



Adega & 2 others v Kibos Sugar and Allied Industries Ltd & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) (Environment & Land Petition 8 of 2018) [2023] KEELC 21619 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 8 OF 2018
SO OKONG'O, J
NOVEMBER 20, 2023**

BETWEEN

**BENSON AMBUTI ADEGA 1ST PETITIONER
ERICK OCHIENG 2ND PETITIONER
BETHER ATIENO OPIYO 3RD PETITIONER**

AND

**KIBOS SUGAR AND ALLIED INDUSTRIES LTD 1ST RESPONDENT
KIBOS POWER LIMITED 2ND RESPONDENT
KIBOS DISTILLERS LIMITED 3RD RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
RESPONDENT
COUNTY GOVERNMENT OF KISUMU 5TH RESPONDENT**

AND

**KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS INTERESTED PARTY**

RULING

1. The petitioners brought this petition against the respondents by way of a petition dated 25th October 2018 seeking several reliefs. The interested party joined the petition on 20th December 2018. In a judgment delivered on 31st July 2019, this court allowed the petitioners' petition and condemned the respondents to pay the costs of the petition. The respondents and the interested party were dissatisfied with the decision of this court and appealed against the same to the Court of Appeal in Kisumu Court



of Appeal Civil Appeal No. 153 of 2019. In a judgment delivered on 31st January 2020, the Court of Appeal set aside the judgment of this court and ordered the petitioners herein together with the 4th respondent to pay the costs of the appeal and of the petition. The petitioners were dissatisfied with the decision of the Court of Appeal and appealed against the same to the Supreme Court in Supreme Court Petition No. 3 of 2020. In a judgment delivered on 4th August 2020, the Supreme Court struck out the petitioners' appeal against the Court of Appeal decision.

2. Following the striking out of the petitioners' appeal by the Supreme Court that left the decision of the Court of Appeal undisturbed, the 5th respondent among others who were awarded costs by the Court of Appeal filed their bills of cost for taxation against among others the 4th respondent. The 5th respondent filed its bill of costs on 3rd June 2021. In a ruling delivered on 4th November 2021, the taxing officer taxed the 5th respondent's costs at a total sum of Kshs. 4,291,342/-. The taxing officer taxed the instruction fees at Kshs. 3,000,000/- and the getting up fees at Kshs. 1,000,000/-. On 8th February 2022, the 5th respondent filed an application by way of a Notice of Motion of the same date seeking an extension of time within which to file a reference against the said ruling of the taxing officer delivered on 4th November 2021. The 5th respondent's application for an extension of time was allowed on 13th July 2023 and the 5th respondent filed its reference by way of Chamber Summons dated 28th July 2023. This is the application the subject of this ruling. In the application, the 5th respondent has sought the following orders;

1. That the decision of the taxing officer dated 4th November 2021 as regards the 5th respondent bill of costs dated 3rd June 2021 be set aside particularly on instruction fees and the court be pleased to re-tax the same or in the alternative, the bill of costs dated 3rd June 2021 be remitted to the taxing officer for re-taxation on instruction fees with appropriate directions.
2. That the costs of the reference be borne by the petitioners and the 4th respondent. The application that was supported by the affidavit of the 5th respondent's advocate, Jared Sala sworn on 28th July 2023 was brought on several grounds. The 5th respondent contended that the taxing officer did not tax the 5th respondent's bill of costs dated 3rd June 2021 at all. The 5th respondent contended that the amount that was awarded to the 5th respondent by the taxing officer was extremely low that it amounted to an error of principle on the part of the taxing officer. The 5th respondent averred that the costs awarded to the 5th respondent was not commensurate with the work that was done by the 5th respondent's advocates. The 5th respondent averred further that the taxing officer failed to appreciate the complexity of the matter, the industry put in, the time taken and the work done as submitted under item 1 of the bill of costs. The 5th respondent averred that the award contradicted the spirit of the Advocates Remuneration Order which is fair and reasonable remuneration of advocates for the services rendered. The 5th respondent averred that the taxing officer misdirected herself in taxing instruction fees at Kshs. 3,000,000/-having regard to the value and weight of the subject matter. In its affidavit in support of the application, the 5th respondent highlighted the interest that the 5th respondent had in the petition and the attention and weight that the 5th respondent's advocates gave to the matter. The 5th respondent averred that the application disclosed valid reasons for the court to interfere and set aside wholly the ruling of the taxing officer on the taxation of the 5th respondent's bill of costs and for the bill to be remitted back to the taxing officer for fresh taxation with appropriate directions.



