



Ngumbau (Suing on Behalf of Piyush Manubhai Patel) v Hariya & 4 others (Environment and Land Case Civil Suit 55 of 2020) [2023] KEELC 18668 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 55 OF 2020
SO OKONG'O, J
JULY 13, 2023**

BETWEEN

KENNEDY NGUMBAU (SUING ON BEHALF OF PIYUSH MANUBHAI PATEL) PLAINTIFF

AND

**PARESHKUMAR AMRUTLAL HARIYA 1ST DEFENDANT
HARIA ASHOK KUMAR 2ND DEFENDANT
HARIA MAYUR AMRITLAL 3RD DEFENDANT
ATULKUMAR MOTICHAND SHAH 4TH DEFENDANT
MUBARAK RAZIK SAID 5TH DEFENDANT**

RULING

Background

1. The plaintiff brought this suit against the defendants on 13th June 2019. The plaintiff averred that he was the lawful proprietor of all that parcel of land known as Kisumu/Municipality/Block 7/96 (hereinafter referred to as “the suit property”). The plaintiff averred that the 5th defendant acquired the suit property fraudulently purportedly from the original proprietors thereof who had all passed on. The plaintiff averred that in perpetuation of the said fraud and with the intention of defeating the plaintiff’s interest in the suit property, the 5th defendant sold and transferred the suit property to the 4th defendant who in turn sold and transferred the same to the 1st, 2nd and 3rd defendants.
2. The plaintiff sought judgment against the defendants for; an order of a permanent injunction restraining the defendants from entering, trespassing, erecting a building and/or in any way dealing with the suit property, an order of eviction and costs of the suit. The plaintiff attached to his bundle of documents among others, an agreement for sale dated 23rd August 2014 in respect of the suit property



- between the 4th defendant and the 1st, 2nd and 3rd defendants under which the 1st, 2nd and 3rd defendants purchased the suit property from the 4th defendant at a consideration of Kshs. 22,500,000/-. The said agreement among others was produced by the plaintiff in evidence at the trial.
3. The 1st, 2nd and 3rd defendants filed a defence to the plaintiff's claim on 9th July 2019. The 1st, 2nd and 3rd defendants denied that the plaintiff was the lawful owner of the suit property and that they acquired the suit property fraudulently. The 1st, 2nd and 3rd defendants averred that they acquired the suit property lawfully from the 4th defendant at a consideration of Kshs. 22,500,000/- and that they had a valid title to the same. The 1st, 2nd and 3rd defendants attached to their list of documents among others a copy of the agreement for sale dated 23rd August 2014 between them and the 4th defendant.
 4. The 4th defendant filed his statement of defence on 11th July 2019 and amended defence on 10th August 2019. The 4th defendant denied that the plaintiff was the lawful proprietor of the suit property. The 4th defendant challenged the plaintiff's locus standi to institute the suit. The 4th defendant averred that he purchased the suit property from the 5th defendant in good faith at a consideration of Kshs. 20,000,000/- and was issued with a certificate of lease.
 5. The plaintiff's suit was heard and in a judgment delivered on 20th January 2022, the suit was dismissed with costs to the defendants. The court held that the plaintiff had failed to prove his case on a balance of probabilities. Following the dismissal of the plaintiff's suit, the 1st, 2nd and 3rd defendants filed party-party bill of costs for taxation on 10th February 2022. The 52-item bill was drawn in the sum of Kshs. Kshs. 817,338/-. The instruction fees was charged at Kshs. 557,500/-.
 6. The plaintiff opposed several items in the bill of costs. In a ruling delivered on 25th August 2022, the taxing officer, Hon. M. Shimenga taxed the bill at Kshs. 758,013/-. Taking the value of the subject matter of the suit to be Kshs. 22,500,000/-, the taxing officer assessed instruction fees at Kshs. 542,000/- based on Schedule 6 of the Advocates Remuneration Order of 2014. Getting up fees was assessed at Kshs. 180,833/- being 1/3 of the instruction fees. Items 3, 32, 43, 40, 41 and 42 were taxed as drawn having been found to have been drawn to scale. Items 20, 28, 29, 30 and 31 were taxed at Kshs. 1,100/- each while items 24, 25, 26 and 27 were taxed off. All items on disbursements were taxed as drawn save for item 51 which was taxed at Kshs. 75/-.

