Muka Mukuu Farmers Co-operative Society Limited v BM Mungata & Company Advocates (Miscellaneous Reference Application 302 of 2018) [2022] KEHC 302 (KLR) (24 March 2022) (Ruling)

Neutral citation: [2022] KEHC 302 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS REFERENCE APPLICATION 302 OF 2018

MW MUIGAI, J

MARCH 24, 2022

IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

MUKA MUKUU FARMERS CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

BM MUNGATA & COMPANY ADVOCATES ..... RESPONDENT

RULING

Chamber Summons Dated 24/3/2021

1. By a Chamber Summons(Reference) dated 24th March,2021, the Applicant is seeking the following ORDERS THAT:-

    1. The ruling and subsequent orders of the Taxing Officer delivered on 23rd May, 2019 on Bill of Costs dated 4th September, 2018 be set aside.

    2. This Honourable Court be pleased to re-tax the Advocate and Client Bill of Costs dated 4th September, 2018.

    3. In the alternative of prayer 2 above, the Advocate and Client Bill of Costs dated 4th September, 2018 be remitted for afresh taxation with appropriate directions

    5. The costs of this application be provided for.

2. The Reference is supported by the supporting of Peter Ngui Mulili, the Applicant's Vice Chairman. According to him, the taxing officer herein applied a wrong acreage of 28,384 acres of land instead of 400 Ha disclosed in the lease agreement dated 2009 which translates to 988 acres to arrive at the instruction fees of Kshs.3,127,008/-. According to him, if the correct acreage of land was applied, the

bill would have been taxed at Kshs.195,716 and not Kshs.3,127,088/- hence necessary to review and re-tax the ruling of the taxing officer in accordance with the law and principle

Replying Affidavit Filed 6/5/2021

3. In opposition to the Reference, Duncan Kisini Muema, an advocate in conduct of the matter on behalf of the Advocate/Respondent swore a replying affidavit on 26th April, 2021. According to the deponent, the Reference was brought under wrong provisions of Section 11 of the *Advocates Act* which deals with foreign advocates and Schedule 6 of the *Advocates Remuneration Order,* 2009 provides for costs for proceedings in the High Court. He averred that the Appellant did not file a Reference out of time within 14 days despite being granted leave on 12th March, 2021 by the court to do so. According to the deponent, the Appellant is trying to challenge the decision of the taxing officer through the back door since it has not given the 14 days' notice in writing to the taxing officer of the items to which it objects pursuant paragraph 11 of the Advocates Remuneration Order, 2009. According to the deponent, the orders sought cannot be issued since the court has not been made aware of the items objected to by the Appellant and subject for re-taxation. According to the deponent, no sufficient reasons has been given to warrant setting aside the decision of the taxing officer and why the bill should be taxed afresh.

4. He asserted that there is no explanation for the delay of almost two (2) years in filing the Reference herein since the taxing officer ruling on the Bill of costs dated 4th September, 2018 was delivered on 23rd May, 2019. The urged the court to dismiss the Reference with costs.

Supplementary Affidavit Filed 9/11/2021

5. In response to the Respondent's advocate averments, the Applicant's Vice Chairman swore a supplementary affidavit on 8th November, 2021 wherein he averred that he has been advised by the Appellant's advocate that the Reference is legally, procedurally and substantively proper and merited. He has also been advised that the affidavit sworn by Danson Kisini Muema, the Respondent's advocate is should be expunged for being fatally defective and bad in law. According to him, the taxing officer had been misled by the Respondent to rely on wrong acreage hence arriving at an erroneous high figure.

6. He asserted that the Applicant adhered to the 14 days' timeline since it filed its Reference on 14th March, 2021 after the leave was granted on 12th March, 2021 to file the Reference out of time. Based on the Applicant's advocate advice, he averred that there was no need to write to the taxing officer asking for the reasons of taxation since the ruling provided sufficient reasons. He urged the court to allow the Reference in the interest of justice.

