REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2010

SAFAN LIHANDA LIHANDA ………………..…..APPLICANT

VERSUS

JAMES NATHAN LUVAI ……………………….RESPONDENT

R U L I N G

1. By a ruling delivered by Miss T. A. Odera Resident Magistrate on 1oth November 2009, the

plaintiff's party and party bill of cost in HCC. No. 2235 of 1999 Nairobi was taxed at Kshs. 525,825. Being agreed by that taxation, the defendant applicant filed a reference under the probation's of Rule 11 (2) of the Advocate's Remuneration order. The applicant is seeking to set aside the decision by the Deputy Registrar delivered on 1oth November 2009 and the Bill of Costs dated 19th May 2008 be referred for taxation before a different taxing officer. In the alternative, this court reassesses the respondent's Bill of Cost dated 19th May, 2008.

2. This application is premise on the grounds that the taxing officer failed to exercise discretion judiciously in accessing the instruction fees.

The taxing master was also faulted for failing to consider relevant factors especially in value of the subject matter could not be determined form pleadings and the schedule that was applicable is the remuneration order of 1997 Schedule 6 (1) (L). The instruction fees should have been about Kshs. 6,000 the taxiing master also failed to appreciate that costs were awarded in Hcc No. 2235 of 1999 which was consolidated with this matter. The prayer sought were merely declarations there was no complexity beyond the minimum research to warrant the granting of Kshs. 300,000 as instructions. This application was opposed by Counsel for the defendant; Counsel relied on the grounds of opposition on points of law,

3. It was submitted that the application had a defective because it was not filed in the original suit but as a miscellaneous application. Moreover, the applicant did not file an objection to taxation pursuant to 11 (1) of the Advocates remuneration order indicating the specific items objected against.

4. Finally it was argued that the applicant has not demonstrated any error of principal on the part of the taxing officer to warrant interference by this court. Counsel quoted the case of Joreth Ltd. Vs Kigano & Associates E. A. Law Reports [2002] 1 EA Pg 92 where the court of appeals hails that:-

"Where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial Judge and all other relevant circumstances. In this instance, the taxing master had followed this course and had not erred in doing so."

The issue raised in this reference is whether the taxing officer earned in principle in the assessment of cost of the items objected to in the notice of objection dated 16th November 2009. The first issue to consider is whether the reference is properly brought under the provisions of Rule 11 (1) of the Advocates Remuneration Order.

The Bill of costs was taxed on 10th November, 2009. The record shows that on 17th November, M/S Kiarie & Co Advocates filed an objection pursuant to the provision of Rule 11 (1) and identified the items that they were objecting to. They further wrote a reminder on 19th January 2010. The ruling contain the reasons was submitted to the Advocates on 29th January 2010. This reference was filed on 11th February 2010 which is within the timeframe provided under the regulation. Although the reference was filed under a miscellaneous application, the original file is available therefore I do not see any prejudice that has been suffered by the Respondent.

5. I will now proceed to evaluate the merits of the reference.

I am also aware of the principles to bring to bear when dealing with a reference on the decision by the taxing master. Those principles are well settled in a long line of authorities by the Court of Appeal and also the High Court. The High Court is not entitled to upset a taxation merely because in the court's opinion the amount awarded is high unless the decision of the taxing officer was based on an error of principle or the fee awarded is manifestly excessive. See the case of **Thomas James Arthur V Nyeri Electricity undertaking (1961) e. a. Page 492** where the Supreme Court held:

"Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matter with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases"

6. I have gone through the pleadings that were filed in this matter and also the submissions that were made before the taxing officer and I am of the view that the taxing master had in principle by failing to consider the following:-

Although there were two cases, Hcc No. 2335 of 1999 (Nairobi) and Hcc No. 122 of 1999 (Kitale), which were consolidated, it appears from the consent order recorded on 7th May 2008 cost were only awarded in Hcc No. 2235 of 1999.

Secondly, the decree arising from these suits is as follows:-

i. That it is declared that **Safan M. Lihanda,** the plaintiff in Kitale HCCC No. 122 of 1999, is entitled to 31.5 acres only in L. R. 5570/2, South West Kittle Trans Nzoia district.

ii. **That** the sub-divisions comprised in L.R 5570/2 be effected and the plaintiff **Safan M. Lihanda** in Kitale HCCC No. 122 of 1999 to get 31.5 acres only to which he should confine himself without interfering with any other portion of the land.

iii. **That** the plaintiff in Kitale HCCC No. 122 of 1999 and who is the defendant in Nairobi HCCC No. 2235 of 1999only, which shall be agreed on or taxed by the Deputy Registrar of this court.

iv. **That** for avoidance of doubt, there is no order as to costs in Kitale HCCC No. 122 of 1999.

v. **That** the defendants in Kitale HCCC No. 122 of 1999 who are the registered owners of L.R 5570/02 to sign all the necessary documents to facilitate the transfers and issuance of title deeds for the various sub-divisions and in default, the Deputy Registrar of this Court to sign on his their behalf.

It is evident that the value of the subject matter of the decree could not be ascertained form the consent order that settled the matter. The taxing master is supposed to use discretion in accessing the instruction fees. The factors to take into consideration are set out in the case of Joreth (Supra). The taxing officer is supposed to take 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 Judge and all the relevant circumstances. In this case, I am afraid the taxing master did not take this course, this matter was settled by consent and the final order is the applicant was awarded 31.5 acres of land. If the above factors were taken into consideration, it is obvious the award of Kshs. 300,000 is too high to warrant this court interfere with the order of taxation.

In the premises, this application is allowed, the order of taxation made on 10th November 2009 is set aside, the respondent bill of costs dated 19th may 2008 is hereby referred for reassessment before a different taxing officer form T. A. Odera (S. R. M.) The applicant shall have the cost of this application.

RULING READ AND SIGNED ON 16TH DECEMBER, 2010 AT KITALE.

M. K. KOOME

JUDGE

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