REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL MISC. APPLICATION NO. 1 OF 2019

KAREN & ASSOCIATES ADVOCATES.....APPLICANT

-VERSUS-

CAROLINE WANGARI NJOROGE.....RESPONDENT

RULING

1. This is a reference dated 11th February 2019, against the decision of the Taxing Officer dated 19th November 2018 on the applicant's advocate /clients bill of costs dated 19th September 2018. The reference challenges the Taxing Officer's decision on items 1, 12, 14, 17, 24 and 30 as well as on disbursements. The reference is supported by the grounds set out on the face of the summons and the affidavit of Karen Nduva Mwende, sworn on the same day 11th February 2019.

2. The grounds upon which the reference is premised are that the Taxing Officer failed to increase the taxed costs by half as required by the Advocates Remuneration Order; that the Taxing Officer erred in failing to take into account the valuation report which contained the true value of the subject matter thus arrived at an erroneous decision; that the Taxing Officer erred in law in failing to consider the importance of the matter to the parties thereby arrived at an inordinately low figure and that the Taxing Officer erred in fact by considering the initial value disclosed in the pleadings which was an estimate given the fact that the respondent's submissions on the bill of costs had also raised the issue of lack of a valuation report. The applicant further faulted the Taxing Officer for failing consider the distance, time and inconvenience of travelling from Nairobi to Kajiado when taxing items 12, 14, 17 24 and 30 on attendance.

3. In the supporting affidavit, it was deposed that the advocate was instructed by the respondent to file a Succession Cause for an estate that comprised a significant number of immovable properties and conducted the cause to conclusion before a disagreement arose regarding the advocates' fees. It was deposed that the Taxing Officer taxed the applicant's bill of costs at Kshs. 1,272,685/= which was inordinately low.

4. According to the deponent, the Taxing Officer was required to increase the taxed amount by half which was not done thus amounted to an error of law. The applicant further deponed that the estate comprised high value properties but the value of the estate given in the pleadings was an estimate when the cause was filed. According to the deponent, it became necessary to get the actual value in order to attain justice and aid the taxing officer in arriving at a correct decision, and that is why the valuation report was filed and the bill of costs amended.

5. It was also deposed that the respondent's counsel had raised the issue of lack of a valuation report and the Taxing Officer allowed the applicant to have the properties valued and granted the applicant leave to amend the bill of costs. She stated that the Taxing Officer erred by declining to take into account the valuation report when taxing item 1.

6. Although the respondent was given time to file a response and submissions, only submissions are on record.

7. During the hearing of the reference, Mr. Theuri moved the reference highlighting their written submissions dated 1st April 2019. He urged the court to allow the reference submitting that the Taxing Officer failed to consider the value of the properties as disclosed in the valuation reports thus committed an error of law. He also faulted the Taxing Officer's decision on items 1, 12, 14, 17, 24, 30 and on disbursements.

8. Counsel further argued that the Taxing Officer should have increased the taxed costs by half as required by Part B (b) of the Advocates Remuneration Order 2014. Item 1 was an instruction fee while the other items were on attendances. He urged this court to overturn the Taxing Officer's decision and allow costs as prayed in the Amended bill of costs. (Ksh. 20,763,149/=).

9. Mr. Wakhisi, counsel to the respondent, opposed the reference. He submitted highlighting their written submissions dated 22nd June 2019 and filed on 24th June 2019, that the Taxing Officer's decision on item I was correct. Counsel argued that the applicant had been on record from the start and had the opportunity to have the property valued before the cause was filed and, therefore, gave the value of the estate as they knew it to be correct.

10. Learned counsel contended that the affidavit in support of the cause placed the value of the estate at Ksh. 100,000,000/= and the Taxing Officer was right in taking into account the value as disclosed in the pleadings since the subsequent value was an afterthought. He however conceded that the amount was not increased by half and the court should, if necessary, interfere with the Taxing Officer's decision to extent only.

11. Regarding the rest of the items, counsel argued that Paragraph 1c of part A to Schedule 6 of the Order applies to confirmation of grant where contested and that the amount allowed is Ksh. 15,000. In his view, items 12, 14, 17 24 and 30 in which the applicant sought Ksh. 10,000/= each were wrongly allowed since the applicant was only entitled to Ksh. 15,000/= all-inclusive. He also contended that the remuneration Order does not provide for costs for attendance in succession causes. He argued that the Taxing Officer was in error in allowing Ksh. 5,000/= on each the items, 12, 14, 17, 24 and 30

12. On disbursements, counsel urged the court not to interfere with the Taxing Officer's decision to decline to allow disbursements. He however faulted the Taxing Officer for awarding Ksh. 50,000/= since valuation was done after the matter had been concluded and the bill of costs filed. Counsel pointed out that the Part A paragraph 7 talks about telephone calls including minutes and correspondence/letters including folios which were missing in the bill of costs as filed.

