Gecaga v Gateway Insurance Company Ltd & 2 others (Civil Case 86 of 2018) [2021] KEHC 288 (KLR) (Commercial and Tax) (25 November 2021) (Ruling)

Neutral citation: [2021] KEHC 288 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 86 OF 2018

WA OKWANY, J

NOVEMBER 25, 2021

BETWEEN

MARGARET GACIGI GECAGA (SUING ON HER BEHALF AND AS A NEXT FRIEND OF DR. BETHUEL MAREKA GECAGA) ..... PLAINTIFF

AND

GATEWAY INSURANCE COMPANY LTD ..... 1ST DEFENDANT

UDI MAREKA GECAGA ..... 2ND DEFENDANT

QUINVEST LIMITED ..... 3RD DEFENDANT

RULING

1. This ruling is in respect to the applicant's a reference dated 11th March 2021 seeking the following orders; -

    1) This honourable court be pleased to review and/or set aside the assessment of the Taxing Officer on Instruction fees (item number 1) with respect to the 2nd and 3rd defendants bill of costs dated 1st October 2020

    2) This honourable court be pleased to assess instruction fees due to the 2nd and 3rd defendants at Kshs 2,000,000 or at such sum as it deems reasonable and just

    3) In alternative to prayer number 2 above, this honourable court be pleased to remit the 2nd and 3rd defendants bill of costs dated 1st October 2020 to the Taxing Officer for the instruction fees to be taxed afresh.

2. The reference is brought under Rule 11(2) of the Advocates Remuneration Order, is supported by the affidavit of Udi Mareka Gecaga and is based on the following grounds; -

a. On 15th February 2021, the Taxing officer delivered her ruling with respect to the 2nd and 3rd defendant's bill of costs dated 1st October 2020. She assessed instruction fees at Kshs 300,000 and taxed off Kshs 1,700,000/-.

b. The Taxing officer erred in principle in assessing instruction fees at Kshs 300,000/-. This is because the taxing officer.

i. Found the value of the subject matter could not be ascertained when it was actually ascertainable.

ii. Ignored paragraphs 8,9,10 and 11 of the 2nd and 3rd defendants' submissions dated 1st December 2020 (the submissions). At paragraph 8 of the submissions, the 2nd and 3rd defendants submitted that they successfully defended the plaintiffs suit which sought to restrain the release of monetary value of 3,238,494 shares. The value of these shares was given by the plaintiff as Kshs 57,618,165/- in her own application dated 13th November 2014.

iii. Failed to consider the well settled legal principle that the value of the subject matter is discerned from the pleadings, judgment, settlement of any papers filed in court.

iv. Failed to consider that the value of the subject matter before her was Kshs 57,618,165/- as disclosed by the plaintiff in her application dated 13th November 2014.

c. 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.

d. It is fair that the assessment of the Taxing officer on instruction fees is disturbed and substitute with an award of Kshs 2,000,000/- or with such sum that this court deems reasonable.

e. The 2nd and 3rd defendants have complied with rule 11 of the Advocates (remuneration) order and have made this application timely.

3. The respondent opposed the reference through the notice of preliminary objection dated 25th May 2021 which outlines the following grounds; -

1) THAT the 2nd and 3rd defendants' application offends paragraph 11(1) of the advocates remuneration order as the reference has been filed out of time and the same is therefore incompetent and should be struck out with costs.

2) THAT the ruling of the taxing master delivered on 15th February 2021 already contained the reasons for the taxation and it was therefore an exercise in futility for the applicant's counsel to again request for the same.

3) That no leave was sought to file the application out of time.

4) That the application is incompetent, misconceived bad in law and an abuse of the court process and the same should be struck out with costs.

4. The application was canvassed by way of written submissions.

5. I have carefully considered the application, the respondents' response and the submissions filed by the parties. I find that the main issues for determination are, firstly; whether the reference was filed out of time and secondly; whether the applicant has made out a case for the review or setting aside of the Taxing Master's assessment of the instruction fees.

6. The procedure for the challenge of the results of taxation is provided under Paragraph 11 of the Advocates Remuneration Order which provides as follows;

    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.

    2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

    3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

    4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

7. The respondent contended that the application is incompetent as it offends paragraph 11(1) of the Advocates remuneration order which requires a party to file a reference within 14 days after the delivery of the ruling. The applicant, on the other hand, stated that time started to run after the Taxing Master's letter dated 8th February 2021.

8. A perusal of the impugned ruling reveals that it contains the reasons for the ruling. In the case of *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5* the court held as follows:

> " Although rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons. Where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."

9. In *Evans Thiga Gaturu, Advocate vs.- Kenya Commercial Bank Limited [2012] eKLR* the court held as follows: -

> " However, where there are reasons on the face of the decision, 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 the reference since that insufficiency may be the very reason for preferring a reference....

10. In *Stanley Kahoro Mwangi & 2 Others V Kanyamwi Trading Company Limited [2015] eKLR* the court was of the view that: -

> " A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised."

11. In the instant case, I find that the reasons for the award on taxation of Bill of Costs were contained in the ruling and there was therefore no basis for requesting for the same from the Taxing Master. Courts have held that failure to comply with the provisions of Rule 11 of the Advocates Remuneration Order may have the effect of making the application incompetent. In the same vein, courts have also taken the position that they have the discretion to allow the application when the applicant demonstrates that there was sufficient cause for the delay. I am therefore persuaded that the court can, in the wider interest of justice, still consider the merits of this application its late filing notwithstanding.

12. Turning to the issue of whether the applicant has made out a case for setting aside the Taxing Master's decision, I find that the law is settled that the court will only interfere where there is an error of principle. In *Republic vs. Ministry of Agriculture & 2 others Ex-parte Muchiri W'njuguna & 6 Others [2006] eKLR* it was held: -

> " 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.

13. *In Machira & Co. Advocates vs. Magugu [2002] 2 EA* where 428 Ringera J. (as he then was) held that: -

> " As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order."

14. The applicant's argument was that the Taxing Master erred in principle by stating that the value of the subject matter could not be ascertained from the pleadings thereby assessing the instruction fees at Kshs 300,000 instead of Kshs 2,000,000.

15. In the case of *Joreth limited vs Kigano &associates (2002) 1 E.A 92 at page 99-100* it was held that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case). The court went on to state that if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in 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.

16. Guided by the dictum in the above cited case, the court will consider the pleadings that gave rise to the taxation with a view to finding out if they disclose the value of the subject matter. Under Section 2 of the *Civil Procedure Act*, pleading includes: -

> "A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."

17. With the above section in mind, I perused the pleadings filed herein and noted that the Plaint did not contain a pray for a liquidated sum. The Taxing Master observed as follows in the impugned ruling: -

> "I have considered that the shares involved were 3,283,494 which we are not told the value and the volume of the filed documents and use my discretion to increase the instruction fees to Kshs 300,000/-"

18. Considering that the value of the shares in question was not disclosed, I find that the Taxing Master did not err in principle by applying her discretion to tax the instruction fees at Kshs 300,000. I note that the plaint did not have a liquidated claim thus necessitating the taxation of the instruction fees under the heading of other matters which when defended makes the fees payable not less than Kshs. 75,000.

19. In sum, I find that the application dated 11th March 2021 is not merited and I therefore dismiss with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 25th day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Wambua for Plaintiff/Respondent

Ms Sirawa for Kimani for 2nd and 3rd defendant

Court Assistant: Margaret