



**Samson v Jitengemee Savings & Credit Co-operative Society Ltd & 2 others  
(Petition 155 of 2018) [2022] KEHC 13008 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13008 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION 155 OF 2018  
JM MATIVO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**MWENDE SAMSON ..... PETITIONER**

**AND**

**THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT .... 1<sup>ST</sup>  
RESPONDENT**

**JITENGEEMEE SAVINGS & CREDIT CO-OPERATIVE SOCIETY  
LTD ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide an application dated April 12, 2022, M/s Jitengemee Savings & Credit Co-operative Society Ltd, the 1<sup>st</sup> Respondent herein (the applicant) seeks a raft of prayers. Prayers (1) & (2) of the application are spent. The other prayers are that the taxing master's ruling delivered on March 30, 2022 on the Petitioner's/ Respondent's Party and Party Bill of costs dated January 29, 2029 be set aside in its entirety. In the alternative and without prejudice to the foregoing, the applicant prays that the award in respect of item numbers 1 and 42 (instruction fees and getting up fees respectively) be set aside. Further, the applicant prays that the said Bill of Costs be remitted to another taxing master for taxation of the said items.
2. The grounds in support of the application are that the said Bill of Costs was taxed at Kshs 863,681,87; that the Taxing Master committed an error of principle by failing to consider that the applicant was exonerated in the judgment delivered on January 25, 2019, so, it was not liable to pay costs. Additionally, the applicant states that the taxing master committed an error of principle by applying schedule 6 (1) of the 2014 *Remuneration Order* when calculating items (1) & (42) instead of applying Schedule 6 (j) of the 2014 *Remuneration Order*. Further, the applicant contends that since the



- Petitioner was challenging alleged violation of rights, the Petition did not qualify to be an election Petition within the meaning of the *Elections Act*. Lastly, the applicant contends that the costs awarded are manifestly excessive.
3. The Petitioner filed a Preliminary Objection dated April 25, 2022 stating that the application is malicious, misconceived, lacking merit and an abuse of court process and that the application offends Order 9 Rule 9 of the *Civil Procedure Rules, 2010*.
  4. In his written submissions, the applicant's counsel argued that the Petitioner's/Respondent's Preliminary Objection is meritless because the applicants' advocates are properly on record; that the judgment exonerated the applicant and that the mere fact that the court judgment did not specify against whom the costs were imposed does not make the applicant liable. He argued that the Taxing Master had a duty to read the judgment holistically to determine which party against whom the costs had been awarded. He cited section 27 of the *Civil Procedure Act* and *Jasbir Singh Rai & 3 others v Tarlocham Singh Rai & 4 others* in support of the proposition that costs follow the event. He also cited *Vinod Seth v Davinder Bajaj* in support of the proposition that costs are not meant to punish the defeated party. He cited a passage from *Halsbury's Laws of England* in support of the proposition that the court has discretion to determine who pays costs and urged the court to allow the reference.
  5. He cited *Kagwimi Kangethe & Company advocates v O-lerai Nurseries Ltd* which defined an error of principle as where costs are so manifestly excessive as to justify an inference that the Taxing Master acted on erroneous principles. He argued that before the court was a constitutional Petition and not an election Petitioner as was held by the Taxing Master, hence the Taxing Master erred in applying provisions of Schedule 6 paragraph (i) of the *Advocates Remuneration Order* which applies to election Petitions as opposed to Schedule 6 Paragraph (j) which applies to constitutional Petitions.
  6. Additionally, counsel submitted that the Taxing Master committed an error of principle by awarding manifestly excessive costs. He cited Schedule 6 (j) and argued that the Taxing Master awarded Kshs 500,000/= as instruction fees on the erroneous assumption that before him was an election Petition which was not the case. He argued that Schedule 6 (1) (i) of the Advocates Remuneration Order provides for a sum of Kshs 100,000/=.
  7. The Petitioner/Respondent did not file submissions. On May 5, 2022 when I issued directions on filing submissions, the Petitioner/ Respondent was absent. I directed that she be served. On May 26, 2022 when the matter came up before me virtually to confirm compliance, again, there was no appearance for the Petitioner/Respondent. Counsel for the applicant stated that he had served the Respondent, so, I reserved the matter for ruling. However, upon retiring to write the ruling, I went through the entire file and I did not trace evidence of service. Nevertheless, I proceeded to write the ruling without the benefit of reading the Petitioner's/Respondent's submissions.
  8. The first ground mounted by the applicant is that in the court in the judgment dated January 25, 2019 exonerated the applicant, so the Taxing Master erred by awarding costs against the applicant. This argument is not supported by the judgment. The clause imposing costs reads "I award to the Petitioner the costs of the Petition." The learned judge did not specifically state that the costs were not to be paid by one party. The question is whether the applicant is trying to assign a meaning to the above sentence which is not supported by the nomenclature deployed by the learned judge.
  9. In trying to search for the meaning of the above short paragraph, and indeed the judgment on the question of costs, useful guidance can be obtained from the Southern African case of *Firestone South*



*Africa (Pty) Ltd v Genticuro AG* in which the court made some general observations about the rules for interpreting a court's judgment or order. It stated: -

“...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it....

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.”

