Crossley Holdings Ltd v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 3 others; Ogendo & another (Interested Party) (Constitutional Petition 6 of 2020) [2022] KEELC 2529 (KLR) (15 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2529 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL PETITION 6 OF 2020

A OMBWAYO, J

JULY 15, 2022

BETWEEN

CROSSLEY HOLDINGS LTD ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES & CO-OPERATIVES ..... 1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF KISUMU ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

RICHARD OCHIENG OGENDO ..... INTERESTED PARTY

JULIUS OKELLO KUNGU ..... INTERESTED PARTY

RULING

(1) Introduction

1. The fifth respondent Miwani Sugar Company (1989) Ltd in receivership filed a reference by way of Chamber Summons dated 7th February 2021 praying that the Learned Deputy Registrar's decision dated and delivered on 26th January, 2022 Petitioner's bill of costs dated the 2nd November, 2021 which she taxed Item 1 of the Petitioner's bill of costs at Kshs. 119,978,500.000; Taxed Item 2 of the Petitioner's bill of costs at Kshs. 239,957,000.00; Made awards under Items 22, 23, 25, 72, 73, 74 and 77 of the Petitioner's bill of costs be set aside.

2. He further prays that the decision of the Learned Deputy Registrar made on the 26th January 2022 be substituted with orders on the items the subject of this reference as proposed in the 5th Respondent's written submissions filed before the taxing officer or with such other orders as this court may find just and lawful in the circumstances of this matter. Costs of this reference be provided for.

3. The application is supported on the grounds that the Learned Deputy Registrar erred in law and fact in pegging the determination of Item 1 on a conjectural figure without any basis at all, in contravention of well-established principles for the placement of expert or opinion evidence before court and in direct contravention of the claim that had been put forward by the Petitioner itself. The court ended up determining the value of the subject property was shocking and without any precedent and amounted to the court creating evidence and importing the same into the proceedings without giving the parties adversely affected thereby the opportunity to interrogate and respond to such evidence. The decision was offhanded, perfunctory and amounted to a poor and most capricious, arbitrary, whimsical and injudicious exercise of judicial discretion.

4. Moreover, that the Learned Deputy Registrar erred in law and in fact in basing her decision of facts that were not before her and in manufacturing her own facts in order to support the decision and that the Learned Deputy Registrar completely ignored the fact that Item 1 was actually pegged on prayers which the trial court had expressly rejected. Her decision was a warped up one that went against the decision of the Judge and especially the finding of the Judge that the petition was not open for recovery of land but for a declaration of rights.

5. That the Learned Deputy Registrar made an error of principle in using the wrong formula or Schedule of the Advocates Remuneration Order in assessing the cots payable.

6. The Learned Deputy Registrar made an error in awarding Kshs. 239,957,000.00 in Item 2 which was not supported by the particulars provided in those items in contravention of the rules for drawing bills of costs and ignored the fact that the value of the subject matter as stated by the Petitioner in those cross-petitions was rejected by the Judge.

7. The Learned Deputy Registrar made an error of fact and Law in awarding getting-up fees in Item 3 when no basis has been laid for the claim for getting up fees and in failing to determine correctly or at all whether the manner in which the petition was presented and prosecuted brought the determination of casts within the purview of Paragraph 2 of Schedule 6. The learned Deputy Registrar particularly got herself mixed up in making such a finding against all parties, including the 3rd Respondent (County Government of Kisumu) who did not deny the Petitioner's claim, admitted it and actually went further and supported the Petitioner's case.

8. The Learned Deputy Registrar erred in fact and in law in failing to find that the bill of costs was a scheme to loot public funds through the 3rd Respondent and that she was under a legal and constitutional obligation to stop the taxation process form being used to steal public funds through an open act of collusion between the Petitioner and the 3rd Respondent.

9. The Learned Deputy Registrar erred in fact and in law in awarding the Petitioner costs under Item 4 yet the court never heard and determined the application and no costs were awarded for it.