The reference against taxation

7. On 22nd November 2022, the court granted the plaintiff leave to file a notice of objection to taxation and a reference together by 9th December 2022. The plaintiff filed a reference on 9th December 2022. I have however not seen on record a copy of the notice of objection to taxation. In the absence of a notice of objection to taxation given pursuant to paragraph 11 (1) of the Advocates Remuneration Order, it becomes difficult to know what items in the bill of costs are the subject of the reference. Since no objection was raised by the 1st, 2nd and 3rd defendants to the plaintiff's failure to file a notice of objection, I will do the best I can with the material before me.
8. In his Chamber Summons dated 8th December 2022, the plaintiff sought an order that that the decision of the taxing officer made on 25th August 2022 in respect of items 1, 2, 3, 32, 40, 41, 42, 43 and 51 of the Advocate-Client(sic) Bill of Costs dated 19th October 2017(sic) be set aside and taxed afresh. The application was supported by the affidavit of the plaintiff's advocate, Paul Maingi Musyimi sworn on 8th December 2022. The plaintiff averred that the taxing officer erred in taxing the instruction at Kshs. 542,000/- based on the value of the subject matter of Kshs. 22,500,000/- which amount was not discernable from the judgment of the court or the pleadings. The plaintiff averred that upon reaching a decision that the value of the subject matter of the suit was discernable from the pleadings, the taxing



- officer applied a wrong section of Schedule 6 of the Advocates Remuneration Order 2014. The plaintiff averred that the value of the subject matter of the suit was not ascertainable from the pleadings or judgment and as such the correct section of Schedule 6 of the Advocates Remuneration Order 2014 that the taxing officer should have applied was Schedule 6(A)(1) which provides for “other matters”.
9. The plaintiff averred that under the said Schedule of the Advocates Remuneration Order, instruction fees due to the 1st, 2nd and 3rd defendants should have been taxed at Kshs. 75,000/-. With regard to the other items whose taxation were also challenged, the plaintiff averred that the amounts taxed were either exaggerated or had no supporting documentation. The plaintiff averred that due to the said errors by the taxing officer, the final amount awarded to the 1st, 2nd and 3rd defendants was erroneous and should be set aside in the interest of justice.
 10. The plaintiff’s application was opposed by the 1st, 2nd and 3rd defendants (hereinafter referred to only as “the defendants”) through a replying affidavit sworn by the 1st defendant, Paresh Kumar Amrutlal Hariya on 12th January 2023. The defendants averred that the bill as taxed by the taxing officer was reasonable. The defendants averred that the plaintiff had not demonstrated that the taxing officer committed any error of law or fact in her decision.
 11. The plaintiff’s application was argued by way of written submissions. The defendants filed their submissions on 2nd February 2023 while the plaintiff filed his submissions on 12th May 2023.
 12. The plaintiff submitted that the taxing officer erred in taxing items 1 and 2 of the bill of costs (instruction and getting up fees) at Kshs. 542,000/- and Kshs. 180,833/- respectively. The plaintiff submitted that the two items should have been taxed at Kshs. 75,000/- and Kshs. 25,000/- respectively under Schedule 6(A)(1) of the Advocates Remuneration Order 2014. The plaintiff submitted that there was no justification for enhancing the instruction fees from Kshs. 75,000/- to Kshs. 542,000/-. The plaintiff submitted that in awarding instruction fees of Kshs. 542,000/-, the taxing officer did not exercise her discretion properly. In support of this submission, the plaintiff cited a number of authorities some of which I will refer to later in the ruling. The plaintiff submitted that since the suit did not seek any monetary relief, there was no basis for the taxing officer basing the instruction fees on Kshs. 22,500,000/- which she adopted as the value of the subject matter of the suit. The plaintiff reiterated that the instruction fees and the getting up fees should have been taxed at Kshs. 75,000/- and Kshs. 25,000/- respectively.
 13. The plaintiff submitted that items 32 and 40 were erroneously taxed as drawn. The plaintiff submitted that Odongo Okal & Company Advocates never entered appearance in the matter and as such the defendants could not charge under item 32 for perusal of a document that was not on record. With regard to item 40, the plaintiff submitted that the 4th defendant did not file submissions and as such the defendants could not charge for perusing a non-existent document.
 14. The plaintiff submitted that items 3 and 41 were not drawn to scale. The plaintiff submitted that the plaint and the accompanying documents were 51 folios and not 76 as claimed by the defendants. The plaintiff submitted further that the judgment of the court was 15 folios rather than 26 folios stated in the bill of costs. The plaintiff submitted that the taxation of these items were erroneous.
 15. The plaintiff submitted further that the taxed amount of Kshs. 758,013/- was mathematically wrong. The plaintiff submitted that from the breakdown given by the taxing officer, the total amount should have come to Kshs. 741,633/-. The plaintiff submitted that there is a sum of Kshs. 16,380/- which is not accounted for. The plaintiff urged the court to allow his application dated 8th December 2022.
 16. In their submissions in reply, the defendants submitted that their bill of cost was properly taxed under Schedule 6 (A)(1)(b) of the Advocates Remuneration Order 2014 which provided for instruction fees



