Mutanga Tea and Coffee Company Ltd v Shikara Limited & another (Environment & Land Case 20 of 2021) [2022] KEELC 13349 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13349 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 20 OF 2021

NA MATHEKA, J

SEPTEMBER 27, 2022

FORMERLY HCCC NO. 171 OF 2011

BETWEEN

MUTANGA TEA AND COFFEE COMPANY LTD ..... PLAINTIFF

AND

SHIKARA LIMITED ..... 1ST DEFENDANT

MUNICIPAL COUNCIL MOMBASA ..... 2ND DEFENDANT

RULING

1. The application is dated September 19, 2014 and is brought under regulation 11(1) and (2) of the *Advocates Remuneration Order* and under inherent powers of the court and the applicant objects to the said ruling on the grounds that:

    1. The learned taxing master erred in holding that the value of the subject matter cannot be ascertained from the pleadings.

    2. The learned taxing master exercised her discretion wrongly in taxing instruction fee at Kshs 90,000- after finding that from the pleadings, the taxing master could tell that ,

        a. The constructions were of great magnitude,

        b. Clearly, the constructions would involve large sums as investment,

        c. The matter was very important to the plaintiff as it was a huge investment which would bring in large profit,

        d. The application to strike out the suit was bulky,

e. The complexity of the matter could be discerned from the general conduct of the proceedings general conduct of the pleadings was reasonable as instruction fees for without ascribing to it any justifiable grounds.

3. The learned taxing master erred in law in ignoring the bulkiness of the 200 page plaint, the 371 page replying affidavit of the 1st defendant and 389 page notice of motion dated July 7, 2011.

4. Further the learned taxing master erred in law in disregarding the fact that the plaintiff instructed 3 advocates to appear in the matter and that the 3 advocates appeared at the hearing of the preliminary objection.

5. The taxing master erred in law taxing off Kshs 5,342,062.45 from the applicant's bill of costs.

6. The taxing master erred in taxing item 12 in awarding a sum of Ksh 10,500 thereby failing to appreciate the time and effort made by counsel in preparing the 389 page complicated application.

7. The learned magistrate erred in awarding Ksh 3,500 for preliminary objection after finding that it was complicated.

8. The learned taxing master erred in striking out item 41 being the costs for drawing the amended statement of defence and counter-claim.

9. The learned taxing master failed to appreciate the preliminary objection and the ruling, thereon established a matter of great public interest because it argued a' novel point of law and established precedent on the jurisdiction of the High Court and as against the physical planning tribunals in physical planning disputes.

10. The learned taxing master arrived at the wrong conclusion by awarding costs at an aggregate sum of Kshs 151,538.45/-.

2. The 1st defendant accordingly prays that;

a. This honorable court dismisses the plaintiff's objection dated April 28, 2014, set aside the ruling dated September 8, 2014 on the 1st defendant's bill of costs dated 13th January 2014 and award such amounts as it deems just.

b. In the alternative applicant's this honourable court remit the 1st applicant's bill of costs dated January 13, 2014 before another taxing master

3. The plaintiff stated that the taxing master was correct in her holding that the value of the subject matter was not ascertainable from the pleadings or verdict, indeed, the value of the subject matter could not properly be pegged on a value asserted by the applicant/1st defendant in its response to the suit in the manner apparent herein, and which value was not only esoteric to the applicant but was also not relevant to the ultimate question for determination by the court. That the mere fact that the construction was of great magnitude does not offset the criteria for assessing instruction fees as set in the schedule to the remuneration order (schedule 6 thereof). That the constructions would involve large sums of money as investment, or would, per 2(c) bring large profit, this could not have been a relevant consideration, as was the fact of the application to strike out being bulky 2(d)), as the element of bulk would have been addressed within the context of drawing, copies, correspondence and perusals under the relevant paragraphs of schedule 6.At any rate, the suit was struck out not on account of that application to strike out, but on a notice of preliminary objection. The taxing master was right in her

apprehension of the complexity or otherwise of the matter as the preliminary objection upon which the suit was struck out turned on the narrow question of jurisdiction.

4. That on ground 3, it is repetitive having, regard to ground 2(d), but, in any event, there was not before court a 200 page affidavit, but documents preparation for which is taken care of by fees for drawing, perusing, photocopying et cetera. Further, as already stated the matter was disposed of on a preliminary objection and the application by motion dated July 7, 2011 was therefore superfluous and no costs were in any case awarded thereon. That on ground number 6 and the taxing master's treatment of item 12 of the bill of costs, the taxing master cannot be faulted especially proceeding from the premise that the suit was ultimately dismissed on a preliminary objection rather than an application to strike out, the logical deduction being that any determination on the preliminary objection would have turned solely on those documents filed by the plaintiff. Any application such as for striking out was therefore in the circumstances a superfluity.

5. That on ground number 9 and the contention that the taxing master failed to appreciate that the preliminary objection and ruling thereon 'established a matter of great public interest' because it argued a novel point of law and 'established precedent on the jurisdiction of the High Court as against the Physical Planning Tribunals in Physical Planning aspects', there was no novelty in the matter as the same turned on the already well established principle in *Speaker of the National Assembly vs Njenga Karume (1992)IKLR 22* which decision the court in fact relied upon. That ultimately, the matters complained of, insofar as relate to quantum, are discretionary and fall within the formulation in *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund (2005) eKLR 528* to the effect that the superior court is not to interfere with the taxing master's discretion on assessment of quantum on a reference such as this.

6. This court has considered the application and the submissions therein. The procedure for the challenge of a taxing master's decision is provided under rule 11 of the Advocates Remuneration Order which provides as follows:

   (1) 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 the objects.

   (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

7. The applicant stated that the learned taxing master exercised her discretion wrongly in taxing instruction fee at Kshs 90,000. That she erred in law in ignoring the bulkiness of the 200 page plaint, the 371 page replying affidavit of the 1st defendant and 389 page notice of motion dated July 7, 2011. Further the learned taxing master erred in law in disregarding the fact that the plaintiff instructed 3 advocates to appear in the matter and that the 3 Advocates appeared at the hearing of the preliminary objection. That the matter was complex.

8. Be that as it may, the principles of varying or setting aside a taxing master's decision as set out in the cases of *First American Bank of Kenya vs Shah and Others (2002) EA 64* and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92, that the taxing master's judicial discretion can only be interfered with when it is established that the there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper

application of the correct principles of law. In *First American Bank of Kenya vs Shah and Others (2002) EALR 64* the court held that;

> First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle'.

9. These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates (2002) eKLR,* where the said court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

10. I have perused the pleadings before me and find that firstly the suit was ultimately dismissed on a preliminary objection for want of jurisdiction. The applicant places the subject matter as the value of the project and this was never established. The cause of action was not on ownership or proprietary interests but on the determination of the legality in the grant of the planning permission I find that the value of the subject matter in the instant case cannot be easily discernible. I find that the taxing master did not err in law taxing off Kshs 5,342,062.45 from the applicant's bill of costs.

11. In the case of *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna (2006) eKLR* Ojwang, J (as he then was) expressed himself 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 inference 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 authorising clause in the law, or a particularised 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.'

12. From the facts of this matter and authorities cited above I find that this application is not merited and I dismiss it with costs.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

NA MATHEKA

JUDGE