Determination

13. I have considered all reference and submissions by counsel for the parties. The reference faults the Taxing Officer's decision for essentially disregarding the valuation report of the estate when taxing instruction fee on item 1. The applicant further challenges the Taxing Officer's decision on items 12, 14, 17, 24 and 30 as well as the item on disbursements.

14. The argument put forward by the applicant is that the Taxing Officer did not take into account relevant factors thus arrived at an inordinately low figure as to amount to an injustice. They also argue that the Taxing Officer failed to increase the taxed costs by half as allowed by the Advocates Remuneration Order.

15. The respondent opposed the applicant's argument in so far as taxation on all the items is concerned. He however faulted the Taxing Officer for awarding costs on attendances when this is not awardable. He supported the Taxing Officer's decision in declining to take into account the valuation report done after the conclusion of the matter, arguing that it was an afterthought. He conceded though that the Taxing Officer should have increased the taxed costs by half and, therefore, conceded the matter to that extent only. He urged the court to dismiss the rest of the reference with costs.

16. What is before court is a reference against taxation of advocate/client bill of costs. I must state from the outset that taxation of costs is a matter of discretion by the Taxing Officer based on well settled principles. The principles that guide taxation of Bill of costs were well stated in ***Premchand Ranchand Ltd & another v Quarry Services of East Africa*** [1972]EA 162, that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy; that a successful litigant ought to be fairly reimbursed for the costs he has had to incur; that the general level of remuneration of advocates must be such as to attract recruits to the profession; and that so far as practicable there should be consistency in the awards made.

17. Taxing of costs is not based on a mathematical formula but on the discretion of the Taxing Officer taking into account relevant factors. This court will not therefore readily interfere with the Taxing Officer's exercise of discretion except where it is shown that in awarding costs, the Taxing Officer failed to take into account factors that he/she should have taken into account or took into account irrelevant factors which led to an injustice.

18. In that regard, the court stated in ***First American Bank Ltd v Shah & Another*** [2002] 1 EA 64 thus;

> ***"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… it would be an error of principle to take into account relevant factors or to omit to take into account relevant factors… some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge…not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him…" (emphasis)***

19. In this reference, the Taxing Officer's decision has been faulted for failing to take into account the valuation report that was done after the conclusion of the cause and the filing of the advocate/ client bill of costs. According to the parties, the value of the estate disclosed in the pleadings was Kshs. 100,000,000/=. This is the value the Taxing officer took into account when taxing item 1 and which the respondent supports as the true value of the estate disclosed in the pleadings.

20. I have perused the record and it is true that parties agree that the affidavit in support of the Petition for Grant of Letters of Administration intestate put the value of the estate at Ksh. 100,000,000/=. When the applicant filed their Advocate/ client bill of costs after falling out with the client, they sought Kshs. 15,000,000/= on item 1. They then filed a valuation report and an amended bill of costs albeit with leave of the Taxing officer which they wanted to be taken into account when taxing instruction fee. The Taxing Officer however declined to take the valuation report into account when taxing item 1, In his view, the valuation was done at the applicant's insistence and after conclusion of the matter thus it was prejudicial to the respondent.

21. The value of the subject matter though one of the important factors to be considered when taxing a bill of costs, it ought to be determined from the pleadings, judgment or settlement. In this case, the petition for grant of letters of administration. In this regard, the court stated in ***Joreth Limited v Kigano & Associates***[2002] EA 92 that;

> ***"[T]he value of the subject matter of a suit for 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 sane is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and 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 relevant circumstances."***

22. In ***D. Njogu & Co-Advocates v Panatcop Engineering Limited*** [2006] eKLR, the court also identified complexity of the matter as an equally important factor in determining instruction fee. Further, in ***Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt Light Ltd.*** HC Misc 729 of 2006 the court stated that;

> ***"The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court. The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of inference. In my view, the point of reference is the figure proposed and accepted…"***

23. And as also correctly pointed out in ***Orion East Africa Limited v Permanent Secretary Ministry of Agriculture & another*** [2013] e KLR, the value of the subject matter may not be decisive but is nonetheless important when determining what amount to allow on instruction fee.

24. The applicant filed their advocate /client bill of costs seeking Kshs.15,000, 000/=on item 1 which the Taxing Officer however declined to allow. When considering the issue of instruction fee, the Taxing Officer is to consider the value of the subject matter if disclosed in the pleadings, judgment or settlement and if not disclosed, consider other factors as demonstrated by the decisions above. Where the value of the subject matter is disclosed, that should be central in determining instruction fee though the Taxing Officer may also consider such other factors including the complexity of the matter and its importance to the parties.

