



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 2022 OF 1996

SAI SPORTS LIMITED..... PLAINTIFF/RESPONDENT

- VERSUS -

NARINDER SIGH ROOPRA

SURINDER SIGH ROOPRA

KULWANT SIGH ROOPRA

SATNAM SIGH ROOPRA

All trading as

MOTORWAYS CONSTRUCTION....DEFENDANTS/APPLICANTS

RULING

(Being a reference of taxation of the taxing master Hon. Elizabeth Tanui delivered on 17th September 2019)

1. Judgment was entered in favour of the plaintiff against the defendants, on 10th December 2014, for **Ksh 1,625,987.50** plus interest and costs. The plaintiff filed its party/party bill of costs for taxation, following that judgment. On 17th September 2019 the taxing master of this court delivered a Ruling, in respect to that bill of costs, and taxed those costs at Ksh 2,547,166/=. That taxation is the subject of the Chamber Summons dated 2nd October 2019. That chamber summons is filed by the defendants. By it the defendants challenge the award made by the taxing master on the items of instruction fees. The defendants seek the decision of the taxing master to be set aside in respect to items number 1 and 2 thereof. In the alternative they seek that this court do re-assess those two items or remit the same to another taxing master for reconsideration.

2. The learned taxing master stated thus in her Ruling:

“In this case, and to the based (sic) on the judgment delivered on 10th December 2014 in which the plaintiff was awarded Kshs.1,625,987.50 and the defendants counterclaim of Kshs.33,380,290/= dismissed (sic), I find the value of the subject matter to be Kshs 1,625,987.50 and Kshs. 33,380,290/= respectively.

Consequently, the instruction fees under the 1993 Advocates Remuneration Order for prosecuting the claim works out as follows:

1st Kshs. 750,000 - Kshs. 36,000

Balance of kshs. 875,988 x 1/100 - Kshs. 8,760

Total - Kshs 44,760

Instruction fees for defending the defendant’s counter claim is as follows;

1st Kshs. 750,000 - Kshs. 36,000

Balance of Kshs 32,630,290 x 1/100 - Kshs 326,303

Total - Kshs 362,303

The total basic instructions fees is Kshs 407,063/=. However, given the length of time this matter has taken in the judicial system, the nature of the proceedings and the conduct thereof, I hereby exercise my discretion and enhance the instruction fees to a sum of Kshs 1,600,000/=. Item No 1 is therefore taxed at Kshs 1,600,000/=. A sum of Kshs 2,845,337/= is taxed of.

Getting up fees:

According to the Advocates (Remuneration) (Amendment) Order of 1993, Schedule VI Paragraph 2, it is provided as follows:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition, to the instruction fee shall be not less than one quarter of the instruction fees allowed on taxation”.

The getting up fees herein works as follows;

$\frac{1}{4} \times \text{Kshs } 1,600,000/=$ Kshs. 400,000/=

Item No 2 is taxed at Kshs 400,000/= An amount of Kshs 1,081,779/= is taxed off.”

3. The defendant’s application is supported by their learned counsel’s affidavit. This is what he deponed by that affidavit:

“11. THAT in paragraph 4 of the ruling under instruction fees the Taxing Officer held that:

- “Total basic instruction fees is Kshs 407, 063/-
- Given the length of time this matter has taken in the Judicial System, the nature of the proceedings and the conduct thereof, I exercise and enhance instruction fees to a sum of kshs 1,600,000/-.”

12. THAT the ruling by the Taxing Officer did not specify the nature of the proceedings that made the Taxing Officer enhance the instruction fees from Kshs 407,063/- to Kshs 1,600,000/-

13. THAT this matter took about 18 years in the Judicial System for various reasons inter alia:-

- Between 24.05.2001 and 27.05.2002 the parties had attempted to settle the matter through arbitration (see page 18 of the 1st set of typed proceedings of the court)
- Hearing commenced before Hon Justice Mbaluto but later the Judge left and the hearing had to start de-novo.
- There were interlocutory applications that were to be disposed of before the hearing of the main suit. (see the ruling by Hon Justice M. Ibrahim at pages 47 and 48 of the 1st set of typed proceedings herein)
- The hearing took off before Hon Justice F. A Ochieng who was later transferred in 2007 to Kitale and the file moved with him but came back to Nairobi when he was then transferred to Kakamega.
- Hon Justice F.A. Ochieng then was transferred to Nairobi in 2009 and he continued hearing the mater in mid-2010.
- The matter was heard between 2010 and 2013 before judgment was given in 2014.

14. THAT the long during taken by this suit in the judicial system is no way attributable to the Defendants/Applicants and therefore they should not be condemned to pay higher costs to the plaintiff/Respondent.

15. THAT the duration taken by a suit in the judicial system is not a relevant consideration in taxing a party-party bill of costs and much more so when there has been delay that it not attributable to the Respondent in the bill of costs.

