Melina Investments Limited v Cicco (Environment & Land Case 221 of 2017) [2025] KEELC 4146 (KLR) (27 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4146 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 221 OF 2017

FM NJOROGE, J

MAY 27, 2025

BETWEEN

MELINA INVESTMENTS LIMITED ..... PLAINTIFF

AND

GIOVANNI SASSI PIERMARCO CICCO ..... DEFENDANT

RULING

1. The Applicant herein, filed this Chamber Summons Application dated 18/11/2024, premised on Article 48 and 159 (2) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Rule 11 (1) (2) and (4) of the Advocates' Remuneration Order and Schedule 6 of the Advocates Remuneration (amendment) Order, 2014, and sought the following orders:

    1. Spent.

    2. Spent.

    3. Spent.

    4. That the decision of the honourable taxing master delivered on 4/11/2024, in so far as the same relates to the reason and determination pertaining taxation of the Defendants' bill of costs dated 15/11/2023, be varied, set aside, removed, quashed and vacated by way of reference and all the consequential orders be set aside.

    5. That in the alternative prayer 4 above, this honopurable court be pleased to re tax the Defendants bill of costs dated 15/11/2023 or refer the defendants' bill of costs dated 15/11/2023 to another taxing officer for re-taxation or make directions to a fresh taxation.

    6. That the costs of this application be borne by the Defendants/respondents.

2. The Chamber Summons is supported by the grounds set out on its face and on the Supporting and supplementary Affidavit of Giuseppino Valsesia, sworn on 18/11/2024 and 13/1/2025 respectively. This reference arises from the decision of Hon. Thamara delivered on 4/11/2024 in respect of the Respondents party and party bill of costs dated 15/11/2023 where she taxed the bill at Kshs. 2,158,531.33. The Applicant challenges item 1, 2 and 17 (a) –(k) on grounds that the same were unreasonably taxed and unjustified as a result of a misapprehension of facts and law. According to the Applicant, the suit was for a claim of 10500 euros and service charge of Kshs. 752, 982.52 translating to a total of Kshs. 1,902, 982. 52, and that the taxing master should have based her decision on this amount. In relation to item 17, he stated that the same was unjustified since the expense was not proved.

3. The application is opposed. The Respondents filed a replying affidavit and further affidavit sworn by Hamisi Abdalla Kabate on 11/12/2024 and 24/1/2025 respectively. The deponent stated that the taxing master's decision on the contested items of the bill of costs was justified and that the application is bereft of merit and a mockery of the Court.

4. The application was canvassed by way of written submissions.

Plaintiff/Applicant's Submissions.

5. In relation to item no. 1, counsel submitted that the guidance is under schedule 6 part A Paragraph (1) (b) of the Advocates (Remuneration) (Amendment) Order, 2014. He argued that the suit was substantially on breach of contract, specifically a lease agreement dated 17/5/2023 and that the reliefs sought were payment of euros 10,500 (an equivalent of Kshs. 1,155,000/-) and Kshs. 725,982.52 as unpaid service charge and insurance premiums. To counsel, the suit was neither complex nor voluminous to warrant the taxing master to increase the instruction fees. He argued that the same should be taxed at Kshs. 122,400. In turn, the getting up fees under item 2 should be revised to Kshs. 40,800. To support his argument, counsel relied on the cases of Jasbir Singh Rai & 3 Others -v- Tarlocham Singh Rai & 4 Others [2014] eKLR; Martha Wangari Karua -v- IEBC & 3 Others [2018] eklr; IEBC & Another v Godfrey Masaba & Another [2014] eKLR; and Premchand Raichand & Another -v- Quarry Services of East Africa Ltd & Others [1972] EA 162.

6. I note that counsel submitted on revision of item nos. 3 -16 and 18 which were not raised in the pleadings. I will with all due respect disregard the same.

7. In relation to item no. 17, counsel submitted that the taxing master based her decision on documents that were sneaked into the record on 11/9/2024 when she asked the Defendants/respondents to file English translated version of the already filed documents. Counsel urged the court to expunge from the record those documents, identified as air tickets. He added that the said air tickets had no evidential value since they were not certified by the airlines or accompanied by a certificate of authentication envisaged under Section 106B of the *Evidence Act*.

8. Counsel further submitted that the alleged tickets do not contain the names of the Defendants herein and that the named persons in those tickets were not even witnesses in this suit; that there was no evidence of payment in form of receipts. Counsel further submitted that only the 1st Defendant appeared once in court on 26/6/2022 to testify, as the record will show.Counsel urged the court to tax off the item in totality.

Defendants/Respondents' Submissions.

9. Counsel for the Defendants argued that the ruling of the taxing master was supported by law, and grounded on the principles of taxation. He asserted that from the pleadings, the value of the subject

matter was Kshs. 11,833, 371. 52 therefore the award of Kshs, 220,000/- was reasonable and on the lower scale. He was guided by the case of First American Bank of Kenya Ltd v Shah & Others [2002] 1 EA 64 where the court expressed that the value of the subject matter is the starting point in determining instruction fees.

10. On disbursements (item 17) counsel submitted that the Applicant's argument on the same was unsubstantiated and self-contradictory. He argued that the taxing master is empowered to consider reasonable disbursements supported by evidence, as was held in the case of Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR.

11. On whether the Applicant has demonstrated substantial prejudice or irreparable harm, counsel submitted that it is a well-established principle that litigation inherently carries financial and legal risks and that parties who initiate and engage in litigation must understand that they may bear adverse consequences including costs. That the Applicant cannot claim immunity from those consequences by pleading financial hardship. To buttress this, counsel cited the case of Raichand Ltd v Quarry Services of East Africa Ltd (No.3) [1972] EA 162; and Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 Others [2013] eKLR.

12. Counsel further submitted that the application is a blatant attempt to re-open matters conclusively determined by the taxing master, hence an abuse of the court process as was defined in the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR.

Analysis And Determination.

13. The issues arising for determination in the application are as follows:

    a. Whether the court should interfere with the taxing master's decision on items no 1 and 17 of the Bill of costs dated 15/11/2024;

    b. Who ought to bear the costs of the application.

14. The principles upon which a court may interfere with the taxing master's decision have been addressed in the past see: First American Bank Ltd v Shah & another [2002] 1 EA 64.

15. The applicant's submission on Item No1 is that the amount awarded was unreasonable; that the suit was basically seeking the payment of euros 10,500 (according to the applicant which is the equivalent of Kshs 1,155,000 at the then prevailing rate of the Euro which was Kshs 110; also claimed was Kshs 725,982.52 being unpaid service charge and unpaid insurance premiums. The plaintiff submitted that the whole suit involved "substantive prayers" for breach of contract regarding the sublease; that the argument that the plaintiff was claiming the suit property is false since the same were "just alternative prayers". The plaintiff also doubted the complexity of the suit, and the volumes of documents involved were not big.

16. The taxing master referred to Peter Muthoka & Another V Ochieng & 3 Others 2019 eKLR on the issue of the instruction fee. She stated that the value of the subject matter can be discerned from the judgment; that the Judge had made a finding that the defendants had purchased the property for Euros 75,000/- and paid service charge of Kshs 828,639 and opined that the instruction fee sought was reasonable.

17. I think the argument by the applicant herein that classifies prayers in the plaint into the categories of "substantive" or "alternative" is misplaced in the realm of taxation of bills of costs. All that matters is that a prayer has been made at the foot of the plaint. Any prayer sought in a plaint is likely to be granted if the court finds that there was sufficient evidence to warrant judgment in favour of the plaintiff in

that regard. The value of the suit property itself was involved in the suit because of the prayer that sought that the defendants do surrender to the plaintiff the sub-lease dated 17th May 2013. There was a further prayer for vacant possession upon forfeiture of the sub-lease. Those were prayers that would have involved the forfeiture of the entire suit property.

18. The applicant seems to have oversimplified the ramifications of the prayers included in the plaint; for this reason, it is necessary in order to do true justice to the case, to consider the situation had the suit succeeded. Perchance the prayers had succeeded even as alternative prayers the plaintiff would similarly have been entitled to costs based on the assessed value of the suit property. On those grounds I find that the value of the subject matter was not just the euros 10,500 (according to the applicant which is the equivalent of Kshs 1,155,000 at the then prevailing rate of the Euro which was Kshs 110) and Kshs 725,982.52 being unpaid service charge and unpaid insurance premiums.

19. Consequently, the manner of computation of the getting up fee not having been impugned, the same also stands unaffected.