25. In the bill before the Taxing Officer, the value of the estate was disclosed to be Ksh. 100,000,000/= which the Taxing Officer took into account when taxing item 1 and awarded Kshs. 1,131,625/= before he added VAT of Kshs. 181060/= to make it Kshs. 1312685/= on instruction fee. There is no evidence that the cause was contested or complex and that much effort was expended that would attract a higher instruction fee than was awarded by the Taxing officer. Taking into account the applicable principles in the taxation of bill of cost, I am satisfied that the Taxing Officer was correct in this regard. Since the value of the estate was disclosed in the pleadings, the cause was not complex or contested, the Taxing Officer did not commit any error of law to warrant this court's interference on his decision on item 1,

26. The subsequent valuation, though allowed by the Taxing Officer, could not form the basis of taxing item 1 on instruction fees. This is so given that When the advocates took instructions to act for the respondent, they were satisfied that the value of the estate they disclosed was the fair estimate value and having drafted the pleadings including the value of the estate, they are precluded from alleging that it was a low estimate now that their fees has come into contention. Valuation of the estate after the advocate /client relationship had taken a negative turn could lead to an overstated value of the estate. In any case, the affidavit in support of the reference shows that the grant of letters of administration had been confirmed, the estate distributed and transfers done. This raised the further question of which properties were valued after transfers had been effected. I am therefore unable to fault the Taxing Officer's decision on this item.

27. Regarding 12, 14, 17, 24 and 30 on attendance, the applicant argued that they should have been allowed at Ksh. 10,000/= each instead of the Ksh. 5,000/= awarded by the Taxing Officer. Counsel for the respondent on the other hand, argued that the amount of Ksh. 5,000/= should not have been awarded at all since there is no provision for attendance fee in the Remuneration Order.

28. As I have already stated, taxation of costs is at the discretion the Taxing Officer which is done taking into account relevant factors, and this court will rarely interfere with the Taxing Officer's exercise of discretion unless the discretion has not been exercised judiciously or where the Taxing Officers has failed to take into account relevant factors or has taken into account irrelevant factors leading to an injustice. It must also be remembered that the remuneration order is only a guideline and usually gives minimum and not the maximum fee and that is why courts have over time developed principles that guide in the taxation of costs. A relevant factor when considering attendance fee would include the distance travelled by the advocate while attending to the matter that gave rise to the bill of costs.

29. The Taxing Officer awarded Ksh. 5,000/= on each occasion instead of Kshs. 10,000/= demanded which the applicant terms low, while the respondent argues it should not have been allowed at all. For my part, given the fact that the applicant travelled from Nairobi on each of the occasions to attend court and given that the cause was not contentious, I do not think the Taxing Officer was wrong in allowing the contested items. I do not therefore agree with the applicant that the amount awarded on items 12, 14, 17, 24 and 30 was inordinately low as to represent an injustice. On the other hand, I do not agree with the respondent that the amount on those items ought not to have been allowed at all. The Taxing Officer exercised his discretion and there is no justifiable cause for this court to interfere with that discretion. I see no basis for doing so.

30. The respondent also argued that the sum Kshs. 50,000/= office expenses should not have been allowed. I note that the applicant did not challenge the decision of the Taxing Officer on this amount by way of a cross reference. It should therefore be taken that the respondent was satisfied with the decision of the Taxing Officer on this item. Their contestation against award on those items is but an afterthought.

31. And regarding disbursement, I can only agree with the Taxing Officer that the amount was not awardable. I have perused the record and all that the applicant attached was a fee deposit request note from Ultimate Valuers for Kshs. 2,470,800/= dated 15th August 2018. No receipt from the valuers was attached to show that the amount was actually paid. That being the case there was no basis for awarding that amount.

32. Finally, the respondent conceded that the taxed amount should have been increased by half which was an error on the part of the Taxing

Officer. It is true that Schedule 6 B (b) of the order allows the taxed costs on the Advocate/client bill of costs to be increased by half and the respondent readily concedes this omission. This was an error on the part of the Taxing Officer and this contention should succeed. The amount works as follows;

The amount on item 1 inclusive of VAT is	Kshs. 1312685/=
Add half	Kshs. 1,969,027.50.
Disbursements	Kshs. 50,000/=
	Kshs. 2,019. 027.50
Less amount paid	Kshs. 90,000/=
	Kshs. 1,929,027.50

33. Consequently the reference is allowed to the extent only that the amount of the taxed costs is Kshs. 1,929,027.50. The rest of the items are declined and dismissed. As regards costs, since there is only partial success, each party shall bear own costs

Dated Signed and Delivered at Kajiado this 26th Day July 2019.

E C MWITA

JUDDGE