Directors and Shareholders of Nakumatt Investments Ltd v County Government of Mombasa & another; Mwangi Njenga t/a Mwangi Njenga & Company Advocates (Applicant); County Government of Mombasa (Respondent) (Petition 25 of 2015) [2023] KEHC 23958 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23958 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 25 OF 2015

OA SEWE, J

SEPTEMBER 29, 2023

BETWEEN

DIRECTORS AND SHAREHOLDERS OF NAKUMATT INVESTMENTS LTD ..... PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

AND

MWANGI NJENGA T/A MWANGI NJENGA & COMPANY ADVOCATES ..... APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT

RULING

[1] This ruling is in respect of the Reference filed by the respondent by way of the Chamber Summons dated 7th March 2022. The Reference was filed under Paragraph 11(1) and (2) of the Advocates (Remuneration) Order. The respondent thereby prayed for orders that:

(a) The Court be pleased to set aside and/or vary the decision of the Taxing Master, Hon. J.M. Nyariki, DR, delivered herein on 17th February 2022.

(b) That the Court be pleased to tax afresh the Bill of Costs dated 3rd September 2019.

(c) The costs of the application be provided for.

[2] The application was premised on the grounds that the taxing officer made a finding that the cause of action was in respect of prerogative orders and not the value of the land; and yet proceeded to assess instructions fees at Kshs. 2,000,000,000/= on the basis of the value of the land. Accordingly, it was the contention of the respondent that the taxing officer erred in principle in using a formula not known in law and in disregarding the instructions given by Hon. Ogola, J. in a previous Reference.

[3] The application was supported by the affidavit sworn on 7th March 2022 by Mangaro Onesmus Safari,Advocate, in which the grounds aforementioned were explicated. He explained that the applicant's Bill of Costs was initially taxed before Hon. Micheka, DR, but was challenged by way of Reference; which reference was heard and determined by Hon. Ogola, J. and a re-taxation ordered. Mr. Mangaro annexed copies of the ruling by Hon. Ogola, J. dated 17th December 2020 to his affidavit to demonstrate that the Court issued clear guidelines to the taxing officer for the re-taxation which the taxing officer ignored. Counsel also annexed a copy of the impugned Ruling on Taxation and urged the Court to find that the taxing officer proceeded on the wrong principles and thereby came up with an erroneous outcome.

[4] The applicant opposed the application and accordingly filed Grounds of Opposition dated 28th March 2022. The applicant thereby contended that:

(a) The Chamber Summons dated 7th March 2022 is unmerited, incompetent, ill-conceived and an abuse of the court process.

(b) The taxing officer's discretion in taxing the Bill of Costs dated 3rd September 2019 was fettered by the ruling of Hon. Ogola, J. delivered on 17th December 2020.

(c) The taxing officer was duly guided by and adhered to the directions of Hon. Ogola, J. contained in the ruling delivered on 17th December 2020.

[5] Directions were thereafter given on 7th March 2023 that the application be canvassed by way of written submissions. Accordingly, Mr. Origi for the applicant filed his written submissions on 12th April 2023 in which he proposed a single issue for determination, namely, whether the re-taxation was properly done. Counsel defended the impugned taxation contending that the decision is sound from two different but permissible approaches. Firstly, he submitted that, from the guidelines delivered on 17th December 2020 in the ruling by Hon. Ogola, J. the taxing officer proceeded to ascertain the value of the subject matter from the proceedings to be Kshs. 2,000,000,000/=. The second approach, according to Mr. Origi was a calculation of the instructions fee based on the figure awarded on Party and Party Bill of Costs. In this regard, counsel relied on Otieno Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR and Central Bank of Kenya v Makhecha & Company Advocates [2019] eKLR. He was of the view that, either way, the taxing officer's conclusion is defensible for its fidelity to the instructions of Hon. Ogola, J. vide the ruling dated 17th December 2020 and its conformity to the principles applicable to Advocate and Client taxation.

[6] Accordingly, Mr. Origi urged the Court to not disturb the decision of the taxing officer. He nevertheless prayed that, should the Court be inclined to make an order other than dismissing the Reference, then it be pleased to undertake the taxation in respect only of the two disputed items, namely Items 1 and 22 of the applicant's Bill of Costs. He relied on *Devshi Dhanji and 2 Others v Kanji Naran Patel and 2 Others* [1978] eKLR and *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR.

[7] There is no indication that Mr. Mangaro for the respondent filed anything else apart from a List of Authorities. I have nevertheless given careful consideration to the application dated 7th March 2022. As

was correctly pointed out by Mr. Origi, the single issue for determination is whether the taxing officer erred in principle in determining the sum due to the applicant as Instructions Fees.