where the value of the subject matter could be ascertained from the pleadings, judgment or settlement. The defendants submitted that it was clear from the pleadings and other documents filed by the parties that the defendants purchased the suit property at Kshs. 22,500,000/-. The defendants submitted that the taxing officer was justified in adopting the said sum of Kshs. 22,500,000/- as the value of the subject matter of the suit and basing the instruction fees on the same. The defendants submitted that items 1 and 2 of the bill of costs were properly taxed. The defendants submitted that no valid grounds have been put forward to justify interference with the taxing officer's decision on the issue.

17. The defendants submitted that items 3, 32, 40, 41, 42, 43 and 51 of the bill of costs concerned perusals of various documents. The defendants submitted that the items were properly taxed as drawn as they were drawn to scale as found by the taxing officer. The defendants submitted that there was justification for interfering with the decision of the taxing officer on these items. The defendant urged the court to dismiss the plaintiff's application with costs.

Analysis and determination

18. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. In my view there is only one issue arising for determination in this reference namely; whether valid grounds have been put forward to warrant interference by the court with the decision of the taxing officer made on 25th August 2022.

19. In *Republic v. Kenyatta University & Another Ex parte Wellington Kihato Wamburu* [2018] eKLR the court cited with approval the Ugandan Supreme Court case of *Bank of Uganda v. Banco Arabe Espanol* SC Civil Application No. 23 of 1999, where the court stated that:

"Save in exceptional circumstances, 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."

20. In *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd.* [2014] eKLR, the court stated that:

"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 officer's discretion 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;



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 be taken 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 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 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.”

21. In the South African case of, *Visser v Gubb* 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in [KTK Advocates v Baringo County Government](#) [2017] eKLR, the court stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

22. The plaintiff’s reference before the court is in respect of two main items; the instruction fees and getting up fees, and a number of minor items relating to perusals. Getting up fees where it is payable is a fraction of the instruction fees. The main contention therefore is on the instruction fees. It is common ground that instruction fees is to be determined from the value of the subject matter of a suit. It is also common ground that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement. It is also common ground that where the value of the subject matter cannot be ascertained from the pleadings, judgment, or settlement, the taxing officer has the discretion to assess the instruction fees taking into account various factors. In [Joreth Limited v Kigano & Associates](#)[2002]eKLR which was cited by both parties and the taxing officer, the Court of Appeal stated as follows:

“We would at this stage point out that 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 so ascertainable the taxing officer 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 direction by the trial judge and all other relevant circumstances”.



