



**Kariuki (Suing as the Trustees of Gilgil Islamic Association Group) v Nanji & 4 others
(Environment & Land Case 287 of 2018) [2023] KEELC 18557 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 287 OF 2018**

**A OMBWAYO, J
JUNE 29, 2023**

BETWEEN

**ALI KARIUKI (SUING AS THE TRUSTEES OF GILGIL ISLAMIC
ASSOCIATION GROUP) PLAINTIFF**

AND

**MOHAMMED JAFFER MOHAMMED HUSSEIN NANJI 1ST DEFENDANT
RAMZAN MOHAMMED HUSSEIN NANJI 2ND DEFENDANT
GULAM ABAS MOHAMED (SUED AS THE TRUSTEES OF MOHAMMED
HUSSEIN MULA NANJI TRUST) 3RD DEFENDANT
FARMLINE COMPANY LTD 4TH DEFENDANT
JOHN MICHAEL NJENGA MUTUTHO 5TH DEFENDANT**

RULING

1. This ruling is in respect of the 1st to 3rd defendants Chamber Summons application dated 16th February 2023 which is expressed to be brought under Rule 11(2) of the *Advocates (Remuneration) Order* which sought the following orders;
 - a. The court be pleased to review and/or set aside the ruling of the taxing officer dated 2nd February 2023 on instruction fees (item number 1) with respect to the bill of costs dated 9th September 2022.
 - b. The court be pleased to assess the 1st, 2nd and 3rd defendants instruction fees at Kshs. 3,187,500 or at such sum as it deems reasonable and just.
 - c. In alternative to prayer number 2 above, this court remit the bill of costs dated 9th September 2022 to a taxing officer other than Hon. Rose Ombata for instruction fees to be taxed afresh.



- d. The costs of this application be provided for.
2. The grounds on the face of the application are that on 2nd February 2023, the taxing officer delivered her ruling on the 1st, 2nd and 3rd defendants bill of costs dated 9th September 2022. She assessed the bill of costs at Kshs. 124,236 and taxed off Kshs. 3,063,264. That in assessing the instruction fees at Kshs. 124,236 the Taxing Officer erred in principle as she failed to apply the correct formula. That in her computation she did not give due regard to the value of the suit property being Kshs. 270 million as per the sale agreement in the plaintiff's list and bundle of documents. That the taxing officer failed to consider the nature of the case as the plaintiff had sought for a permanent injunction to restrain the 1st, 2nd and 3rd defendants which issue was res judicata. That the assessment of the taxing officer is grossly unjust as it goes against the legal principle that a successful litigant is entitled to reasonable costs and it is therefore fair and just that the assessment of instruction fees be set aside and substantiated with an award of Kshs. 3,187,500/= or with such sum that the court deems reasonable.
 3. The application was supported by the affidavit of Winnie Songok counsel for the 1st, 2nd and 3rd defendants sworn on 16th February 2023. She deposed that the 1st, 2nd and 3rd defendants filed their bill of costs dated 9th September 2022. That it was not opposed by the plaintiff and on 2nd February 2023 the Taxing Officer taxed the said bill. That the bill of costs was taxed at kshs. 124,236/=. That the bill was taxed under schedule 6 of the *Advocates (Remuneration) (Amendment) Order* 2014. That the taxing officer applied the scale in Paragraph 1 (b) of Schedule 6 which makes provision for assessment in accordance with the value of the subject matter where proceedings have been commenced and a defence has been filed. That the taxing officer ascertained that the value of the suit property was over Kshs. 200 million. That the taxing officer's starting point was the scale for property which does not exceed Kshs. 1 million which gave her the base figure of Kshs. 120,000/=. That considering that the property exceeded Kshs. 1 million, the taxing officer applied the next scale which was for property not exceeding Kshs. 20 million. That the fees would be as for property worth Kshs. 1 million plus an additional 2%. That with the base figure of Kshs. 120,000/= the taxing officer interpreted the 2% to be a percentage of the instruction fees. That the taxing officer therefore calculated it as 2% of Kshs. 120,000 which gave her Kshs. 2,400. That this was added to the base figure and came to Kshs. 122,400. That considering further that the property exceeded Kshs. 20 million, the taxing officer applied the scale for such property which is fees as for Kshs. 20 million plus an additional 1.5%. That the taxing officer interpreted the additional 1.5% to be a percentage of the instruction fees calculated and therefore calculated it as 1.5% of Kshs 122,400 which came to Kshs. 1,836 that was added to Kshs 122,400 which came to Kshs, 124,236. That the said amount was then awarded. That the formula applied by the taxing officer to compute the instruction fees was erroneous and deviated from standard practice. That it is just and fair that the taxation on instruction fees be set aside.
 4. The plaintiff did not file any response to the chamber summons application.
 5. The application was canvassed by way of written submissions. The 1st, 2nd and 3rd defendants filed their submissions dated 11th May 2023 while the plaintiff did not file any submissions.
 6. In their submissions, the 1st, 2nd and 3rd defendants submitted that the general principle is that the court cannot interfere with the findings of the taxing officer unless the taxing officer misdirected himself on a matter of principle in making assessment. They relied on the cases of *Joreth Ltd v Kigano & Associates* Civil Appeal No. 66 of 1999 [2002]eKLR and *First American Bank of Kenya v Shah and Others* [2002] eKLR in support of their arguments.
 7. The 1st, 2nd and 3rd defendants also submitted that the suit properties in this matter were known as Kiambogo/Kiambogo Block 2/13, 2/527 and 2/528 whose value was kshs. 270 million as per the sale