4. In response the plaintiff, through its learned counsel in the affidavit in reply stated that the taxing master’s decision was based on factors that are relevant and cogent which took into account the costs the plaintiff incurred in prosecuting the suit. The plaintiff cited the court of appeal case **FARAH AWAD GULLET V CMC MOTORS GROUP LIMITED (2018) eKLR** in support of its argument that the defendants failed to lay a basis for this court to interfere with the taxing master’s discretion, in taxing the bill of costs.

ANALYSIS AND DETERMINATION

5. As I begin to consider the application before me I need to remind myself that matters of quantum of taxation belong to the taxing master:

see the court of appeal case **PETER MUTHOKA & ANOTHER V OCHIENG & 3 OTHERS (2019) eKLR** where in that regard the justices stated:

*It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in **MBOGO -vs- SHAH** (Supra), then the decision though discretionary, may properly be interfered with. See also **ATTORNEY GENERAL OF KENYA -vs- PROF. ANYANG' NYONG'O & 10 OTHERS, EACJ App. No. 1 OF 2009.**"*

6. The taxing master's consideration of the instruction fee was right on point. Having enumerated what should exercise her mind in consideration of that item and after referring to the case **JORETH LIMITED V KAGANO & ASSOCIATES** Civil Appeal No. 66 of 1999, proceeded to quote the case **PETER MUTHOKA** decision (supra) as follows:

"It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court."

7. The defendants, bring the present application because they are aggrieved by the taxing master's enhancement of the instruction fee, from Ksh 407,063 to Ksh 1.6 million. In increasing that amount the taxing master stated that she considered "the length of time this matter has taken in the judicial system, the nature of the proceedings and the conduct thereof." **Justice J.B. Ojwang** (as he then was) in the case **REPUBLIC V MINISTER FOR AGRICULTURE & 2 OTHERS Ex-parte SAMUEL MUCHIRI W' NJUGUNA & 6 OTHERS (2006) eKLR** had this to say on exercise of discretion in taxation:

"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, 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 clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for under a different head of costs."

8. The learned taxing master identified two criteria as a basis of enhancing the instruction fee. The first is the length of time this case has been in the Judiciary System and the second is the nature and proceedings and conduct thereof. Whereas one can discern from the title of this case that this case has been in court since 1996 and was concluded by a judgment of 10th December 2014 the failure of the taxing officer to specify in details the second criteria identified above will lead to a finding that the nature of the proceedings ought not to have been a basis of enhancing the instruction fee because it lacked specification. One is left uncertain what exactly is the nature of this case which justifies the enhancement of instruction fee. Having reconsidered the bill of costs I am however of the opinion that bearing in mind the nature of the proceedings that was before court there was a basis of enhancing the item No. 1.

9. I have perused the judgment hereof. The judgment is very detailed and runs into 135 paragraphs. The basic claim of the plaintiff in this case was that the defendant breached the contract of construction. The defendants filed a counterclaim alleging the plaintiff failed to pay for services rendered, failed to appoint independent quantity surveyor and structural engineer. I have noted that parties adduced voluminous evidence which engaged the judge in writing a lengthy judgment. That as it maybe I am satisfied, after reviewing the taxing master taxation, that the award of enhanced costs was excessive, bearing in mind the nature of the case. I am however persuaded that there was need to enhance those costs firstly because the case has been in the Judiciary System for 18 years, before judgment was delivered and despite the defendant's protest the length of time a case takes is all relevant when taxing costs. Further the case, although seemingly one of breach of contract and failure to pay contractual sum, the fact remains that the parties had to adduce evidence, which included expert evidence. The amount of enhancement by the taxing master is however open to interference in view of failure to specify the nature of the case which justified enhancement.

10. I reject the defendants' argument that the fact the case was in the court system for a prolonged period was not their fault and therefore they should not bear the enhanced costs. The fact remains that the learned judge who delivered the judgment hereof, which judgment was not appealed, ordered that the defendants bear the costs. The consequence of that order is that all costs of the suit are payable by the defendants. It is not a case of finding fault while taxing the bill of costs.

11. Bearing in mind my finding above, I will proceed to enhance the instruction fee from Ksh 407,063 to Ksh 800,000. The defendants did not submit in respect to item number 2, in the bill of costs, that is the award of costs on the defendants' counter claim that was dismissed. I therefore assume that the defendants abandoned their challenge to that item.

12. The plaintiff and the defendants have partially succeeded in respect to the application. Accordingly, I shall order each party to bear their own costs.

CONCLUSION

13. In the end, the orders of the court are:

- a. *The decision of the taxing master Hon. Elizabeth Tanui delivered on 17th September 2019 in respect to item No. 1 in the party/party bill of costs dated 18th April 2019 is hereby **set aside**.*
- b. *That item No 1 of that bill of costs is enhanced from Ksh 407,063 to Ksh 800,000.*
- c. *The bill of costs dated 18th April 2019 is hereby taxed at Ksh 1,747,166.*
- d. *Each party shall bear their own costs to the chamber summons dated 2nd October 2019.*

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of JUNE 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **24th** day of **June, 2020**.

MARY KASANGO

JUDGE