10. The Learned Deputy Registrar erred in fact and in law in making an award on Items 22, 23, 25, 72, 73, 74, 76 and 77 yet they were not chargeable because they related to an application dated 08.12.2020 that was never prosecuted and so no costs were awarded in respect thereof.

11. The Learned Deputy Registrar erred in fact and in law in making a determination whose effect was to condemn parties, including the 5th Respondent to carry the burden of paying for costs that were payable by other parties and which were not payable by it.

12. The decision of the Learned Deputy Registrar flew in the face of the precedents she had cited as setting out the principles guiding the taxation of costs and the figure awarded in Item 1, 2 and 3 and the overall figure were so manifestly high as to justify an interference by this court on a reference.

13. The Attorney General on behalf of the 1st Respondent and himself equally filed a reference on 9/2/2022 dated 8/2/2022 challenging the decision of the taxing officer delivered on 26/2/2022 on items 1, 2, 3 and 4 of the bill of costs and that the same be re-taxed.

14. The reference is based on grounds that the taxing master erred in both fact and in law by failing to take note that the petition before it sought declaratory orders and that the value of subject matter was not in issue thus she failed to take into account the fact that the *advocate remuneration order* 2014 under schedule 6 (i) (j) (ii) clearly provides for instruction fees should be a reasonable amount but not less than 100000/= in cases where constitutional petitions seeking such orders are filed.

15. The taxing Master erred in both fact and law and failed to act judiciously when she awarded instruction based on a approximate current value of the subject matter without giving reasons as to where she derived her the valuation thus using an improper formula based on no valuation report to derive the instruction fees. Thus awarding fees so manifestly excessive as to warrant disturbance by the court.

16. In failing to consider that the petition sought declaratory orders as stated above. The taxing Master erred in fact and law by failing to consider that the cross petitions referenced as item 2 thereunder were derivatives of the petition and thus schedule 6 (i) (j) (ii) would apply in calculating instruction fees and not as against the instruction fee derived from the erroneous formula she applied.

17. The taxing master erred in fact and in law by awarding getting up fees in blatant disregard to that the parameters laid down in Schedule 6 subparagraph 2 of the Advocates Remuneration amendment order 2014. She thus she ignored that the petition was canvassed by way of submissions, no *viva voce* evidence tendered. Thus there was no preparation required for trial.

18. The taxing Master erred in both fact and law by applying the getting up fees as against the erroneous instruction fees she awarded based on valuation/expert report thus arriving at an erroneous and manifestly excessive fees.

19. The taxing master erred in fact and law in exercising discretion to award exorbitant fees especially item 1, 2, 3 contrary to the established legal principles on taxation.

(2) Response By the Decree Holder

20. In the replying affidavit filed by Buggar Singh the Director of Crossley Holdings Ltd, in respond of the reference by the Attorney General, he states that the reference is misconceived and an abuse of court process as it seeks to challenge the discretion of the taxing officer of this court without setting out basis of challenge. That the Applicant (Miwani Sugar Company (1989) Limited (in Receivership) seeks to challenge the exercise of judicial discretion by the Taxiing Officer and yet it has not set out the basis for such a challenge, the reference does not fall within the parameters upon which this court can interfere with, alter, review and or set aside an order made based on the discretionary powers of a taxing officer.

21. The respondent states that the taxing officer did not take into account external, exterior and or irrelevant matters that she ought not have taken into account and neither did she misapprehend, or fail

to take into account relevant matters or apply the wrong principles in the taxation of a party and party bill of costs which would have made her fall into error in such taxation.

22. In reply to the reference dated 7/2/2022 by the 5th Respondent, the Petitioner decree holder states that the reference is misconceived as the taxing officer of the court applied her discretion properly by used a figure of Kshs. 752,000,000 as the value of the property a figure that was availed by the honourable Attorney General. The petitioner arguers that there is no basis for the challenge.

(3) Rival Submissions

23. The applicant, Miwani Sugar Company in receivership through its advocate David Otieno submits that the taxing officer was wrong in finding that since the Judge found the property to have been bought at 752,000,000 on 24/12/2007 same could appreciate 10 times in value between that time and the date of Judgment taking cognizance of the passage of time and element of inflation therefore buying thereby bring the value to Kshs 850,000 per acre or 7,984,900,000.