23. In this case, the plaintiff has contended that the value of the subject matter of the suit could not be ascertained from the pleadings or the judgment of the court. The plaintiff has gone further and contended that no monetary claim was made by the plaintiff and as such there was no need for ascertaining the value of the subject matter of the suit. According to the plaintiff, the defendant's bill should have been taxed under "other matters".
24. The defendants on the other hand have supported the taxing officer's position that the value of the subject matter of the suit could be ascertained from the pleadings and other documents that were produced by the parties at the trial. In her ruling, the taxing officer stated as follows on this issue: "I have perused the pleadings in the file, I have noted that there is an agreement dated 23.08.2014 attached to the pleadings which valued the subject matter at Kshs. 22,500,000/-."
25. What I need to determine is whether the taxing officer committed an error in her finding that the value of the subject matter of the suit could be ascertained from the pleadings and for adopting the sum of Kshs. 22,500,000/- as the value of the subject matter of the suit.
26. Contrary to the plaintiff's contention, I do not think that there is any ambiguity as to what the subject matter of this suit was. The subject matter of the suit was a parcel of land known as Kisumu Municipality/Block 7/96(the suit property). The plaintiff's claim was that the defendants had acquired the suit property fraudulently. The plaintiff sought the eviction of the defendants from the property. I am therefore not in agreement with the plaintiff that no monetary value could be put on the subject matter of the suit. Since the subject matter of the suit was clear, what the taxing officer was required to do was to ascertain its value. From the material on record presented by both parties, the value of the suit property was put at Kshs. 22,500,000/-. This is the price at which the 1st, 2nd and 3rd defendants acquired the suit property from the 4th defendant in 1994. The agreement for sale between the 1st, 2nd and 3rd defendants and the 4th defendant was produced in evidence by both parties. I am therefore unable to fault the taxing officer for her finding that the value of the subject matter of the suit could be ascertained from the pleadings and that the value was Kshs. 22,500,000/-. In the circumstances, it is my finding that the taxing officer made no error in assessing instruction fees and getting up fees.
27. With regard to items 3, 32, 40, 41, 42, 43 and 51, I find no merit in the challenge of the taxing officer's exercise of discretion in respect thereof. With regard to item 3, I have noted that the plaint was accompanied by several documents. The defendants put the folios at 76 while the plaintiff contended that the folios were 51. The margin is very little. On item 32, I have confirmed from the record that Odongo Okal & Company Advocates filed a Notice of Appointment of Advocates on behalf of the 1st, 2nd and 3rd defendants on 20th September 2021. The plaintiff's contention that no such notice was filed has no basis in the circumstances. With regard to item 40, I have also confirmed from the record that the 4th defendant filed submissions on 30th December 2021. The plaintiff's challenge to the taxation of this item also has no basis. With regard to item 41, the plaintiff claimed that the judgment of the court was 26 folios while the defendants had charged for 50 folios. I have noted that the judgment was 15 pages; 50 folios were therefore not exaggerated as claimed by the plaintiff. Items 42 and 43 relate to drawing of the bill of cost and making copies thereof in respect of which a fee of Kshs. 1500/- and Kshs. 150/- respectively were charged. I find no merit in the challenge mounted against the taxation of these items. Item 51 concerned court fees for filing submissions. This item was taxed at Kshs. 75/-. I see no merit in the objection raised in respect of this item since that was the court fees payable for filing a bill of costs at the material time. With regard to the plaintiff's contention that the taxed amount of Kshs. 758,013/- is mathematically wrong, I am of the view that such an error can be corrected by the taxing officer under the slip rule. The plaintiff can move the taxing officer accordingly.



Conclusion:

28. In conclusion, I find no merit in the plaintiff's Chamber Summons application dated 8th December 2022. The application is dismissed with costs to the 1st, 2nd and 3rd defendants.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JULY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyakongo h/b for Mr. Ngala Awino for the Plaintiff

N/A for the 1st, 2nd, 3rd and 5th Defendants

Ms. Owiti for the 4th Defendant

Ms. J. Omondi - Court Assistant

