



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 7 OF 2017

HAITHAR HAJI ABDI 1ST APPELLANT/APPLICANT

ABDI RAHIM HAITHR HAJI2ND APPELLANT/APPLICANT

=VERSUS=

SOUTHDOWNS DEVELOPERS LIMITED.....RESPONDENT

RULING

1. The Applicants herein filed a reference dated 18th July 2021 seeking for the following orders: -
 - i) *That the matter herein be deemed as a reference to this trial Court.*
 - ii) *That the 18th May 2021 decision of the Taxing Officer on items 1 to 10 be set aside.*
 - iii) *That the decision of the Taxing Officer of 18th May 2021 be set aside.*
 - iv) *That the costs of this Application be borne by the Plaintiff.*
2. The grounds are on the face of the Application. The said Application was supported by the Affidavit of **G. J. Kahuthu Advocate** sworn on 8th July 2021.
3. The Application was opposed by the Respondent vide a replying affidavit sworn by **Victor Ayieko Advocate** on 11th November 2021.
4. The Respondent had also made an application for a notice to show cause dated 6th October 2021 on why execution should not issue against the Applicants in respect to the ruling and certificate of costs delivered and issued on 18th May 2021 and 27th July 2021 respectively.
5. Pursuant to the directions issued by the Court on 9th November 2021 and 2nd December 2021, parties were directed to file their written submissions in respect to both the Application and the Notice to Show Cause that were on record.
6. The Applicants filed their submissions dated 22nd November 2021 while the Respondent equally filed two sets of written submissions dated 11th November 2021 and 16th November 2021.
7. It was the Applicants' submission that the Taxing Officer never gave any reasons for the ruling when she was requested to do so. That she had merely written to the Applicants and stated that the reasons for the taxation were contained in the Ruling. The same was done vide her letter dated 31st May 2021.
8. It was further submitted that the Taxing Officer misdirected herself and made an excessive award when taxing the bill since the Appeal herein was never admitted under section 79B of the Civil Procedure Act and hence there was no Appeal upon which the instruction fees was considered.
9. In respect to the Notice to Show Cause, the Applicants contended that since the same was as a result of the taxation, it ought to await the outcome of the Reference filed herein and that the same could not proceed without the determination and disposal of the Reference.

10. In respect to the Reference, the Respondent submitted that the same was not properly before this Court since the Applicants had not attached a certified copy of the ruling at the time of filing the reference.

11. The Respondent further submitted that even if the court was to consider the Reference, the Taxing Officer had exercised her discretion properly and there was no error in principle or the law to warrant an interference with her discretion. In support of this position, the Respondent referred to the case of ***Kipkorir, Tito and Kiara Advocates v Deposit Protection Fund Board [2005] eKLR***.

12. For the Notice to Show Cause, the Respondent relied on the case of ***Labh Sign Harman Sign Limited v Attorney General and 2 Others [2016] eKLR***, and stated that the Applicants herein ought to have complied with Order 42 rule 6 of the Civil Procedures rules and applied for stay of execution without which no automatic stay would be applied. In conclusion, the Respondent urged the Court to dismiss the Reference and allow execution to proceed.

13. I have considered the Reference, the response and submissions by parties. I have also considered the decisions relied on by parties. The issues which in my opinion arise for determination are as follows:

i) Whether the Reference is properly before this Court.

ii) Whether the Taxing Officer erred in law and principle while taxing the Respondent's Bill of costs.

Issue No. I

Whether the Reference is properly before this Court.

14. The Respondent submitted that the Reference was not properly before this Court for want of an accompanying ruling subject of the Reference. It was the Respondent's contention that a Reference is like an Appeal from the decision of the Deputy Registrar and hence the provisions of Section 89 of the Civil Procedure Act and Order 42 of the Civil Procedure Code are applicable. On this aspect it was submitted that Order 42 rule 2 is clear that where no certified copy of decree or order appealed from is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed. In the instant case no copy of the Ruling had been attached neither was there a certificate of costs annexed to the supporting affidavit.

15. Its trite law that a party pursuing an appeal ought to attach either a copy of the ruling or the judgement being subject of the Appeal. In view of the foregoing, this Court agrees with the submissions of the Respondent that the said reference is not properly before this Court.

Issue No. ii

Whether the Taxing Officer erred in law and principle while taxing the Respondent's Bill of costs herein.

16. The Principles of taxation were aptly stated in ***Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162)*** where the court noted as follows on the principles on taxation:

"(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

17. The circumstances under which a Judge 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 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 inference 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 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 practise 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) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in ***First American Bank of Kenya v Shah and Others [2002] 1 EA 64***.

18. The Applicant's principal argument is that the Taxing Master misdirected herself on items 1 to 10 of the bill and made an excessive award while the Respondent on the other hand maintained that the Taxing Master correctly taxed the bill and exercised her discretion properly.

19. I have perused the Taxing Officer's decision and reasons for it. In my view, the taxing officer considered the material placed before her and properly exercised her discretion in taxing the Respondent's bill. The Taxing Officer in my view did not misapprehend the applicable principles and law in arriving at her decision. It is therefore not open for this court to interfere with the same.

20. Flowing from what I have stated above, I am unable to uphold the Applicants' argument that the taxing officer committed an error of principle or law in her decision. Consequently, the reference is declined and dismissed. Having dismissed the reference, the Respondent is at liberty to proceed with Application for the Notice to Show Cause dated 6th October 2021.

21. Each party shall meet their respective costs of the reference.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kahuthu for the Applicants.

N/A for the Respondent.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE