Wamanda & 2 others v Egoli Estates Limited & another (Environment and Land Case Civil Suit 103 of 2020) [2022] KEELC 15124 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15124 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 103 OF 2020

OA ANGOTE, J

NOVEMBER 24, 2022

BETWEEN

CECILIA NJERI WAMANDA ..... 1ST PLAINTIFF

BLUE BILL ENTERPRISES LIMITED ..... 2ND PLAINTIFF

RAWJA COMPANY LIMITED ..... 3RD PLAINTIFF

AND

EGOLI ESTATES LIMITED ..... 1ST DEFENDANT

R. J VARSANI ENTERPRISES LIMITED ..... 2ND DEFENDANT

RULING

1. Vide Chamber Summons dated November 11, 2021, the Applicant seeks the following reliefs:

    i. That the time fixed for the lodging of the reference against the Taxation Ruling be enlarged to allow for the prosecution and determination of the Application under prayer 4 below.

    ii. That the Taxation Ruling be reviewed in respect of the sum allowed on instruction fees and consequently on getting up fees.

    iii. That the costs of the Application be provided.

2. The application is based on the grounds on the face of the Motion and is supported by the Affidavit of Peter Magwa of an even date. It was his deposition that the Taxing Master erroneously handled the question of instruction fees by applying the price of the construction agreement between the 1st and 2nd Defendants as the subject matter.

3. It is the Applicant's case that the subject of the suit was the unlawful and irregular way the construction was being undertaken by the Defendants and in relation to the 3rd Plaintiff, breach of contract by the 1st Defendant; that in using the construction agreement as a basis for instruction fees, the Taxing officer took into account a wrong factor and that even if the assessment was not based on a wrong factor, the sum of Kshs 2,320,732.92 is inordinately high as to manifest an error of principle.

4. According to the Deponent, the Advocates Remuneration Order provides for Kshs 75,000 as the minimum chargeable instruction fees and allowing Kshs 2,320,732.92 as instruction fees would be allowing 30 times the prescribed minimum fees and that there was nothing complex or unique about the main suit to justify the high instruction fees taking into account the fact that the suit was withdrawn before it proceeded for hearing.

5. It was deponed that the Plaintiffs had filed the suit in good faith on the basis that no checks had been undertaken by the relevant authorities as a prerequisite for the abstraction of water and was constrained to take the decision to litigate; and that as soon as they became aware that the Defendants had obtained the requisite approvals, they withdrew the suit.

6. In response to the Chamber Summons, the 1st and 2nd Defendants/Respondents filed Grounds of Opposition in which they stated that the Applicants' Chamber Summons is fatally defective because its Advocates are not properly on record having failed to comply with the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010* and that the Application offends paragraph 11 of the *Advocates Remuneration order* as no Notice of Objection in writing was given to the Taxing Officer specifying the items objected to.

7. It was averred by the Defendants that the application is incompetent as there is no prayer for extension of time within which to file the Notice of Objection and Reference against the decision of the Taxing Officer delivered on October 28, 2021 and that the 1st and 2nd Defendants' Bill of Costs dated May 10, 2021 was un-opposed by the 3rd Plaintiff hence the current Application is a back door attempt to challenge the same without complying with the provisions of the law.

8. According to the Defendants, the delay in preferring a challenge to the Ruling delivered on October 28, 2021 has not been explained.

9. Vide a Supplementary Affidavit dated December 14, 2021, the 3rd Plaintiff/Applicant reiterated the contents of his supporting affidavit of November 11, 2021 and deponed that the provisions of the Civil Procedure Rules are inapplicable because the main suit is still on-going and that in any event, he has obtained consent from his previous advocates which consent has been filed with the Affidavit.

Analysis and Determination

10. Having considered the application, Affidavits and submissions herein, the issue that arise for determination are;

    i. Whether the firm of Mugeria, Lempaa & Kariuki Advocates LLP are properly on record for the Applicant?

    ii. Whether this court should enlarge time to enable the Applicant file a Reference against the ruling of the Taxing Master out of time?

    iii. Whether the failure to file a Notice of objection to the Taxation is fatal to the Reference?

iv. Whether the Applicant is entitled to the orders sought?

11. The 1st and 2nd Defendants contend that the application is fatally defective having been filed by counsel who is not properly on record. They assert that Order 9 Rule 9 and 10 of the Civil Procedure Rules is clear that an advocate or party who wants to come on record post judgment must seek leave of the court by way of a formal application.

12. In response, the Applicant asserts that the matter is yet to proceed for hearing and that nonetheless, the Applicant has obtained and duly filed the requisite consent. The Applicant has urged that the court should in the spirit of Article 159(2) of the *Constitution* deal with the application on substantive grounds rather than dismiss it on a procedural technicality especially as the Respondents have not indicated what prejudice they stand to suffer.

13. The Court has considered the record. The present suit was instituted sometime in June 2020. On September 30, 2020, the 3rd Plaintiff filed a Notice of Withdrawal of suit as against the Defendants pursuant to Order 25 Rule 3 of the Civil Procedure Rules. After the withdrawal, the Defendants vide its letter of January 26, 2021 and pursuant to the provisions of Order 25 Rule 3 of the Civil Procedure Rules sought a judgment on costs. The said provision states;

> ' Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

14. The judgment sought was duly entered by the Deputy Registrar on the March 4, 2021 and is for all intents a final determination of the suit as between the 3rd Plaintiff and the Defendants.

15. At the time of the institution of the suit and withdrawal of the suit, the Plaintiffs were represented by the firm of Naikuni Ngaah & Company Advocates. The present application, coming after entry of judgment, has been instituted by the firm of Mugeria, Lempaa and Kariuki Advocates LLP. Was the proper procedure for coming on record post judgment followed?

16. The law in this respect is provided for under Order 9 Rule 9 the Civil Procedure Rules which provides;

> ' When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
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> (a) Upon an application with notice to all the parties; or
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> (b) Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.'

17. Order 9, rule 10 provides;

> ' An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.'

18. A reading of the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application, with notice to all parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

19. As correctly stated by the Respondents, the essence of Order 9 Rule 9 of the Civil Procedure Rule is to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him with another advocate of file a notice to act in person with a view or avoiding to pay fees.

20. The Court has considered the affidavit evidence, particularly the notice of change of advocates annexed to the supplementary affidavit. It shows that a Notice of Change of Advocates was duly signed and consented to by the Applicant's previous counsel on December 14, 2021. The present Application was filed on November 11, 2021 and strictly speaking, the present firm of Mugeria, Lempaa and Kariuki Advocates LLP was not properly on record at the time they filed the application.

21. The effect of late or non-filing of a Notice of Change is provided under the proviso to Order 9 Rule 5 which reads as follows:

> ' But unless and until the notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former Advocate shall subject to Rule 12 and 13 be considered the advocate of the party until the final conclusion of the case or matter including any review or appeal.'

22. While it may well be said that any action by counsel who was not properly on record constitutes a nullity, this court is inclined to take a different approach. The filing of a Notice of Change is to notify the other parties as well as the court that there has been a change of advocates in a matter.

23. While it is prudent for parties to always follow procedure, in this case, this mis-step is procedural and does not go to the root of the matter. More importantly, no prejudice has been occasioned to the Respondents. That being the case, and the previous advocate having consented to the filing of the notice of change advocates unreservedly, the court is not convinced that the late filing of the consent warrants the extreme measure of locking out the Applicant. This is the position that the Court of Appeal took in *Tobias M Wafubwa vs Ben Butali [2017] eKLR*:

> ' We would go further to add that, provided that where the failure to comply with the Rule 9, did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of *Boniface Kiragu Waweru vs James K Mulinge [2015] eKLR* where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;
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> 'All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all.'

24. This Court is therefore inclined to take the same path. The Court therefore finds that the firm of Mugeria, Lempaa and Kariuki are entitled to prosecute this application on behalf of the Applicants.

25. The 3rd Plaintiff/Applicant is seeking the court's leave to enlarge the time fixed for lodging of a Reference to allow the prosecution of prayer 4 which seeks a review of the sum allowed as Instruction Fees and Getting Up Fees.

26. Paragraph 11 (1) and (2) of the 2014 ARO spells out the time within which to file an objection and provides as follows;

> ' 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
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> 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.
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> 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
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> 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.'

27. It is noted that paragraph 11 (1) (2) of the Advocates Remuneration Order does not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. This is a discretionary power granted to the Court by the provisions of sections 1 (A), 1(B),3(A), of the Civil Procedure Rules. In *County Executive of Kisumu vs County Government of Kisumu & 8 others [2017] eKLR* the Supreme Court, laid out the general principles governing extension of time thus:-

> ' (23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat Case to which all the parties herein have relied upon. The Court delineated the following as: 'the underlying principles that a Court should consider in exercise of such discretion:
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> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
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> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
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> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'

28. As aforesaid, the length of the delay and the reasons for non-compliance of the time lines are crucial considerations on whether or not to exercise the discretion of the Court.

29. As to what constitutes delay, the same has been held to be a matter of fact. Visram J (as he then was) stated thus in the case of *Agip (Kenya) Limited vs Highlands Tyres Limited [2001] KLR 630*:

> ' Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.'

30. In the instant case, it is not in dispute that a Reference was not filed within the stipulated time. The Ruling having been issued on October 28, 2021, the Applicant had 14 days within which to file an objection to the same. This means that the objection ought to have been filed on or before November 10, 2021. The filing of the Application on the November 11, 2021 constitutes a one day delay.

31. This delay has been explained by the Applicant who has stated that the same was occasioned by a three day delay in counsel communicating the decision to them. This Court finds that the delay is not unreasonable and the explanation satisfactory. The Court will there oblige and extend time in favor of the applicant to file a Reference under paragraph 11 (1) (2) of the Advocates Remuneration Order.

