



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 309 OF 2004

MAE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

CHANDER MOHAN KHOLI (suing as the

legal representative of SUBASH CHANDER KHOLI.....1ST DEFENDANT

FEDERAL DISTRIBUTORS LTD.....2ND DEFENDANT

RULING

1. This ruling is in respect to the application dated 14th August 2017 in which the 1st defendant/applicant seeks the following orders:

- 1. This Honourable court be pleased to enlarge and/or extended the time within which the applicant may lodge an objection to the taxation of the Bill of Costs taxed on 17th January 2017 by the learned Taxing Officer.***
- 2. The applicant's Notice of Objection to taxation attached herewith be deemed to have been filed and served within the enlarged and/or extended time.***
- 3. That the decision of the learned Taxing Officer dated 17th January 2017 be set aside and the Bill of Costs dated 18th July 2016 taxed afresh.***
- 4. That the costs of this application be provided for.***

2. The application is supported by the affidavits of the applicants advocate **Mr. Sheetal Kapila** and is premised in the grounds that the taxing officer erred in failing to award the applicant costs for instructions fees. The applicant states that a serious miscarriage of justice will be occasioned to it unless the orders sought are granted.

3. A summary of the applicant's case is that the plaintiff/respondent herein filed a suit against him on 15th June 2004 seeking, *inter alia*, damages arising from alleged breach of fiduciary duty which suit was, by consent of the parties, referred to arbitration and that the suit was subsequently dismissed by the arbitrator who awarded the costs of the arbitration to the applicant herein. The applicant then filed his bill of cost claiming the sum of Kshs 1,928,840, but that a ruling on taxation delivered on 17th January 2017, the costs were taxed at Kshs 50,000 only thereby precipitating filing of the instant application wherein the applicant challenges the Taxing Masters decision on costs and explains the reasons for the delay in filing of the instant application.

4. At the hearing of the application, Mr. Wandabwa, learned counsel for the applicant explained that his client's terminal illness subsequent death caused the delay in bringing the instant application and thus, the need to enlarge time within which the applicant may file an objection to the taxation of the bill of costs.

5. On the prayer for the setting aside of the impugned decision by the Taxing Master, counsel submitted that the Taxing Master erred in failing to appreciate the fact that the reference of the dispute to arbitration was as result of a consent entered into by the parties after the suit was filed before the court and an appearance and defence filed, in which case, a winning party was entitled to instructions fees. Counsel distinguished the instant case from instances where reference to arbitration occurs on the basis of parties having signed commercial agreement to refer any disputes arising out of their transaction to arbitration where instructions fees are ordinarily not awarded.

6. Counsel submitted that in view of the fact the referral of the suit to arbitration occurred after the commencement of the suit and the filing

of the defence before the High Court, the matter fell within the purview of the court in which case, the issue of costs of the High Court case needed to have been determined by the Taxing Master. For this argument, counsel distinguished the circumstances in the instant case from the circumstances in *Kangethe & Company Advocates – Vs Kenya Pipeline Company Limited* [2011] eKLR wherein the court declined award costs to the applicant on the basis that the suit had been filed in the High Court despite the fact that parties had entered into an agreement to refer their dispute to arbitration.

7. It was the applicant's contention that instructions fees became payable to the applicant the moment he entered appearance and filed a defence in the case and that this entitlement was not vitiated by the subsequent agreement to refer the case to arbitration under order 45 of the Civil Procedure Rules.

8. It was submitted that the Taxing Master erred in law and in principle in determining the costs due to the applicant.

9. The respondent/plaintiff opposed the application through the Notice of Preliminary objection dated 28th September 2017 in which it lists the following grounds:

1. The application herein is fatally defective as there is no existing or valid notice issued setting out the items of taxation objected to as required under Rule 11(1) of the Advocates Remuneration Order.

2. The cause of action herein has abated due to the defendant's failure to issue a valid notice under Rule 11(1) of the Advocates Remuneration Order.

3. In the absence of the notice referred to paragraph 1 hereinabove, the court lacks the jurisdiction to grant the orders sought particularly with respect to the lodging of an objection to the taxation of the bill of costs taxed on 17th January 2017.

10. The plaintiff submitted that this court lacks the jurisdiction to grant the orders sought particularly with respect to the lodging of an objection to the taxation of the Bill of Costs on 17th January 2017.