20. The applicant also submits that the taxing master grossly erred in taxing item no 17 of the bill of costs; that the reasons she gave were not sufficient justification for the said taxation, that the items therein were not supported by law or admissible evidence, and so she improperly used her discretion. That the taxing master exhibited unfairness for the reason that she even re-opened the matter and allowed the defendants to file further documents, pursuant to which the defendants filed more documents than authorized by her order, which were not part of the originally filed documents. The further complaint is that the taxing master even relied on those extra documents in her taxation of Item 17. The applicant complains that the documents attached to the Bill of costs dated 15/11/24 should be scrutinized against the bundle filed with the defendant's list of documents dated 15/11/2024, and that any new documents filed on 11/9/2024 should be expunged. In particular, it was urged that it would not be expected that the defendants would ensure that they attend even mentions of the suit, and that expenses of nonparties to the case ought not be included in the bill of costs; that it was also erroneous that the travel costs were awarded in Kenya shillings while the purported travel documents are in terms of Euros and further that no prevailing exchange rate was given for the travel periods. Thus the Item 17 should be taxed off entirely according to the plaintiff. It is urged, of which I do not find any evidence from the plaintiff, that the defendants concocted the documentary evidence to support their claim for travel expenses.

21. I have considered the rest of the applicant's submissions. It seems that there is a concession that at least one Emmanuele, who was not a party, testified in the matter and the name appears in the purported tickets, while the name of another Michele was included while she never testified at all in the matter (however, my observation is that the taxing master took stock of the fact that Sassi Emmanuele and Enrico Cicco testified at the hearing of the defendants' case); that the 1st defendant only testified on 26/6/2022 while the 2nd defendant never appeared at all; that there is no evidence that the defendants ever travelled to Malindi on any day other than the day that the 1st defendant attended court and testified. Lastly, the documents having been submitted in a foreign language they should not have been used in the taxation.

22. What was the taxing master's manner of handling the issue of Item 17? She dealt with it at paragraphs 12 -18 of her ruling and concluded as follows:

> " The costs of travelling in this case has (sic) been demonstrated by the defendants in the Bill and no additional documents were filed save for those that were filed in support of this item. This court finds that these costs are reasonable considering that the defendants only sought the cost of travelling and no costs for accommodation. Further, this matter was

heard physically and the court adjourned the matter on 15th February 2021 after 2 of the defendants' witnesses testified. Therefore, item 17 is reasonably charged. It is taxed as drawn. In arriving at this conclusion the taxing master had considered paragraph 74A (1) of the Advocates Remuneration Order 2014 which states as follows:

"1) The taxing officer shall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors-

a. ....."

b. ....

c. ....

d. The costs of travelling board and lodging in accordance with the status of the witness;

e. ...

f. If the witness came from abroad, whether this was a reasonable means of obtaining his evidence after considering the importance or otherwise of his evidence.""

23. First American Bank Ltd v Shah & another [2002] 1 EA 64 held thus:

> " 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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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..."

24. A case belongs to the party; it has always been thus stated. A party to litigation has only himself to blame for ever attending court without his witnesses, or for not attending at all when he is called upon to tender his evidence or call witnesses. The defendants reside in Italy and the taxing master specifically found that the counsel for the defendants had informed the court of the fact. No submission has been made in the present application as to indicate that the disposal of the matter took the trajectory of a planned schedule in which the defendants and or any of their witness or witnesses were exempt from attending court for any of the physical hearings or mentions. Furthermore, I have already stated that the taxing master found that two witnesses, Sassi Emmanuele and Enrico Cicco, testified at the hearing of the defendants' case Further litigation is often not a smooth affair, but one in which modifications to the strategy may be arrived at depending of the events observed at each hearing. Witnesses may even be dispensed with in certain cases, documents may be abandoned, proof of certain facts may be unnecessary. The submissions of the plaintiff in respect of the expenses under Item 17 are also extenuated by the provisions of paragraph 74A (1) of the Advocates Remuneration Order 2014 which the taxing master duly considered. In addition, she stated, which is correct in my view since I have personally perused the bill of costs, that no costs for accommodation were included therein.

Regarding the fact of her reliance on the documents in a foreign language, the taxing master disclosed in her ruling that the person who translated the documents provided the court with a certificate of translation which showed his qualifications. I do not hear the applicant as stating that the competence of the translator was ever challenged. This court is persuaded that for justice to be done in the matter it was a necessity to have the documents translated to enable all involved to understand them and which was done. That was for the benefit of all the parties and the court and I find nothing wrong with it.

25. In that regard I do not find the taxing master's decision in respect of Item 1 and Item 17 to be unreasonable or to be in error of principle. It did not take into account irrelevant factors. It did not fail to take into account relevant factors. I find it to be well balanced reasoning that she applied in her ruling dated 4/11/2024. Consequently, I find no merit in the plaintiff's application dated 18/11/2024 and the same is dismissed with costs to the defendants.

RULING DATED, SIGNED AND **DELIVERED** AT **MALINDI VIA ELECTRONIC MAIL** ON THIS **27TH** DAY OF **MAY 2025.**

MWANGI NJOROGE

JUDGE, ELC MALINDI.