10. The court's directions in a judgment are to be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, (like paragraph 37 of the judgment is), it is decisive, and it cannot be restricted or extended by adding anything else. The applicant's counsel is inviting this court to assign a meaning which is not supported by the court's judgment. If at all the applicant did not understand the judgment, the right thing to do would have been to move the issuing court for clarification. It is impermissible to excessively strain words or a sentence in a court judgment so as to ascribe to it a meaning it does not bear.

11. I now proceed to address the application before me on merit. It is an established position that before interfering with a decision of a Taxing Master, the court must be satisfied that the Taxing Master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the Taxing Master was wrong. The court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the Taxing Master. The court only interferes when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. When a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. This means: -

“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.

12. It is accepted that the Taxing Master is required to consider the time taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The definitive question is whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case. This requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with the decision. The quantum of such costs is to be what was reasonable fees and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power



guided by the applicable principles. However, the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'

13. In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the Taxing Master to take into account these principles. As was held by the Ugandan Supreme court: -

"Save 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 with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

14. The court in *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* stated :-

"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 interference 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...”

15. Perhaps I should add that the Taxing Master is enjoined to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. The discretion vested in Taxing Master is to allow fees, costs, charges and expenses as appears to him to have been necessary or proper, and not those which may objectively attain such qualities, and that such opinion must relate to fees and all costs reasonably incurred, but also imports a value judgment as to what is reasonable. The discretion to decide is given to the Taxing Master and not to this court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.
16. As was held in *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another* thus: -
  - i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
  - ii. The taxing master was expected to tax each bill on its merits;
  - iii. The value of the subject matter had to be taken into account;
  - iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;
  - v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
  - vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.
17. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or if there is proof that the taxing officer followed a wrong principle in reaching his decision. As was held in *Joreth Limited v Kigano & Associates (supra)* and *First American Bank of Kenya v Shah and Others*“instruction fees is static such that it does not depend on such circumstances as the client is suggesting.” Further, 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 Master is entitled to use his discretion to assess such 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, any directions by the trial Judge and all other relevant circumstance.

18. The applicant's argument is that the Taxing Master treated the matter before him as an Election Petition as opposed to a constitutional Petition. This argument as I understand it is premised on the following statement in the impugned ruling: - "...This item is therefore guided by Schedule 6 (i) of the 2014 Remuneration Order as the matter was opposed. This item is taxed at Kshs 500,000/= with Kshs 1,000,000/= being taxed off." The relevant provisions of i.e. 6(i) and 6 (j) of the 2014 Remuneration Order are reproduced below: -

i. Election petitions

To present or oppose an election petition; such sum as may be reasonable but not less than 500,000

(j) Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000

ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

19. The amount prescribed for Election Petitions is such sum as may be reasonable but not less than Kshs 500,000. On the other hand, the amounts prescribed for constitutional Petitions under Schedule 6 (j) are: - (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000, and (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000. The learned Taxing Master in arriving at the fees on Item No. 1 in his ruling stated: -

"This item provides for instruction fees where the applicant approached the court seeking prerogative orders. I have considered the nature of the suit, interest of the parties, the general conduct of the proceedings and all other relevant factors such as the number of parties involved and the duration. In my view, the suit is in the general conduct of the proceedings, taking into account the nature of the prayers in the pleadings...."

20. The above excerpt is the ratio for the decision. It leaves no doubt that the learned Taxing Master was acutely aware that before him was a suit seeking prerogative orders which falls under paragraph 6 (f) above. He was evidently aware of the nature of the dispute before him and the prayers sought. To jump to the last sentence of the above paragraph and isolate the letter (i) and ignore the context in which the sentence is located is to miss the point and to look for the easier meaning which is not supported by the context.



21. As was held in the earlier cited case of Firestone South Africa (Pty) Ltd v Genticuro AG/the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or orders. As the Supreme Court of India held in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others stated: -

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

22. The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation: -

“Certainly, no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”

23. The Supreme Court of Appeal of South Africa in Natal Joint Municipal Pension Funds v Endumeni Municipality acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that “in resolving a problem, where the language of a statute leads to ambiguity the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation.” These statements are true of interpretation of judgments/rulings. A reading of the earlier reproduced excerpt clearly shows the context within which the award of Kshs. 500,000/= was arrived at. It leaves no doubt that the Taxing Mater was acutely aware that before him was a Constitutional Petition. I decline the invitation to ignore context while interpreting the ruling and import a meaning not supported by the context.

24. A reading of the impugned ruling shows that Taxing Master properly arrived at the instruction fees guided by the applicable provisions of the Remuneration order and that he did not depart from these established principles. The Taxing Master considered all the material before him and properly exercised his discretion in arriving at his decision both on the instruction fees and on the getting up fees. He was not only alive to the law and principles governing taxation, but also, he took into account the applicable principles and fully understood the task before him.

25. On the whole, the applicant has failed to demonstrate that the Taxing Master misdirected himself or improperly exercised his discretion or arrived at inordinately high or unreasonable awards to warrant this court's intervention. In view of my conclusions arrived at above, it is my finding that the application dated April 12 2022 fails. The said application is dismissed with no orders as to costs. Orders accordingly

**SIGNED AND DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022**

**JOHN M MATIVO**

**JUDGE**



**SIGNED, DATED AND DELIVERED VIRTUALLY AT \_MOMBASA THIS 21<sup>ST</sup> DAY OF  
SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

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