[8] A reiteration of the history of the matter is pertinent because it will determine whether or not the taxing officer applied his fettered discretion properly. Initially the applicant's Bill of Costs dated 3rd September 2019 for Kshs. 116,842,556 was taxed at Kshs. 2,436,416/=, with Item 1 being allowed in the sum of Kshs. 900,000/= only by Hon. Michieka, PM, in a ruling delivered on his behalf on 4th June 2020. The respondent was aggrieved with the decision and therefore it filed a Reference dated 6th August 2020, contending that the basis for determining Item 1 was the value of the subject matter, namely the subject property, whose value at the time was estimated to be Kshs. 5,000,000,000/=. Upon hearing the Reference, Hon. Ogola, J. allowed it with instructions for re-taxation. The instructions were:

> ...the Taxing Master should clearly ascertain the value of the subject matter from the proceedings and if he or she is to deviate from it, to justify why, by providing reasons."

[9] The taxing officer, Hon. Nyariki, DR, thereupon proceeded on the basis that the value of the subject matter was Kshs. 2,000,000,000/= and accordingly taxed the applicant's Bill of Costs in the total sum of Kshs. 60,420,733.33 in a ruling dated 17th February 2022. He confined the ruling to the two disputed items, namely, items 1 and 22. In respect of Item 1, the taxing officer held:

> I have looked at the instructions from the pleadings and find that the subject matter arises from a Petition seeking prerogative orders and as such are guided by Schedule 6 para 1(j) of the R.O. which gives a basic minimum figure of Kshs 100,000/- as fees. The value of the land was never a contentious issue in the suit...However, the trial Judge directed in his ruling that the value of the subject matter be ascertained from the proceedings unless with justification. I take cognizance of the fact that a Court ruling by Hon Justice E Ogola dated 21st June, 2017 already gave guidelines on how the instruction fees ought to be tabulated...The trial judge conceded that the value of the subject matter is ascertainable at Kshs 2,000,000,000/= and that "it is within acceptable reason for the Taxing Master to award Kshs 20,000,000/= for instructions fees"..."

[10] Accordingly, the taxing officer proceeded to compute the instructions fees on the basis of the subject matter value of Kshs. 2,000,000,000/= and arrived at Kshs. 30,205,000/= as instructions fees and increased it by a 3rd in respect of Item 22.

[11] The guiding principles in taxation of costs, as were well restated in *Premchand Raichand Limited & Another Vs Quarry Services of East Africa Limtied& Another* (1972) EA 162, are:

(a) That costs should not be allowed to rise to such a level as to limit access to the Courts to the wealthy only;

(b) That a successful litigant ought to be fairly reimbursed for the costs has to incur;

(c) That whereas the general level of remuneration of advocates must be such as to attract recruits to the profession, there must be a sense of proportionality and consistency in the awards made.

[12] Hence, the Court of Appeal for Eastern Africa proceeded to hold, in the *Premchand* case that:

> The taxation of costs is not a mathematical exercise, it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer and particularly where he is an officer of great experience, merely because it thinks the award

somewhat too high or too low. It will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

[13] In *First American Bank of Kenya v Shah & Others* [2002] 1 EA 64, it was similarly held that:

> The High Court was not entitled to upset a taxation merely because in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle (*Steel Construction Petroleum Engineering (EA) Limited vs. Uganda Sugar Factory* [1970] EA 141 followed). Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the 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."

[14] Where, as in this case the matter was a re-taxation following a Reference, the taxing officer is obliged to take into account such instructions as were given by the Court in the Reference. In this instance, Hon. Ogola, J. gave guidelines at paragraph 24 of his Ruling thus:

> ...it is clear that neither the Applicant nor the Respondent is satisfied with the verdict reached by the Taxing Master. In my view the Taxing Master should clearly ascertain the value of the subject matter from the proceedings and if he or she is to deviate from it, to justify why, by providing reasons..."

[15] To my mind therefore, the taxing officer was not thereby placed in a straightjacket sort of situation as to the value of the subject matter, but was at liberty to ascertain what in fact was the subject matter of the suit and give a plausible justification for his decision, taking into consideration the applicable law, including decisional law; such as the case of *Joreth Limited v Kigano & Associates* [2002] eKLR, in which it was held that:

> ...the value of the subject matter of a suit 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 ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances."

[16] Moreover, it is now trite that where taxation follows a judgment of the Court, the subject matter ought to be ascertained, not from the pleadings but from the judgment itself. I am consequently in agreement with the position taken in *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others* [2014] eKLR that:

> ...The taxing officer was right in awarding the instructions fee based on the amount that was allowed by the Court and not what had been pleaded. Indeed, in doing so, the taxing officer was guided by the decision of *Lubellellah & Associates Advocates vs. N. K. Brother*- Nairobi Misc. Application No.52 of 2012 which she quoted extensively.

