



D. Manji Construction Limited v C&R Holdings Limited (Civil Miscellaneous Application 372 of 2015 & Miscellaneous Case 882 of 2011 (Consolidated)) [2022] KEHC 13180 (KLR) (Civ) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

**CIVIL MISCELLANEOUS APPLICATION 372 OF 2015 &
MISCELLANEOUS CASE 882 OF 2011 (CONSOLIDATED)**

DO CHEPKWONY, J

SEPTEMBER 23, 2022

BETWEEN

D. MANJI CONSTRUCTION LIMITED APPLICANT

AND

C&R HOLDINGS LIMITED RESPONDENT

RULING

1. Before this court are two applications both dated September 13, 2019 filed in the two consolidated files, both seeking order that;
 - a. The ruling delivered herein on August 2019 by the Honorable Learned taxing master, Hon S A Opande striking out the party and party bill of costs dated August 18, 2015 be set aside and/or vacated;
 - b. The said bill of costs be remitted back for taxation by a different taxing officer;
 - c. In the alternative to prayer 2 above, this honorable court be pleased to tax the said bill of costs;
 - d. Costs of the application be provided for.
2. The applications are premised on the grounds common on the face of the application and in the supporting affidavits of James Nyiya both sworn on September 13, 2019. The deponent avers that the taxing master erred in striking out the applicant's party and party bill of costs dated August 18, 2015 for want of jurisdiction notwithstanding that the said court is vested with inherent jurisdiction under the Advocates Remuneration Order. That the taxing master inaccurately interpreted Section 32B of the *Arbitration Act*, No 4 of 1995 which allows parties to among other things agree on how costs are to



be assessed or determined. He added that the taxing master erred in law and fact by failing to appreciate that the subject of bill of costs had been brought before him by consent and agreement of both parties. In his view, the taxing master did not appreciate that the law contemplates a situation where parties can agree to have determined costs and expenses of an arbitration assessed by court. Further that the taxing master failed to consider that the respondent in its submissions dated July 17, 2017 in respect to the applicant's bill of costs admits to the jurisdiction of the court and acknowledges that the Advocates Remuneration Order, 2006 was applicable in the circumstances. He urges the court to hold that the taxing master erred in dismissing the bill of costs and prays that the ruling of the taxing master be set aside and the applicant's bill be taxed afresh by a different taxing officer.

3. The respondent opposed the application vide the grounds of opposition dated February 25, 2020. In summary, its case is that the reference fails to establish factual or legal basis for the grant of the orders sought, and that the applicant has failed to satisfy this court that the taxing master erred in principle in assessing the costs. According to the respondent, the reference does not lie in law, is misconceived and is otherwise an abuse of the process of court.
4. By consent of parties, the instant application was canvassed by way of written submissions which I have read and considered.
5. In my considered view, the main issue for consideration is which part of schedule VI of the Advocates Remuneration Order is applicable for the taxation of costs of filing an application for enforcement of an arbitral award and defending an application seeking to set aside the same award.
6. I adopt with approval the decision in the case of *Evans M Gakuu & 66 others v National Bank of Kenya Ltd & 8 others* [2013] eKLR Odunga J Cited with approval the case of *First American Bank of Kenya v Shah & others* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 64, where it was held;

“The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are,

- (1) that the court cannot interfere with the taxing master'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;
- (2) 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 take 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;
- (3) if the court considers that the decision of the taxing officer discloses errors of principle, the normal practise 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- (4) it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
- (5) the taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;



- (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
- (8) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case"

7. Further, section 32B(1) of the [Arbitration Act](#) provides as follows:

32(B)(1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34 (5).

8. From the above provision, the jurisdiction on costs of the arbitral proceedings is solely vested in the arbitrator. However, on applications filed in court by virtue of the provisions of the [Arbitration Act](#), the court can make a determination on the cost of such applications. I am persuaded by the decision of the court in Miscellaneous Application E017 of 2021 & Arbitration Cause E003 of 2021 (Consolidated) where it was held that;

“In ‘All fees for any proceedings under the Act’ This refers to the applications filed in court under the provisions of the Act and not to the arbitral proceedings themselves. For example, the costs awarded in an application to set aside an award or for appointment of an arbitrator or for any other application made under any provisions of the Act in court are governed by the provisions of the Order.”

9. That being said, in the present case, the taxing master in his ruling dated August 28, 2019 observed that the instructions fees ought not to be based on the subject matter but to be calculated as under Schedule VI Paragraph K of the Advocates Remuneration Order, 2006. However, the applicant contends that the said paragraph is applicable for objection or defense to the objection of an arbitral award which he argues was not the case herein. Instead his submissions is that he received instructions to file an application for adoption and enforcement of the arbitral award and to equally defend an application against adoption. In support of his view, he places reliance in the case of [M/S Nyaundi Tuyott & Company Advocates v Tarita Development ltd](#) (2006) eKLR in which the court held;

“But if taxation takes place after the matter in question had been determined either by the court in a judgment or by consent of the parties, then the taxing master should calculate instruction fees based on the amount awarded by the court or the sum agreed upon by the parties. But since the taxation in this case was in respect of arbitration proceedings, which had been determined at the time the bill was taxed, the taxing master ought to have calculated instruction fees on the basis of the arbitral award.”

10. To this end,, I do agree with the applicant that an application for adoption or to oppose adoption of an arbitral award the subject of taxation were not objections or defense to objections of the arbitral award contemplated under Paragraph K above. Similarly, I am persuaded that Schedule VI (d) of the



Advocates Remuneration Order, 2006 is applicable in this instance so that the arbitral award forms the basis of calculation of the instruction fees.

11. In that regard, I fault the taxing masters view as far as the basis of calculating the instructions fees is concerned. As such, the taxing masters taxation of the bill of costs dated August 18, 2015 in Misc 882 of 2011 is set aside and the same is remitted back for taxation afresh before a different taxing master.
12. Each party to bear own costs of this application.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23rd DAY OF SEPTEMBER , 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Njueini counsel holding brief for Mr. Nyiha for Applicant

No appearance for and by Respondent

Court Assistant - Sakina