Applicant's Submissions

7. On behalf of the Applicant the following issues were identified for determination:

    a. Whether the application dated 24th March,2021 is properly placed before this court

    b. Whether the Taxing Master erred in law by taxing item number 1 of the Bill of costs at Kshs.3,172,008/-

8. On the first issue, the Applicant submitted that the court granted it leave to file its Reference out of time pursuant to Rule 11(4) of the Advocates Remuneration Order,2009 which was filed on 25th March,2021within the 14 days' timeline ordered by court.

9. In response to the Respondent's argument that the Applicant ought to have requested for the taxing officer reasons of the taxation decision, the Applicant submitted that there was no need to ask for the taxing officer reasons since the ruling of the taxing officer dated 23rd May, 2019 marked as PNM-2 enumerated the same. Reliance was placed on the cases of *Evans Thiga Gaturu, Advocate vs. Kenya*

Commercial Bank Limited [2012] eKLR and *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd [2006] eKLR* on the proposition that where reasons are contained in the ruling, there is no need to seek for further reasons.

10. According to the Applicant, it would be irrational and superfluous to demand from it to request the same reasons which are in the detailed ruling.

11. On the second issues, it is submitted that the basis of the Bill of Costs dated 4th September, 2018 was the Lease Agreement dated 2009 between the Applicant and Del Monte Kenya Limited. According to the Applicant, in the Bill of costs under 'Particulars of services rendered' Item No.1 Date 5/6/2009- To taking instructions to prepare the lease agreement between(....) for all the land referred to as Land Reference No. 13198 measuring 28,384(Twenty Eight thousand three hundred and eighty four) for a period of 21(...) years for an annual rent of Kshs. 10700- Amount Charged Kshs.3,107,088/-", the Respondent's advocate misled the taxing officer by stating that the land measured 28,384 acres instead of 400 Ha stated at page 11 under the heading 'The Schedule and demised premises'. It is submitted that 400 Ha translates to 988 acres hence the taxed amount ought to have been Kshs. 195,716 (Kshs.120, 000/- + 75,716/-= Kshs.195, 716/-) and not Kshs. 3,127,088/- pursuant to provisions of Schedule II of the Advocates Remuneration Order, 2009.

12. The Applicant urged the court to review and re-tax the instruction fees for being based on an erroneous acreage or remit the Bill of costs for fresh taxation.

Respondent's Submissions

13. It is submitted on behalf of the Respondent that upon the 14 days leave being granted to the Applicant to file the Reference out of time, the Applicant ought to have written to the taxing officer pursuant to Rule 11(1) of the Advocates Remuneration Order giving notice of the items it objects to and the taxing officer guided by Paragraph 11(2) to forward to the Applicant's her reasons for the decisions. According to the Respondent, the Applicant is not aware of the taxing officer's reasons why Kshs.3, 127,008/- was awarded.

14. Regarding reliance on the wrong acreage by the taxing officer, it is submitted that the measurement of 28,384 acres is contained in the Lease Agreement. According to the Respondent, the Applicant has not produced a certificate of title or an official search in court to show the land measured 400 Ha or a valuation to show the value of the land. It is submitted that there is no evidence before the court to challenge the size of the land and/or disapprove the acreage applied by the taxing officer.

15. According to the Respondent, the Applicant has not shown the amount taxed was either too high or too low to amount to an injustice on the other or that the taxing officer did not exercise its discretion judicially and/or exercised its discretion improperly. Reliance was placed on the case of *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 Others (2006) eKLR*.

16. The Respondent urged the court to find that the procedure under Paragraph 11 of the Advocates Remuneration Order was not complied with hence the reliefs sought should not be granted for non-compliance. It is asserted that the conditions for interfering with the decision of the taxing officer have not been met hence the Reference should be dismissed with costs.

Determination

17. I have considered the submission filed and the authorities relied upon by respective parties.

18. The Applicant has challenged the taxing officer assessment on Item 1, the instruction fee of Kshs. 3,127,008/-. According to the Applicant, the assessed fee is erroneous since it was based on a wrong acreage of land. Essentially, the Applicant has asked this court to interfere with the assessment.

19. In *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna [2006] eKLR*, Ojwang J. (Retired) expressed himself inter alia as follows:

> " 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, 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...The 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 manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state 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. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs..." See Mativo J. in *KANU National Elections Board & 2 others vs. Salah Yakub Farah [2018] eKLR*.

20. The Supreme Court of *Uganda (Mulenga, JSC) in Bank of Uganda vs. Banco Arabe Espaniol, Civil Application No. 29 of 2019* stated that:

> " ...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the

decision on quantum and that upholding the amount allowed would cause injustice to one of the parties." (Emphasis).

21. The court will only interfere with the taxing officer decision only where either the decision was based on an error of principle, or the fee awarded was manifestly excessive.

22. I find the issues raised by the Applicant in its submissions to be proper which is have adopted for determination and the issues are:-

    Whether the application dated 24th March, 2021 is properly placed before this court

23. According to the Respondent, no explanation for the delay in filing the application has been advanced by the Applicant. The application dated 24th March, 2021 was filed on 25th March, 2021. I have read Kemei J. ruling 12th March, 2021. The Learned Judge granted the Applicant 'leave to file a reference out of time for review of the Ruling on the Bill of costs dated 4th September,2018 as well as the Certificate of Taxation with the next 14 days from the date of the ruling'. I find that the application was filed within 14 days from 12th March, 2021.

24. The Respondent contend that application is brought under the wrong provision of the law. Order 51, rule 10 of the Civil Procedure Rules,2010 provides:-

    (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

    (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

25. Rule 10 (1) and (2) above is to the effect that the failure to cite the legal provisions in an application where the technicality does not affect the substance of the application, the application shall not be defeated.

26. In the same vein, the Supreme Court in *Moses Mwicigi & 14 Other vs. Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR* stated:

    "This Court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of case, that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

    Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinent of Article 159 (2) of the Constitution, which proclaims that" .... Courts and tribunals shall be guided by..... (the principle that) justice shall be administered without undue regard to procedural technicalities." this provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."

27. The court is enjoined under Article 159 of the *Constitution, 2010* to disregard technicalities in the interest of justice.

28. The Respondent contend that the Applicant did not follow the procedure envisaged under paragraph 11 of the Advocates Remuneration Order. According to the Respondent, the Applicant has not written to the taxing officer of the items of taxation to which he objects to

29. Paragraph 11 Rule (1) of the Advocates Remuneration Order in which it is provided:-

> " (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.

30. It is trite that procedure provided under the law must be followed by a party seeking remedies before the court lest the pleadings are declared incompetent. See Moses Mwicigi & 14 Others vs. IEBC & 5 Others (supra).

31. In *Twiga Motor Limited vs. Hon. Dalmas Otieno Onyango [2015] eKLR*, the Court stated: -

> " The limits in Rule II of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance."

32. However, Odunga J. in *Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR* held that:

> " It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.
>
> However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference".

33. In the same vein, the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] 1KLR 528 at page 535* held that:

> " Although there was no strict compliance with Rule 11(2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference." See Makau, J. in Kinyua Muyaa & Co. Advocates vs. Kenya Ports Authority Oensin Scheme & 8 others [2017] eKLR.

34. I note that the only issue in contention is the acreage. The taxing officer picked the disputed acreage from the lease agreement dated 2009 to arrive at the instruction fees. The challenge is on the instruction

fees. I find that the taxing officer ruling has the reasons to aid this court in determining the merit of the application.

Whether the Taxing Master erred in law by taxing item number 1 of the Bill of costs at Kshs.3,172,008/-

35. The Applicant assert that the correct acreage which ought to have been applied by the taxing officer was 400 Ha which translates to 988 acres. The Applicant faults the taxing officer for applying 28,384 acres hence reaching at an erroneous amount of instruction fees. The Applicant assert that the Respondent's advocate misled the taxing officer by inserting the disputed acreage in the particulars under Item 1.