32. The next issue in contention is whether or not the failure to file a notice of objection is fatal to the Reference. It is undisputed that no objection has been filed pursuant to the provisions of para 11(1) of the ARO. The Applicant avers that it is not necessary while the Respondents contend that it is mandatory and that the Applicant cannot purport to file a Reference before notifying the Taxing Officer in writing.

33. The procedure for the challenge of the results of taxation is provided under Paragraph 11 of the Advocates (Remuneration) Order which provides that:

> ' (1) Should any party object to the decision of the Taxing officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of Taxation to which he objects.'

34. Paragraph 11 (2) of the Advocates Remuneration Order provides as follows;

> ' 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.'

35. The purpose of the notice to is to elicit reasons from the taxing officer. In this case, there was a written Ruling. Having considered the same, it is quite detailed and clearly sets out the reasons of the Taxing master in assessing the fees. That being the case, it would be superfluous for the Applicant to ask

for reasons which are clearly elaborated in the ruling. This court agrees with the rationale in *Evans M Gakuu & 66 Others vs National Bank of Kenya Limited & 8 Others, Hccc No 287 of 2009*, where Odunga J held as follows;

> ' Accordingly, the mere fact that the applicants did not seek the reasons before filing the reference does not, ipso facto, render the reference incompetent. If the applicants, in their wisdom, believed that the decision was self-sufficient in terms of the reasons thereof, there was no need for them to seek the reasons. However, it would have been better to notify the respondents of their intention to object to the taxation. Failure to do so alone, however, where there is no allegation that the respondents have been thereby prejudiced, ought not to lock the applicants from the seat of justice.'

36. The Court aligns itself to this position and finds that the failure to give a written notice of objection is not fatal to the Application.

37. The legal parameters within which the Court can interfere with the taxing master's decision are well settled. In First American Bank of Kenya vs Shah and others [2002] EA LR 64 at 69, Ringera J (as he then was) delivered himself thus;

> ' 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.'

38. More recently, the principles were outlined by Odunga J in the case of *Republic vs Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others [2018] eKLR* wherein he stated as follows;

> ' 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,
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> (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;
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> (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;
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> (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;
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> (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 the case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA.

39. Similarly, the Ugandan Supreme Court in *Bank of Uganda vs Banco Arabe Espanol SC Civil Application No 23 of 1999* (Mulenga JSC) stated:-

> ' Save in exceptional cases, 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.
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> 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.
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> 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.'

40. In the present case, the Applicant seeks to impugn the assessment on instruction and getting up fees. He asserts that there was an error in principle as the Taxing Officer based his assessment on the sum of Kshs 192,954,037 which was the contractual sum of the contract between the 1st and 2nd Defendants; and that the said sum was not the subject matter of the suit.

41. It is trite that instruction fees is to be determined from the value of the subject matter of a suit. It is also trite that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement.

42. Where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement, the taxing officer has discretion to assess instruction fees taking into account various factors. This was affirmed by the Court of Appeal in *Peter Muthoka & Another vs Ochieng & 3 others NRB CA Civil Appeal No 328 of 2017 [2019] eKLR* which, while expounding on the principles in *Joreth Ltd vs Kigano & Associates[2002]eKLR* set down the proper basis of taxing the instruction fees as follows;

> ' It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason,

recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

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 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 no 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.'

43. The Court has considered the record. The Plaintiffs instituted this suit on June 9, 2020 seeking inter-alia permanent injunctive orders restraining the Defendants from excavation, construction of multi dwelling 66 residential apartments and erecting any structures on LR Dagoretti/Riruta/3094 and 3096(suit property), a declaration that the intended action by the 1st and 2nd Defendants in continuing with the excavation and construction of the multi-dwelling apartments are unprocedural and irregular and an order stopping and preventing the 1st and 2nd Defendants from drilling, constructing and abstracting any water and its resources from the suit property. The suit was thereafter withdrawn before it proceeded for hearing.

44. It is clear from the foregoing that the Plaintiffs' claim was essentially with respect to construction activities undertaken by the 1st and 2nd Defendants and their impact on his adjoining property. The 3rd Plaintiff was also concerned that the Defendants had not obtained the requisite approvals from NEMA and the construction project was irregular.

45. While the sum of the contract between the 1st and 2nd Defendants is an important consideration in as far as it speaks to the nature and complexity of the suit, the Court is not convinced that the same constitutes the subject matter of the suit. The same was clearly unascertainable, and was only known to the Defendants. The instruction fees was therefore based on an erroneous figure.

46. The getting up fees having been premised on the erroneous instruction fees cannot stand. That being so, it is the finding of the Court that there was an error in principle by the Taxing Officer in identifying the subject matter of the suit leading to an erroneous assessment. Consequently, the court finds that the Application dated November 11, 2021 is meritorious and proceeds to make the following orders;

    a. The Taxing Master's Ruling delivered on October 28, 2021 be and is hereby set aside.

    b. The Bill of Costs dated May 10, 2021 shall be remitted to another Taxing Master for taxation.

    c. Each party bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno for 1st and 2nd Defendants

Mr. Njoroge for Plaintiff

Court Asssitant - June