The submissions

3. I have not seen on record the response by the petitioners and the 4th respondent to the application. The application was argued by way of written submissions. The 5th respondent filed its submissions dated 28th July 2023. I have not seen the submissions in response by the petitioners and the 4th respondent. In their submissions, the 5th respondent reiterated the grounds in support of the application set out on the face of the application and in the supporting affidavit that I have highlighted above. It is not necessary to reproduce the same here. The 5th respondent reiterated that the taxing officer misdirected herself in taxing the instruction fees at Kshs. 3,000,000/- in view of the value and weight of the subject matter. In support of this submission, the 5th respondent cited a ruling of my brother Ombwayo J. on a reference by the 3rd respondent herein that was delivered on 15th July 2022. The taxing officer had taxed the instruction fees and getting up fees on the 3rd respondent's bill of costs at Kshs. 3,000,000/- and Kshs. 1,000,000/- respectively on 4th November 2021. On the said reference by the 3rd respondent, Ombwayo J. increased the instruction fees to Kshs. 12,000,000/- and getting up fees to Kshs. 4,000,000/-. Ombwayo J. held that the taxing officer erred by failing to consider that the petitioners had sought compensation of Kshs. 100,000,000/- and restitution of the property, and the complexity and input of the parties in terms of research as a result of which she arrived at a wrong assessment of the instruction fees. The 4th respondent has preferred an appeal to the Court of Appeal against that decision by my brother namely, Kisumu Court of Appeal Civil Appeal No. E239 of 2022 which appeal is pending. The 5th respondent urged the court to allow the application.

Analysis and determination

4. I have considered the 5th respondent's reference together with the affidavit filed in support thereof. I have also considered the submissions by the 5th respondent's advocates. The issue arising for determination in this reference is whether sufficient cause has been shown by the 5th respondent to warrant interference with the decision of the taxing officer made on 4th November 2021. 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.”
5. 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.”

6. 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.”

7. From its notice of objection dated 19th November 2021, the 5th respondent appears to be objecting to the entire taxation of its bill of costs which it claimed was not taxed “at all”. The 5th respondent’s bill of costs had a total of 68 items. Items 1 to 2 related to instruction and getting up fees, items 3 to 8 related to drawings, items 9 to 15 related to filings, items 16 to 42 related to service, items 43 to 50 related to court attendance, items 51 to 62 related to perusals and items 63 to 68 related to disbursements. From the ruling by the taxing officer, the taxing officer taxed only the items in the bill that were contested. The uncontested bills were taxed as drawn. Item 1 of the bill relating to instruction fees was contested. The 5th respondent sought a sum of Kshs. 40,000,000/- while the 4th respondent proposed Kshs. 45,000/- The taxing officer taxed the item at Kshs. 3,000,000/- which she considered reasonable compensation for the work that was done by the 5th respondent’s advocates after considering several factors including the complexity of the proceedings, responsibility borne by the advocates, time spent, research done, and skill deployed by counsel. Item 2 of the bill of costs that concerned getting up fees was taxed at Kshs. 1,000,000/- being 1/3 of the instruction fees. The other items that were contested according to



the ruling were items, 18, 22, 25, 29, 33, 37, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 60, 61, 62, 64 and 67. All these items were taxed and the taxing officer gave reasons for her decision in respect of each of them. It is therefore my finding that the 5th respondent's bill of costs dated 3rd June 2021 was taxed by the taxing officer. In its application and submissions, the 5th respondent did not point out which item in its bill of costs was not taxed. In its application and submissions, the applicant's complaint is confined to the taxation of only two items namely, instruction fees and getting up fees. As I have mentioned earlier, the taxing officer awarded the 5th respondent Kshs. 3,000,000/- as instruction fees against its claim of Kshs. 40,000,000/-. Getting up fees was assessed at Kshs. 1,000,000/- against the 5th respondent's claim of Kshs. 13,333,333.33.

8. In its bill of costs, the 5th respondent's advocate stated the basis of its claim for Kshs. 40,000,000/- as instruction fees as follows:

“Advocates fees on instruction to defend the petition seeking orders for closure and/or discontinuation of operations at the 1st, 2nd and 3rd respondents factories and where the claim is vehemently defended and taking into account the labour required, the number and length of the papers to be perused, the nature, magnitude, complexity and importance of the matter to the client in terms of the adverse economic, social and political effects of shutting the 1st, 2nd and 3rd respondents on the client since they will lose the revenue collected from the 1st, 2nd and 3rd respondents, occasioning job losses to thousands of people within the county and the surrounding areas to lose their only means of livelihood and adverse effect, if not entirely stall its economic agenda for the county of Kisumu with the pecuniary value of the 1st-3rd respondents being approximately Kshs.2 Billion.”