24. The applicants argue that the court awarded an order of eviction and vacant possession and not a refund of money or special damages and therefore the award of costs was excessive.

25. He submits that the taxing officer became a valuer and placed a value on the subject property.

26. The Attorney General, through Mr Oscar Eredi, Chief Litigation Counsel submits that the general rule in such matters is that unless the taxing officer has misdirected himself on a matter of principle, the Judge sitting on a reference against an assessment ought not interfere with the findings. The Attorney General argues that the learned taxing officer misdirected herself for the following reasons:

27. The taxing Master awarded instruction based on an approximate current value of the subject matter without giving reasons as to where she derived her valuation thus using an improper formula based on no valuation report to derive the instruction fees. Thus awarding fees so manifestly excessive as to warrant disturbance by the court.

> "We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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".

28. From a reading of the judgment the claims for special damages were rejected by the court because they were not specifically proved by the petitioner, clearly ascertain the value of the subject matter and so the orders pleadings are averments that must be proved by evidence. Under paragraph 13 A of the *Advocates Remuneration Order* the taxing master may call for any evidence to prove any matter before her. The taxing master in her ruling (see page 9) took cognizance of the fact that the value of the subject matter was contested by parties but failed to call for a valuation report.

29. Be that as it may since the claims for special damages were rejected by the court. The taxing master ought to have awarded cost as against the claims that succeeded that is for the constitutional or a prerogative order. Basing it on the unascertained value of the property was erroneous. The value of subject matter was never an issue before the court and therefore amounted to an irrelevant factor. The

fees chargeable should have been charged as per schedule 6 paragraph j where under constitutional petitions and prerogative orders it provides

1. "To present and oppose an application for a constitutional or a prerogative order such fees as the taxing master is exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter, the difficulty or novelty of questions raised the amount or value of the subject matter, the time expended... (ii) where the matter is opposed and found to satisfy the criteria set above such sum as may be reasonable but not less than 100,000/="

30. In failing to consider that only their claims for constitutional or a prerogative order. Succeeded as stated above. The taxing master erred in fact and law by failing to consider that the cross petitions referenced as item 2 thereunder were derivatives of the petition and thus schedule 6 (i) (j) (ii) would apply in calculating instruction fees and not as against the instruction fee derived from the erroneous formula she applied.

31. In awarding getting up fees the taxing master blatant disregard the parameters laid down in schedule 6 subparagraph 2 of the *Advocates Remuneration amendment order* 2014. She thus she ignored that some parties such as the county government never denied any liability and thus condemned them to pay the same.

32. The taxing master further erred in both fact and law by applying the getting up fees as against the erroneous instruction fees she awarded based on valuation/expert report thus arriving at an erroneous and manifestly excessive fees.

33. The taxing master also failed to give reasons as to why she applied that formula in arriving at the instruction fees as opposed to the manner suggested by the respondents in *K. Mberia & Partners Advocates v Property Reality Limited* [2018] eKLR the court stated The rationale for giving reasons in a judgement or ruling or decision was espoused in the persuasive authority in the case of *Soulemezis Versus Dudley (Holdings PTY Limited*, 1987 10 NS WLR 247, 279 where MC Hugh J. A. held;

" The giving of reasons for a judicial decision serves three purposes:

First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judges decision. As Lord Macmillan has pointed, the main defect of a reasonable judgement is not only to do but seem to do justice. Secondly, the giving of reasons furthers judicial accountability. A requirement that Judges give reasons for the decisions, grounds of decision that can be debated, attacked and defended – serves a vital function in construing the Judiciary's exercise of power. Thirdly, under the common law system of adjudication, courts not only resolve disputes they formulate rules for application in future cases."

34. The taxing master acted on erroneous principles awarding cost that was so manifestly excessive and even goes beyond the government budgetary allocations of the respondent herein yet the petitioners only succeeded in their constitutional/prerogative orders.