36. In Civil Appeal 206 of 2006, *Kamunyori & Company Advocates vs. Development Bank Of Kenya Limited [2015]* the Court of Appeal stated;

> " Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside"

37. In this matter the guiding document on acreage is the lease agreement, 2009 entered into between the Applicant (Lessor) and Del Monte Kenya Limited (Lessee) hence the need to scrutinize the document to find the correct acreage that ought to have been applied by the taxing officer since the Applicant disputes the acreage applied.

38. The Court of Appeal in *Joreth Limited vs. Kigano & Associates [2002] 1 EA 92* at 99 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, judgement or settlement (if such be the case) but if the same 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, 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."

39. In the recitals of the lease agreement, it is provided as follows;

> " Whereas:-
>
> 1. The lessor is the sole registered proprietor of All That piece of land more particularly described in the schedule hereto(subject to such charges and other matters as are notified in the Memorandum endorsed hereon hereinafter referred to as "the Land".
>
> 2. The Lessor has agreed with the Lessee to grant the Lessee a portion of the Land (as demarcated on a plan registered at the Registry of Documents at Nairobi in Volume....Folio....File....and hereinafter called "the Demised Premises" for the term, at the rent and with and subject to the covenants, agreements, conditions, restriction and provisions hereinafter contained"
>
> "Now this witnesseth as follows:-

> In consideration of the rent hereinafter reserved and the covenants, conditions, agreements,...Hereby leases unto the Lessee all that Demised premises together with the buildings and improvements erected...
>
> The Schedule
>
> The Land is:-
>
> All that piece of land situate to the South East of Thika Municipality in the Machakos District of the Republic of Kenya containing measurement 28,384) Acres or thereabouts....
>
> Memorandum
>
> .....
>
> The Demised Premises is:
>
> All that piece of land forming part of the land and comprising by measurement Four Hundred Hectares 400Ha or thereabouts situate within the Kangundo District the approximate position of which is shown on the Plan annexed hereto for the purposes of identification only edged in red, which Plan is annexed hereto....."

40. A keen reading of the above parts in the lease agreement, in my view the consideration of Kshs.10, 700/- as annual rent was for the demised premises. Recital 2 of the Lease Agreement show that the lease was for 'demised premises' which according to the Memorandum to the Lease Agreement measured Four Hundred Hectares (400 Ha). The lease is indicated to be for 21 years. The entire land measured Twenty Eight Thousand Three Hundred and Eighty Four (28,384) Acres but as per recital 2 of the Lease Agreement, the Lessor agreed to lease 'a portion of the Land' hereinafter called "the "Demised Premises" to the Lessee.

41. I find that the correct acreage that ought to have been applied by the taxing officer was 400 Ha which translates to 988 acres.

42. From the foregoing, should this court review and retax the instruction fees or remit back to the taxing officer? In my view it is just that I proceed to retax the instruction fees noting that the challenge is only on the acreage applied by the taxing officer. The ruling of the taxing officer was made 3 years ago hence the need to expeditiously dispose of this matter.

43. I am fortified by the Court of Appeal holding in *Kipkorir & Kiara Advocates vs. Deposit Protection Fund Board* {2005} I KLR 528 where the Court stated that:

> " And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle. The general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza vs. Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel (No. 2)* [1978] KLR 243.."

44. As was stated by Law, JA. In D*evshi Dhanji v Kanji Naran Patel (No. 2)* (*supra*) it is a question of discretion. The Learned Judge was of the view that the circumstances and history of the case justified the Plat J. decision to finalize the matter instead of following the general practice and remitting the matter to the taxing officer.

Disposition

45. In the result, the instruction fees of Kshs. 3, 127, 088/- assessed by the taxing officer is set aside and substituted with an assessment by this court of Kshs. 195,716/- pursuant to the provision of Schedule II paragraph 1 of the Advocates (Remuneration) (Amendment) Order, 2009.

46. The reference is allowed.

47. The Applicant/Client shall have the costs of this reference.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. WASIKE HOLDING BRIEF FOR- MR. MUUMBI FOR RESPONDENT

MR. KAMINDO - FOR THE APPLICANT

GEOFFREY - COURT ASSISTANT