



Kayser Investment Limited v Bamburi Special Products Ltd & 2 others (Environment & Land Miscellaneous Case E116 of 2023) [2023] KEELC 19354 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19354 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E116 OF 2023
EK WABWOTO, J
AUGUST 30, 2023

BETWEEN

KAYSER INVESTMENT LIMITED PLAINTIFF

AND

STEPHEN KIRIIYU T/A KIRIIYU MERCHANTS AUCTIONEERS 1ST DEFENDANT

BAMBURI SPECIAL PRODUCTS LTD 2ND DEFENDANT

STEPHEN GIKERA & PUNIT VADGAMA T/A GIKERA & VADGAMA ADVOCATES 3RD DEFENDANT

RULING

1. The Applicant filed an application dated May 3, 2023 which was accompanied by a supporting affidavit sworn by Dorothy Mbaye where the Applicant sought the following orders:
 - a. ...Spent.
 - b. That this Honourable Court be pleased to grant an order of stay of execution of the ruling of the Deputy Registrar delivered on February 23, 2023 on the party and party bill of costs dated June 21, 2021 pending hearing and determination of the Reference herein.
 - c. That the decision of the Taxing Officer as evidenced in the ruling delivered on February 23, 2023 with respect to item no.1 on the instruction fees and on items no. 45,46,47,49,50,51,52,53,54,55,57,58,59,60,61, 62, 68, 70 and 71 in the bill of costs dated June 21, 2021 be set aside and taxed afresh by this Honourable Court.
 - d. That in the alternative, the Honourable Court be pleased to order that the Respondent's bill of costs dated 21st June 2021 with respect to item no 1 on the instruction fees and on items no



45,46,47,49,50,51,52,53,54,55,57,58,59,60,61, 62, 68, 70 and 71 be taxed afresh by another taxing master.

- e. Costs of this application be provided for.
2. The Application was premised on the grounds that:
- i. The Learned Taxing master erred in law and in fact by erroneously taxing item no 1 on the instruction fees and on items no. 45,46,47,49,50,51,52,53,54,55,57,58,59,60,61, 62, 68, 70 and 71 on the Respondent's bill of costs dated June 21, 2021, yet the proceedings thereof were neither complex nor time consuming.
 - ii. The Learned Taxing master erred in law and in fact by basing reliance on the unproven and unascertainable amount of Kshs 23,500,000 in taxing item no 1 on the Respondent's bill of costs and without considering the true value of what is at stake.
 - iii. The Learned Taxing master erred in law and in fact by wrongly and unlawfully charactering the value of the subject matter to be 23,500,000, hence wrongfully taxing item no 1. based on the said erroneous amount.
 - iv. The Learned Taxing master erred in law and in fact by taxing on items no 45,46,47,49,50,51,52,53,54,55,57,58,59,60,61, 62, 68, 70 and 71 as drawn without considering the fact that it was excessively taxed and the items no 70 and 71 does not exist on the bill of costs dated June 21, 2021.
 - v. The Applicant is greatly aggrieved by the wrongly taxed amounts under item no. 1 on the instruction fees and on items no. 45,46,47,49,50,51,52,53,54,55,57,58,59,60,61, 62, 68, 70 and 71 on the Respondent's bill of costs dated June 21, 2021
 - vi. Indeed, the learned taxing master erred in law and in fact in failing to consider the Applicant's submissions and in particular submissions under item no 1 on the value of the subject matter.
 - vii. This reference has been filed timeously upon the Applicant extracting and obtaining the master's reasons as contained in the ruling dated February 23, 2023 on April 20, 2023.
 - viii. It is in the interests of fairness and justice that this Honourable Court does grant the prayers sought in the Application herein.
3. The Applicant filed an affidavit of service sworn by Esther Kabura dated June 5, 2023, in which service upon the Respondents was effected via email on May 19, 2023 and physically at the offices of GVA Advocates on June 2, 2023. The documents, which included the Chamber summons application, court orders for an interpartes hearing and hearing notice were duly received by the secretary at 12.48pm, albeit under protest due to short notice.
4. On June 7, 2023, the Court directed that the matter be canvassed by way of written submissions. The Respondents was granted 7 days to file and serve the response after which the Applicant would file and serve their submission within 7 days. The Respondents did not file any documents in opposition of the application.
5. Having considered the Applicant's voluminous evidence and supporting documents, it is clear that the main issue for determination before this court is whether the application is merited.
6. It is a well-established principle that the taxation process relies on the discretion and sound experience of the Taxing Officer. With regard to calculation of instruction fees, I echo the sentiments in *Paul*



Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001 [unreported] where the Court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”[Emphasis Mine]

7. The role of the Court in reviewing taxation has been discussed at length by the Court of Appeal in *University of Nairobi & Another v Moses* (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment), where it was held that:

“That the High Court in the discharge of its supervisory mandate over a Taxing Master has power to correct the Taxing Master's ruling, not only if the decision is founded on malafides; ulterior and improper motive; not properly applying his/her mind to the matter or exercised the judicial discretion improperly; but also where there is demonstration of the Taxing Master having disregarded the express provision of a Statute...” [Emphasis mine]

8. My perusal of the Plaintiff in ELC 534 of 2018 dated December 13, 2018 enumerates the prayers sought to include special damages of Kshs 23,500,000 which were calculated as loss of rental income in the suit property (LR No 1/299-Original No 1/42/6). It is on this premise that the Court is led to believe that the taxing officer considered the value of the property as equal to the amount sought in the Plaintiff, which this Court find to be erroneous.
9. With regards to determining stay of execution in taxation matters, the Court is guided by the procedure set out in the *Advocates Remuneration Order*. Paragraph 11 and is very specific on what an aggrieved party should do.

“A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling”

10. Paragraph 8 of the Applicant's supporting affidavit by Ms Mbaye reads as follows:

“This reference has been filed timeously upon the Applicant extracting and obtaining the taxing master's reasons as contained in the ruling dated 23rd February 2023, on 20th April 2023.”

11. No opposition was presented to counter the averments. The court takes note that the application for stay was filed 13 days after obtaining the taxing master's reasons.



12. In the foregoing, this Court hereby finds that the application dated May 3, 2023 is merited and hereby make the following orders:
- a. An order of stay of execution is hereby issued against the ruling delivered on February 23, 2023 on party to party bill of costs.
 - b. The party to party bill of costs dated June 21, 2021 will be taxed afresh by another taxing master with respect to items No.1 on the instruction fees and on items no. 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 68, 70 and 71.
 - c. Each party to bear its own costs of the application.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF AUGUST 2023.

E.K. WABWOTO
JUDGE