9. In assessing the instruction fees due to the 5th respondent, the taxing officer noted that the bill of costs that was before her related to a constitutional petition and that the minimum fees payable was provided for in Schedule VI (1)(j)(ii) of the *Advocates Remuneration Order* which provides that; to oppose an application for a constitutional and prerogative orders the respondents are entitled to such fee as the taxing master in the exercise of his discretion may determine taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate but such fees shall not be less than Kshs. 100,000/-. By awarding the 5th respondent instruction fees of Kshs. 3,000,000/-, the taxing officer increased the minimum scale fees by 3000%. In increasing this minimum fee, the taxing officer stated that she considered among others the fact that, the proceedings were public law proceedings, what taxation of advocates fees should yield should be reasonable compensation for professional work done, taxation should avoid unjust enrichment for any party, where the complexity of a matter is alleged, particulars should be provided, where a higher level of responsibility is alleged, the particulars should be provided, when time spent, research done and skill deployed by counsel is to be taken into account, the details must be provided. Taking all these factors and principles into account, the taxing master in the exercise of her discretion, increased the minimum instruction fees from Kshs. 100,000/- to Kshs. 3,000,000/-.
10. The 5th respondent has contended that the said sum of Kshs. 3,000,000/- was manifestly low in the circumstances as to amount to an error of principle on the part of the taxing officer. I have read the petition that was filed herein and the responses thereto that were filed by the respondents, particularly the 1st, 2nd and 3rd respondents, and the 5th respondent. In my view, the petition did not raise any complex or novel issues. The petitioners' contention was that the 1st, 2nd and 3rd respondents were operating their factories illegally in violation of planning and environmental laws and in the process infringing on the petitioners' statutory and constitutional right to a clean and healthy environment.



I am in agreement with the 5th respondent that the impact of some of the reliefs that were sought by the petitioners would have been grave had they succeeded. I am of the view however that the impact of the closure of the 1st, 2nd and 3rd respondents' factories upon the 5th respondent has been overrated by the 5th respondent. I am of the view that the 5th respondent was a nominal respondent in the suit. The respondents against which substantive reliefs were sought in the petition were the 1st, 2nd and 3rd respondents. From the petition, the 4th and 5th respondents were joined to the petition as physical planning, environmental management and administration regulators for the role that they played on the issues that were the subject of the petitioners' complaints. I have noted that in its replying affidavit to the petition, the 5th respondent adopted to a large extent the affidavit by the 1st, 2nd and 3rd respondents. In its statement of justification of the instruction fees of Kshs. 40,000,000/- in its bill of costs that I have reproduced above, much of the justification is on the impact the reliefs sought against the 1st, 2nd and 3rd respondents would have had on the 5th respondent rather than the complexity of the work done, the level of responsibly, the industry and time put in by the advocate.

11. In *Republic v. Minister of Agriculture & 2 others, Ex parte Samuel Muchiri W Njuguna & 6 others* [2006] eKLR the court stated that:

“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.”

12. I am not persuaded that the taxing officer exercised her discretion wrongly. I am not convinced that the award of Kshs. 3,000,000/- to the 5th respondent as instruction fees was manifestly low in the circumstances taking into account the fact that the minimum scale fees the 5th respondent was entitled to was Kshs. 100,000/-. The ruling by my brother Ombwayo J. in which he increased the instruction fees payable to the 3rd respondent's herein from Kshs. 3,000,000/- to Kshs. 12,000,000/- is the subject of an appeal to the Court of Appeal. The little said about it the better. I wish only to state that different respondents had different stakes in the petition and as such the instruction fees payable to the respondents need not be uniform. As I have mentioned, the 5th respondent was a nominal respondent in the suit. The only relief sought against the 5th respondent in the petition was a declaration that failure by the 4th and 5th respondents to stop the 1st, 2nd and 3rd respondents from operating their factories illegally was unconstitutional, illegal and contravened the law.
13. I am of the view that Kshs. 3,000,000/- and Kshs. 1,000,000/- awarded to the 5th respondent as instruction and getting up fees respectively were fair and reasonable compensation for the work done by its advocates. The 5th respondent has not convinced me that its advocates employed labour and care in the petition that would have justified an award of Kshs. 30,000,000/- instruction fees that the 5th respondent sought in the bill of costs. The work that was entrusted to the 5th respondent's advocates was in my view nothing out of the ordinary and as such would not have justified a premium on cost sought by the 5th respondent.



Conclusion

14. For the foregoing reasons, I find no merit in the Chamber Summons application dated 28th July 2023. The application is dismissed. Since the petitioners and the 4th respondent did not defend the application, each party shall bear its own costs.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF NOVEMBER, 2023.

S. OKONG'O

JUDGE

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

N/A for the petitioners

N/A for the 1st, 2nd and 3rd Respondents

N/A for the 4th Respondent

Mr. Sala for the 5th Respondent

Ms. J. Omondi-Court Assistant