11. The respondent however abandoned the 2nd ground of the preliminary objection and proceeded to submit on the remaining two grounds. It was submitted that the application is fatally defective for lack of a valid notice setting out the items of the bill of costs objected to as is required under Rule 11(1) of the Advocates Remuneration Order (ARO). On this point counsel argued that the impugned decision having been delivered on 7th January 2017, the applicant was required to have filed his notice of objection on or before 31st January 2017. Counsel cited the case of *Tranquility Development Limited v Andrew Barney Khakula t/a J.S. Khakula & Co- Advocates* [2017] eKLR wherein it was held that:

“The respondent invited the court to hold that, failure to file a Notice of Objection by the applicant renders the Reference fatally defective as there is no proper reference before the court for determination. There are several authorities relied on by the respondent....

Based on the legal principles cited herein and the submissions of the respondent which I uphold, I find that there is no competent reference before the court.

The upshot of all this is that I hereby find that, the chamber summons application dated 16th May, 2016 is incompetent due to non-compliance with rule 11(1) of the Advocates (Remuneration) Order.”

12. It was submitted that in the absence of the notice, the court lacks the jurisdiction to grant the orders sought in respect to lodging an objection to the taxation. It was further submitted that in view of the fact that there is no competent reference before the court as per the provisions of Schedule 11 of the Advocated Remuneration Order, the court must down its tools as it lacks jurisdiction in the matter. For this argument, counsel relied on the decision in *Daly & Figgis & Company Advocates v Karuturu Networks Ltd & Another* [2009] eKLR wherein it was held:

“There is no reference as contemplated under paragraph 11 of the Advocates Remuneration Order filed before this court challenging the decision of the taxing officer that would grant this court jurisdiction to hear and determine the application seeking to stay the taxation of the advocates bill of costs pending the hearing of such reference.

In the circumstances, this court cannot exercise its discretion in favour of the respondents who have not lodged a competent reference to this court from the decision of the taxing officer.”

13. On the setting aside the decision of the Taxing Master, it was submitted that it is trite law that a court will not interfere with such decision unless it is satisfied that the same was manifestly wrong in principle.

14. On instructions fees, it was submitted that the applicant is not entitled to any sums under this head as the case was transferred to arbitration by the consent of both parties who wholly submitted themselves to the arbitrator on all issues including the issue of costs to be awarded.

15. On getting up fees, it was submitted that the same would have only been awarded if the suit had proceeded for full trial. Counsel cited the decision in the case of *Mits Electrical Company Limited v National Industrial Credit Bank Limited* wherein it was held thus:-

“Getting up fees contemplates where there is full trial and where evidence is adduced....”

16. On the issue of costs payable in arbitration proceedings, it was submitted that the same was within the jurisdiction of the arbitrator and not the court. For this argument, the decision of the Court of Appeal in the case of **Kenfit Limited v Consolata Fathers** [2015] eKLR was cited.

17. Counsel contended that the amount of kshs 50,000/- awarded to the applicant in respect to the preliminary objection under Schedule V1 Part K of the Advocates Remuneration Order was reasonable for the work done.

Determination

18. I have carefully considered the instant application, the respondent’s preliminary objection, the parties’ submissions and the authorities that they cited. The main issues for determination are whether this court has the jurisdiction to entertain the application and whether the applicant has made out a case for the granting of the orders sought.

19. On jurisdiction, the respondent submitted that there was no proper reference filed before the court as contemplated under Rule 11(1) of the ARO and that the failure to file the Notice of Objection within the stipulated period rendered the reference fatally defective. On his part, the applicant attributed the delay in filing the objection on time to the illness and subsequent death of the original 1st defendant.

20. Rule 11(1) of the ARO stipulates as follows: “

“Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”

21. In the instant case the notice of objection was not filed within 14 days after the decision of the taxing officer and this explains why the first prayer in the application is for the extension of time within which the objection may be lodged. On enlargement of time within which to lodge the objection to taxation, I am unable to agree with the respondent’s position that the Court has no power to enlarge time within which a party can file notice of objection to taxation. Indeed, the power of the court to extend time is captured under Rule 11(5) of the ARO as follows:

“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.”