agreement dated 16th September 2015. They further submitted that the taxing officer ascertained from the pleadings the value of the suit property and that even though she applied the correct provisions of the law, her computation was not in line with the law and she therefore erred in principle.

8. The 1st, 2nd and 3rd defendants also submitted that the correct sum that was to be granted would have been Ksh. 4,250,000 and they relied on the cases of *Republic v Minister for Agriculture & 2 Others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006]eKLR, *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] EA 492 and *Prenchand Raichand Ltd & another v Quarry Services of East Africa Ltd & Others* [1972] EA p. 162 and submitted that the instruction fees awarded by the taxing officer was manifestly low and should either be remitted to a different taxing officer for taxation or be taxed as drawn.

Analysis and determination

9. The 1st, 2nd and 3rd defendants are seeking that the court sets aside the ruling of the taxing officer dated 2nd February 2023 on instruction fees.
10. They argue that even though the taxing officer applied the correct provisions of the law, the arithmetic calculations on instruction fees disregarded the value of the subject matter.

The taxing officer in her ruling indicated as follows;

“On instruction fees, the applicants charged 3,187, 500.00 for opposing the suit herein for the subject matter whose value is over 270,000,000,00 as per the sale agreement attached in the plaintiffs documents.

I have perused the plaintiff's pleadings and confirm the stated value of the subject matter herein.

The applicable fee is found under Schedule VI (1)(b) of the *ARO*. It provides that the fees for a subject matter whose value exceeds 20,000,000.00 fees are as for 20,000,000.00 plus an additional 1.5%. The sum is calculated thus;

Fees for 20,000,000.00 is as for Kshs. 1,000,000.00 plus an additional 2%.

Fees for 1,000,000.00 is for Kes. 120,000.00

Therefore, fees for 20,000,000.00 = 120,000.00 + (2% of 120,000) = Kes. 122, 400.00

Fees for over 20,000,000.00 = 122, 400 + (1.5 % of 122,400.00) = Kes. 124, 236.00”

11. The Court of Appeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] held as follows:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

12. The Court also in the case of *Republic v Kenya Medical Supplies Authority & another; Medox Pharmaceuticals Limited (Interested Party); Ex parte Nairobi Enterprises Limited* [2019] eKLR,



considered various decisions on the applicable principles as regards setting aside or varying a taxation of a bill of costs and stated as follows:

“The principle is that a Court cannot interfere with the Taxing Officer’s decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference.

These legal parameters were laid down in *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64 at 69 by Ringera J. (as he then was) who delivered himself thus;

“First, I find that on the authorities, 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”.

These principles reiterate the position of the Court of Appeal in *Joreth Ltd v Kigano & Associates* (2002) 1 EA 92, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.”

13. Item No. 1 that the Applicant is challenging is on instruction fees. It is now trite law that the court can only interfere with the decision of a taxing officer where there is a demonstration that there was an error of principle. The Court in the case of *Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna* [2006] eKLR held 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 is 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.”

14. As indicated before, the taxing officer taxed the instruction fees at Kshs. 124,236.00. A perusal of the court record indicates that the value of the suit property was Kshs. 270,000,000/=. The applicable provision of the law is Schedule 6 (1)(b) of the *Advocates Remuneration Order*.
15. The fees for Kshs 1,000,000/= would be Kshs. 120,000/=. The fees for the value between 1,000,000/= to 20,000,000/= would be an additional 2%. The computation would be as follows; 2% of 20,000,000 = 400,000/=
16. The fees for over 20,000,000/= would be fees as for Kshs. 20,000,000/= plus an additional 1.5%. The computation would be as follows; 1.5% of 249,000,000 = 3,735,000/=. The total instruction fees ought to have been 4,255,000/=



17. Since the suit was dismissed for want of prosecution, the 1st, 2nd and 3rd defendants were only entitled to 75% of 4,255,000/= as per schedule 6 (1)(b) of the *Advocates Remuneration Order* which provides as follows;

“To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b)”

18. 75% of 4,255,000 is 3, 191,250/=. The 1st, 2nd and 3rd defendants were therefore entitled to kshs. 3, 191,250 as instruction fees and the taxing master thus erred in awarding Kshs. 122,400/= as instruction fees. The court awards the defendants ksh 3,191,250 with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON 29TH JUNE 2023.

A.O.OMBWAYO

JUDGE

