



Swing Limited v Attorney General (Sued on behalf of the Kenya Meteorological Department) & 2 others (Environment & Land Case 114 of 2020) [2022] KEELC 13599 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 114 OF 2020
LN MBUGUA, J
OCTOBER 13, 2022**

BETWEEN

SWING LIMITED PLAINTIFF

AND

ATTORNEY GENERAL (SUED ON BEHALF OF THE KENYA METEOROLOGICAL DEPARTMENT) 1ST DEFENDANT

NATIONAL HOUSING CORPORATION 2ND DEFENDANT

ATTORNEY GENERAL (SUED ON BEHALF OF MINISTRY OF TRANSPORT INFRASTRUCTURE HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS) 3RD DEFENDANT

RULING

1. Coming up for determination is an application by the plaintiff/applicant dated June 21, 2022 whereby the applicant objects to the taxing officer’s ruling dated May 10, 2022 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court be pleased to vary and/or set aside the taxing officer's ruling dated May 10, 2022 in relation to items no 1, 4, 6, 8, 10, 18, 25, 29 and 31 in the 2nd defendant's party & party bill of costs dated December 3, 2021 by giving appropriate direction that the specified items to be taxed afresh before another taxing officer strictly in accordance with the appropriate paragraphs under the [Advocates Remuneration Order, 2014](#) and as submitted by the plaintiff/applicant.



- iv. That this honourable court be pleased to exercise its inherent jurisdiction to set aside and reassess the fees under items no 1, 4, 6, 8, 10, 18, 25, 29 and 31 in the 2nd defendant's party & party bill of costs dated December 3, 2021 as prayed for in the plaintiff/applicant's submissions dated March 2, 2022 and/or in the alternative make such other or further orders as it deems fit to enable the said items to be taxed afresh in accordance with the appropriate paragraphs under the [Advocates Remuneration Order, 2014](#) by giving appropriate direction that the specified items to be retaxed/re-assessed before another taxing officer.
- v. That the costs of this application be provided for.
2. The background to the dispute at hand is that the 2nd defendant had filed an application dated July 14, 2020 seeking orders to be struck out from this suit. The said application was allowed on November 25, 2021 of which costs thereof were to be agreed upon. Apparently there was no agreement and the 2nd defendant filed their bill of costs before the Deputy Registrar culminating in the ruling of May 10, 2022.
3. The case for the applicant is premised on the supporting affidavit of his advocate, one Anthony Thuo Kanai dated June 21, 2022, where he contends that the suit against the 2nd defendant was struck out before any hearing or pre-trial directions of the suit were issued. Based on this, the 2nd defendant filed a party to party bill of costs and pegged its instruction fees on the value of the property which was not pleaded in the plaint, adding that the plaint did not also have a prayer for liquidated damages. Therefore, the instruction fees ought to be assessed at Kshs 75,000 as per schedule 6 paragraph 1(ii) of the [Advocates Remuneration Order, 2014](#). As such, the taxing officer erred in principle by awarding the 2nd defendant instruction fees of Kshs. 1,400,000 which was grossly excessive and without justification.
4. Further, considering that the suit against the 2nd defendant was withdrawn at the preliminary stage, the taxing officer also acted in disregard to schedule 6 paragraph 1(b) of the [Advocates Remuneration Order, 2014](#) which stipulates that fees should be reduced to 75% of the chargeable fees when the suit is summarily determined.
5. The applicant also raised objections to items no. 4,6,8,10,18,25,29 & 31 as taxed off by the taxing officer on the grounds that no copies were served by the 2nd defendant since physical service had been halted due to the Covid 19 pandemic.
6. The applicant was to file their submissions by August 16, 2022 but filed the same on September 7, 2022. In the said submissions, the applicant rehashed what was in their application, stating that whereas the taxing officer acknowledged in her ruling that the suit against the 2nd defendant was withdrawn at the preliminary stage, she did not demonstrate how she arrived at the instruction fees. Reference was made to the cases of [Evans M Gakuu & 66 others vs National Bank of Kenya Ltd & 8 others](#) (2013) eKLR, [Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others](#) [2006] eKLR, [First American Bank of Kenya Ltd v Gulab P Shah & 2 others](#) [2002] eKLR, [Eddy Nicholas O Orinda p/a One and Associates Advocates vs Victoria Commercial Bank Limited](#) [2020] eKLR, [Chandaria v Njeri](#) [1982] eKLR.
7. The 2nd defendant/ respondent opposed the application *vide* their replying affidavit dated August 2, 2022 sworn by its Advocate Abobo Euphemiah. They aver that when the plaintiff instituted this suit, they availed a sale agreement dated July 22, 2015 between United Care Limited and itself where the purchase price for the suit property was indicated as Kshs 110,000,000. The 2nd defendant therefore used the value of the suit property indicated on the sale agreement in drawing its instruction fees, thus the instruction fees were drawn to scale. It was further argued that the 2nd defendant did make copies of the pleadings for purposes of filing and service. As such, the amount taxed off by the taxing officer