If an advocate taxes his bill of costs before a matter is determined, then the taxing officer is supposed to base the instruction fees on the basis of the pleaded amount in the pleadings. However, once an award has been made by the court, then the taxing officer is supposed to use the figure awarded by the court

in calculating the payable instruction fees while taking into account the other perimeters in increasing such fees, if at all…"

[17] The same position was taken by Hon. Mwita, J. in *Lalji Mehji Pate & Company Limited v PCEA Foundation & another* [2020] eKLR thus:

> …Where a suit has been concluded and the judgment sum is discernible, that is the subject matter for purposes of determining instruction fee and not what is pleaded in the suit. The figures in the pleadings should not be used at the expense of the amount in the judgment because that is what has been found to be due. A party may plead any amount for purposes of enhancing the chances of getting higher instruction fee if this was to be allowed. The dispute having been settled for Kshs 17,000,000, that became the subject matter for purposes of the respondent's party and party bill of costs and more so item 1 on instruction fee…"

[18] More importantly, in *Peter Muthoka & Another v Ochieng & 3 others* [2019] eKLR, the Court of Appeal reiterated that:

> …It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive…" (Emphasis supplied)

[19] A perusal of the Judgment dated 7th April 2016 does reveal that, although the Petition revolved around the petitioner's ownership of land parcel LR No. MOMBASA/BLOCK XXV/122 there was no dispute about the ownership. At paragraph 5 of the judgment the Court's appreciation of the dispute is evinced thus:

> …The Respondent's case is not a denial of the Petitioner's title to suit land. The Respondent's case is merely that the Petitioner failed to follow the procedure laid down in the Physical Planning Act (Cap 286, Laws of Kenya) and that for that reason the Petition is incompetent and should be dismissed with costs."

[20] Similarly, at paragraph 6 of the judgment, the Court observed:

> Though the Petition is coached in terms of a Petition against ownership and expropriation of property, the real question in my view, and to be answered is whether the First Respondent's letter dated 13th February, 2015 cancelling the Notification of Approval PPA2 Serial No. xxxx dated 16th December, 2014 of Development Plan P/422/13 on Plot No. 122/XXV/MI is or amounts to expropriation of property contrary to Article 40 of *the Constitution* and is therefore unconstitutional."

[21] At paragraphs 10 to15 of the Judgment, it is explicit that the issue was whether the petitioner, as a developer had complied with the conditions of the development approval, for which there was an alternative dispute resolution procedure. Hence, at paragraphs 16 and 17, the Court held:

> 16. With respect to the Petitioner the issue here is not about the right to or acquisition of property. The respondent has not questioned that right. By the Enforcement Notice, the Respondent has merely reminded the Petitioner that until it clears the issues pertaining to its title to the property under development, the developmental approval first granted, is cancelled.
>
> 17. The procedure is laid down in the Physical Planning Act. The Petitioner however chose to ignore the clear procedures of both *the Constitution* and the relevant law, Section 38 of the *Physical Planning Act*, by instituting a Petition in the High Court. Under the clear provisions of Section 38(6) of the *Act* the Petitioner could only come to the High Court by way of an Appeal. The Petition is thus incompetent and an abuse of the process of *the Constitution*."

[22] The Petition was accordingly dismissed with costs to the respondent on that score. It is therefore manifest that there was grave misdirection on the part of the taxing officer in his appreciation of the instructions given by Hon. Ogola, J. in the ruling dated 17th December 2020. The Judge would not have otherwise instructed the taxing officer to thereafter ascertain the value of the subject matter if the issue had been defined with finality. The taxing officer was therefore at liberty to make an independent decision as to the subject matter on the basis of the final judgment of the Court and thereupon ascertain the instructions fees accordingly.

[23] From my appreciation of the Judgment dated 7th April 2016, it is plain that the subject matter of the Petition had nothing to do with the value of the suit property; but everything to do with whether the constitutional reliefs sought were available to the Petitioner. Needless to mention that the matter was found to be premature and was accordingly dismissed on that score.

[24] For the foregoing reasons, I am satisfied that the taxing officer misdirected himself and thereby committed an error of principle in the re-taxation. Accordingly, the Chamber Summons dated 7th March 2022 is hereby allowed and orders granted as hereunder:

> (a) The Ruling on Taxation by the Taxing Master, Hon. J.M. Nyariki, DR, delivered herein on 17th February 2022 be and is hereby set aside.
>
> (b) That the applicant's Bill of Costs dated 3rd September 2019 be taxed afresh before another Deputy Registrar, other than Hon. J.M. Nyariki, DR.
>
> (c) Each party to bear own costs of the Reference.

It is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2023.

OLGA SEWE

JUDGE