable balance correctly in the light of the circumstance of the case when he awarded the instruction fee of Ksh. 300,000/= considering that the Respondent had been awarded a portion of the subject matter and not the whole portion. That awarding costs for the whole portion whose value could not be ascertained was indicative of an error in principle and the exercise of discretion capriciously rather than judiciously.

6. That the fee awarded was inordinately too high as to amount to an injustice to the Applicants, the value of the property not having been ascertained as there was no valuation report. That further, the Respondent had been awarded a portion of suit land and not the whole subject land. The Applicants further submitted that the Taxing Officer gave no reason on how he had arrived at multiplying the amount of Ksh 75,000/= as allowed in paragraph 'J', by four thus arriving at Ksh 300,000/=. That the Taxing Master ought to have considered a fair value on the work and responsibility involved.

7. That the High Court in its performance of supervisory function is entitled to and will interfere with the Taxing Master' rulings when he has not exercised his discretion judiciously. The amount taxed was manifestly excessive and the party and party bill of costs ought to be taxed afresh by the honorable court.

8. In opposition to the application, the Respondent submitted that the Taxing master, in awarding instruction fee of Ksh 300,000/= relied on schedule 6 of the Advocates Remuneration Amendment Order 2014 which schedule gave him the discretion either to increase or decrease the amount taxed. That the Taxing Officer had applied the applicable principles in the circumstance.

9. The Respondent conceded that since the value of the subject property was not ascertained, and a minimum of Kshs. 75,000/= shillings is provided for, yet the objection of an excess of Ksh 225,000/= was at the discretion of the Taxing officer.

10. That the suit was not an ordinary suit and it involved complex matters pertaining to the relationship between the Respondent and the Applicants, whether the subject matter was held in trust whether or not the Respondent was entitled to have the subject property and whether or not the Respondent was a trespasser thereto, which issues required a lot of time to prepare and present the evidence.

11. That Ksh. 225,000/= was not excessive in the circumstance and by the Applicants filing the matter in court, they had been aware that the subject value was above Ksh. 20,000,000/= which meant that the instruction fee itself would be more than Ksh. 300,000/=. That there was no error in principle by the Taxing Officer that required the intervention of this court to set aside his decision. The litigation had to come to an end, the reference was not merited and should be dismissed.

#### **Determination**

12. Based on the above, submissions, I find the issues for determination as herein under;

- i. Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.
- ii. Whether the Taxing Officer had committed any errors of principle while taxing item 1 on the bill of costs.

13. From the analysis of the issue at hand it is clear that the Taxing Officer rendered his written ruling on the 30<sup>th</sup> September 2020. The Applicant gave notice in writing albeit out of time, to the Taxing officer, as required by Rule 11(1) of the Advocates (Remuneration) Order, objecting on Items No 1 in the bill of costs.

14. Rule 11(1)(2) of the Advocates Remuneration Order provides as follows:

*(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.*

15. I note from a copy of the ruling dated the 30<sup>th</sup> September 2020, that the Taxing Master gave reasons for his decision on the item 1 as taxed and therefore, I do not see the need for seeking further reasons or giving notice in writing to the Taxing Officer for the said decisions. In my view the filing of the notice of objection albeit out of time was therefore not fatal, as in any case the ruling containing the reasons was availed.

16. It was held in the case of **Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5** as follows:

*“Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the 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 subrule (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.”*

17. On the second issue for determination as to whether the Taxing Master committed any errors of principle while taxing item 1 on the Bill of Costs, the often cited case of **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64** sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162** and **Arthur vs Nyeri Electricity Undertaking [1961] E.A 492**. The said principles were also re-affirmed by the Court of Appeal in **Joreth Limited vs Kigano and Associates [2002] 1 E.A 92**. These principles include

*i.* that the Court cannot interfere with the Taxing Master’s discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;

*ii.* it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

*iii.* if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

*iv.* it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

18. From the above stated, it can be discerned that there is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see **Premchand’s case** (supra)

19. The Applicant is aggrieved by Taxing Master’s ‘inflated and exaggerated’ awards on the item 1 of the Bill of Costs which was as submitted was not in tandem with Advocates’ Remuneration Order of 2014.

20. The Applicant contends that in Item 1, the Taxing Master erred in awarding instruction fees four (4) times the amount provided for in schedule 6 paragraph 1 (j) of the Advocates Remuneration Amendment Order 2014 in the absence of evidence to justify such a high award considering that the Respondent had been awarded a portion of the subject matter and not the whole portion.

21. It is not contested that the Plaintiff’s suit against the Respondent was for the eviction orders and general damages arising from parcel of land known as LR No. Kericho/Kapsuser/61. The suit was dismissed, via a judgment delivered on 31<sup>st</sup> July 2018 and costs granted to the Defendant.

22. In the case of **Joreth Limited** (Supra) the Court of Appeal held that the value of the subject matter 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/her discretion to assess such instruction fee as (s)he considers just, taking into account, amongst other matters, the nature and the 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.

23. Schedule 6 paragraph 2 of the Act provides that:

*'In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation'.*

24. In this case, there was nothing to show that the matter was complex. In my view, the responsibility entrusted to Counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. On this item the Taxing Master awarded the instruction fee of Ksh 300,000/- which was four times more than the minimum instruction fee not minding that the Respondent had been awarded a portion of suit land and not the whole subject land.

25. It is my conclusion therefore that the Taxing Master did not exercise his discretion judicially thereby following a wrong principle in reaching his decision. I therefore find that the Application dated 27<sup>th</sup> July 2020 is merited, I allow the same with the following orders:-

- i. That the taxation of the Defendant's Bill of Costs dated 30<sup>th</sup> September 2020 in reference to Item No 1 is hereby set aside.
- ii. That the said Bill of Costs be and is hereby remitted back to another Deputy Registrar to be taxed afresh on the item objected to by the Plaintiff/Applicant.
- iii. That each party shall bear its own costs for this Application.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF MARCH 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)