was fair and this application should be dismissed with costs to the respondent for being an abuse of the court process.

8. The submissions of the 2nd defendant are dated August 28, 2022 where they also reiterated the averments set out in their replying affidavit. They aver that the value of the suit property was evident from the pleadings and documents filed in court and as such, the instruction fees was based on the value of land as captured in the sale agreement. They added that they did make copies of documents for purposes of service. The 2nd defendant relied on the cases of *Masore Nyang'au & Co Advocates v Kensalt Limited* [2019] eKLR and *Shiva Enterprises v Mwangi Njenga & Company Advocates* [2020] eKLR.
9. Having considered the application and the submissions, I find that the issue for determination is: Whether the ruling dated May 10, 2022 by the taxing officer should be set aside, taxed afresh or varied as sought by the applicant in its application dated June 21, 2022.
10. The applicant has contested the respondent's instruction fees as taxed off at Kshs 1,400,000 instead of Kshs 75,000 on the grounds that the value of the property was not pleaded in the Plaint and that the suit against the Respondent was withdrawn before it was either heard or set down for pre-trial directions. The applicant also contested items number 4, 6, 8, 10, 18, 25, 29 and 31 on the grounds that the respondent never made any copies for physical service because it was at the height of Covid19 pandemic where physical service was limited. As such, the respondent is not entitled to the costs granted to them. The respondent has disputed the application stating that they based their legal fees on the value of the property as per the sale agreement in the applicant's documents and also stated that they made copies of the pleadings for service and as such, they are entitled to the costs as taxed.
11. In the case of *Joreth Ltd vs Kigano & Associates* [2002] 1 EA 92, the Court of Appeal stated that;

“ The value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”
12. In the case of *Peter Muthoka & another vs Ochieng & 3 others* [2019] eKLR, it was stated that;

“ It is only where the value of the subject matter is neither discernible 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....”
13. Indeed this is a case where instruction fees could not be discernible from the pleadings, hence the ruling of the taxing master which reads as follows;

“ ... This is a suit that calls for my discretion in determining instruction fees. And in so doing, I have considered the nature of the suit and the prayers sought, the suit property and the interest of the parties evident in the pleadings and the proceedings on record. I have also considered attendances in court and the fact that the suit against the 2nd defendant was withdrawn at the preliminary stages. I am persuaded that an instruction fee of Kshs 1,400,000 is fair and reasonable.”



14. In the case of *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund* Civil Appeal No 220 of 2004 [2005]1 KLR 528, the Court of Appeal provided the rule for interference with the exercise of a taxing officer's discretion in the following words:

“On a 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.....”

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

15. I find that the taxing master took into consideration the relevant factors in arriving at the sum of Ksh 1 400 000 as instructions fees. On the issue of copies, I find that even the court's physical file contains documents filed during the Covid 19 pandemic, thus the contention by the applicant that no physical service was being conducted is unfounded.

16. The upshot of my findings is that the application dated June 21, 2022 is not merited and the reference is hereby dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Thuo for the Plaintiff/Applicant

Abobo for 2nd Defendant

Allan Kamau for Attorney General (1st & 3rd Defendants)

Court assistant: Eddel/Joan