35. To this end, The Attorney General prays that this court sets aside the award on items 1, 2 and 3 of the bill of costs and refer the matter back to the taxing officer or to reassess the bill of costs as per the provisions of schedule 6 schedule 6 paragraph j.

36. The respondent through Mr Onsongo, an advocate of the high court of Kenya submits that the substance of this reference concerns the assessment of instruction fees. The principle to be applied when assessing instruction fees in a suit are well settled. In *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR the Court of Appeal outlined the principle as follows:-

> "We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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".

37. In *Peter Muthoka and Another v Ochieng and 3 Others* NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR, the Court of Appeal expounded further on its decision in the Joreth Case (Supra) as follows:

> "It is only where the value of the subject matter is neither discretion nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has o leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive".

38. In the instant case, the Taxing officer was perfectly in order in relying of the value as pleaded by the Respondents, it matters not the orders sought for but the value of the subject matter on which the pleadings are founded and on which the orders sought are based. In the Cross-petitions, the Respondents sought to recover the subject matter, L. R. No. Kisumu 7545/3 (I.R.21038) which is currently registered in the name of the Petitioner and accordingly the entire petition revolved around a dispute as to ownership and recovery of the said parcel of land.

39. The taxing Officer used the figure (Kshs. 752,000,000.00) in computing the instructions fees. She did not go outside the pleadings to pick a figure, the value of the subject matter, from the abstract, it was pleaded.

40. It is upon the Applicants to establish that the Learned Taxing Officer did not appreciate the value of the subject matter and that she either misapprehended the principles on taxation or that she used the wrong principles that resulted in an erroneous decision. It is not enough for the Applicants to expect the court to substitute the taxing Officers decision with its won just because it (this Court) cold have reached a different decision had it been the one taxing the bill.

41. It is upon the applicant to demonstrate that the Taxing Officer exercised her discretion capriciously, unreasonably and or injudiciously such that she either took into account factors that were irrelevant or that she failed to take into account relevant factors and hence arrived at a decision which no reasonable tribunal addressing itself on the matters before her could arrive at.

42. That the Applicants have jointly and severally failed to make out a case for this court to interfere and or tinker with the findings, decision and or orders of the Taxing Officer and hence these Reverences are for dismissal. They urged the court to dismiss the same with costs to the Petitioner/Respondents.

43. I have considered the two references and do find that they raise similar issues and therefore the principles for their determination are the same. The error of principle was defined in the case of *Kagwimi Kang'ethe & co. Advocates vs O-lerai Nurseries Ltd* 2009 eKLR as follows:

> " An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles-
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> *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board* [2005]eKLR, the Court of Appeal held as follows:-
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> On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."

44. Schedule 6 paragraph (j) of the *Advocate Remuneration Order* provides as follows:

1. Instruction fees.

Subject as hereinafter provided, the fees for instructions shall be as follows...

(j) Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing officer in the exercise of his discretion and 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-

(i) Where the matter is not complex or opposed such sum as ma be reasonable but not less than 45,000.

(ii) Where the matter is opposed and fond to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000.

(iii) To present or oppose application for setting aside arbitral award 50,000.

45. In the case before me the learned taxing officer applied a figure that was discerned from the proceedings and pleadings. The Learned taxing officer found from the proceedings that the petitioner paid ksh 752,000,000 for 9,394 acres in the year 2007 and therefore according to the learned Taxing Master the value of one acre of the property was Ksh 80,051. That it has been 14 years since the property was bought and therefore it was her duty to take cognisance of passage of time and effects of inflation and therefore approximated the value of an acre at ksh 850,000. The learned Taxing Master then calculated the current value by multiplying 850,000 per acre by the acreage and reached a figure of ksh 7,984,900.000 as the value of the subject matter. It is clear from the proceedings of the Taxing Master that the value of the subject matter was discerned from the proceedings. I do find that there was no error of principle of awarding costs as the taxing officer considered the issue of passage of time and inflation. The upshot of the above is that the references are dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15th DAY OF JULY 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.