22. In the present case, I find that the explanation tendered by the applicant for failing to file the Notice of objection within the stipulated timelines is plausible. I note that in the further affidavit filed on 4th October 2017, the applicant’s counsel explained, at length, the reasons for failing to file the objection on time which reasons included inability to obtain the applicants instructions in time due to his illness and subsequent death. The fact that the initial applicant died midstream in the proceedings is a matter that was not contested by the respondents.

23. It is therefore my finding that this is a case where the court can, in the interest of justice extend time within which the applicant can file the Notice of Objection to Taxation.

24. Consequently, I allow the prayer for extension of time and order that the Notice of Objection filed with the application be deemed as duly filed.

25. Turning to prayer for the setting aside of the impugned decision of the Taxing Master dated 17th January 2017 and the Taxing of the Bill of Costs afresh, I take cognizance of the well-established principle of review that the exercise of the Taxing Master’s discretion will not be interfered with ‘unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.’ (See **Preller vs S Jordaan and Another** [1957 \(3\) SA 201 \(O\)](#) at 203C – E).

26. In **Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others** [2006] eKLR Ojwang, J (as he then was) expressed himself *inter alia* 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 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... 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 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 classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

27. The principles governing taxation of costs by a Taxing master laid out in the above cited cases were also reiterated in the leading case of ***Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another*** (1972) EA 162 as follows: -

- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.*
- ii. The taxing master was expected to tax each bill on its merits;*
- iii. The value of the subject matter had to be taken into account;*
- iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;*
- v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.*
- vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.*

28. Applying the above principles to this case, it is noteworthy that the question that arises is not whether the amount taxed is too high or too low, but rather, whether the Taxing Master was right in holding that the applicant was not entitled to instructions fees in view of the fact that the matter was referred to arbitration. In other words the applicant challenged the Taxing Masters finding and or failure to award costs on the instructions fees on the basis that the matter was referred to arbitration.

29. At the heart of the dispute is the finding and reliance, by the Taxing Master, on the decision in the case of ***Kangethe & Company Advocates*** (supra) where the Court of Appeal dismissed the appeal and declined to award any costs as parties had come to court in contravention of the arbitral Clause in terms of their contract. The question which then arises is therefore whether, in the circumstances of this case, the applicant was entitled to an award of costs under instructions fees.

30. A perusal of the pleadings, proceedings and the consent order dated 4th September 2008 shows that this dispute between the parties was referred to arbitration under the provisions of Order 45 of the Civil Procedure Rules for hearing and determination of the issues in dispute. This reference to arbitration was after the filing of the plaint and defence. To my mind and going by the adage that costs follow the events, it logically follows that a party who is successful at the arbitration is entitled to the costs before both the arbitration and the court. It is noteworthy that the said consent to refer case to arbitration was categorical that the arbitral award would be filed in court within a specified period.

31. I am of the humble view that the circumstances of the instant case are quite different and distinguishable from the circumstances in the ***Kangethe & Company Advocates*** case (supra) where reference to arbitration was through a Clause in the Agreement itself. In the instant case, I find that the applicant cannot be said to have acted in contravention of any arbitration Clause by filing his defence to the suit upon being served with the summons and plaint so as to preclude him from claiming instructions fees upon the dismissal of the respondent's suit.

32. Costs are awarded to a successful party in order to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled either to initiate or to defend litigation. The discretion vested in Taxing Master is to allow costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities, and that such opinion must relate to all costs reasonably incurred by the litigant which also imports a value judgment as to what is reasonable. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the Court. This discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to the circumstances of the case.

33. It is trite that the court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. In the present case, I find that the taxing master adopted the wrong principle in holding that the applicant was not entitled to instructions fees when the applicant was entitled to costs incurred in defending the suit that was filed against him.

34. For the above reasons, I find that Taxing Master erred in principle in holding that the applicant was not entitled to instructions fees and I therefore allow the application and set aside the impugned decision by the Taxing Master.

35. I direct that the matter be referred for a fresh taxation of the applicant's bill of costs dated 18th July 2016, on the issue of instructions fees only, before another Taxing Master other than Honourable G. M. Wattimah.

36. I award the costs of this application to the applicant.

Dated, signed and delivered in open court at Nairobi this 26th day of September 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Karani for Wandabwa for the 1st respondent

Miss Onyango for Gachuhi for the applicant

Court Assistant – Otieno