Mathenge & another v Belle Holdings Limited & 2 others (Environment and Land Miscellaneous Application 54 of 2022) [2023] KEELC 15942 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 54 OF 2022

SM KIBUNJA, J

MARCH 8, 2023

BETWEEN

DOMINIC MUREITHI MATHENGE ..... 1ST PLAINTIFF

PRISCILLA WANGECI NJOROGE ..... 2ND PLAINTIFF

AND

BELLE HOLDINGS LIMITED ..... 1ST DEFENDANT

WIRELESS CELL CONNECTION LIMITED ..... 2ND DEFENDANT

BALALA AND ABED ADVOCATES ..... 3RD DEFENDANT

RULING

[Chamber Summons dated the 11th August 2022]

1. The plaintiffs filed the Reference by way of chamber summons dated the 11th August 2022 seeking inter alia, to set aside, review, reverse, or vary the decision of the taxing master dated 20th July 2022, which taxed the bill of costs dated 28th July 2021 to Kshs 704,026, for among others finding that party to party costs are subject to VAT. The application is based on the four (4) grounds on its face and supported by the affidavits sworn by Hadassah Rimunya, advocate, and Dominic Mureithi Mathenge, 1st plaintiff, on the 17th August 2022 and 15th November 2022 respectively. It is the plaintiff's case that the taxing master erred in finding that party to party costs are subject to VAT. That further, the taxing master failed to give reasons for taxing each item as he did, which was contrary to the provisions of the Advocates Remuneration Order.

2. The 3rd respondent opposed the reference through the replying affidavit sworn on the 4th October 2022, by Mohamed S. Balala. The 3rd defendant's case is that the bill of costs taxed through the ruling of 20th July 2022 had been drawn to scale and the taxing master exercised his discretion judicially in taxing the bill. The plaintiffs had not opposed item 28-30 on the bill of costs hence cannot be allowed to do the

same on reference. The deponent argued that the VAT was properly included as the 3rd respondent, being a law firm, was subject to taxation. The court was urged to dismiss the reference with costs.

3. The learned counsel or the plaintiffs and the 3rd defendant filed their submissions dated the 30th November 2022 and 30th January 2023 respectively, which the court has considered.

4. The issues before the court for determination are as follows:

    a. Whether the taxing master erred in law by failing to give the reasons for each item in the ruling dated the 20th July 2022.

    b. Whether party to party bill of costs is exempted from VAT.

    c. Who pays the costs in the application.

5. The court has carefully considered the grounds on the reference, affidavit evidence, submissions by the learned counsel, superior courts decisions relied on therein and come to the following conclusions;

    a. Where a party is dissatisfied with the decision of the taxing master, they are at liberty to object to the same to this court as provided for by Rule 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.

            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.

            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.

            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."

        The plaintiffs objected to the ruling of 20th July 2022 on the taxation of various items on the bill of costs dated the 28th July 2021. However, they have not demonstrated that they first wrote to the taxing master seeking reasons for the decisions on the various assessments as obligated to do by the provision set out above. That had they first sought for the reasons for the items objected to, the taxing master would have given the reasons for his decision to the party dissatisfied with the said decision. Where the

reasons sought are not in the taxing master's ruling, it is up to the parties to request for the said reasons at the earliest possible time within 14 days as stipulated under Rule 11. It should follow therefore that, where the said reasons are not sought, any reference filed thereafter would be premature.

b. However, in the interest of justice, and so as to save judicial time as expressed in Section 3A of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, the court will proceed to consider the merit of the reference filed herein. The position I have taken to proceed to the merit of the reference despite being prematurely filed is based on the Court of Appeal decision in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where it held that:

> " The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

c. The plaintiffs have objected the taxation of item numbers 2, 3, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, and 31 on the ground that the taxing master generalized the reasons for taxing the items which they termed as excessive and repetitive. Both parties have submitted on the principles that govern the assessment of costs in the application of the schedules under the Advocates (Remuneration Order). The Court of Appeal in Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board (supra) held that:

> " 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
>
> "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".
>
> 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 – see Arthur v Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243."

Though the plaintiffs have opposed the taxation of the bill of costs dated the 28th July 2021, they have failed to provide the court with the said bill of costs. That could have been done by attaching a copy to the supporting or further affidavits. The taxing master's ruling of 20th July 2022 has however been annexed to the further affidavit sworn on the 15th November 2022, and luckily, the 3rd respondent has attached a

copy of the bill of costs dated the 28th July 2021 to their replying affidavit sworn on the 4th October 2022. I have perused all the items on the bill of costs taxed, as well as the impugned items 2, 3, 8, 9, 12, 13, 15, 16, 17, 18, 19, 22, 23 and 31 and it is apparent from paragraph 2 of the ruling that the taxing master applied the provisions of Schedule 6 of the Advocates (Remuneration Order) 2014. The schedule among others makes provision for routine drafting, attendances, registry work as well as copying and making perusals. I am of the view that the taxing master was within his discretion to increase or decrease the amounts stipulated in the schedule, and I do not see where he acted on the wrong principle in making the said awards. The figures are generally consistent with what is provided for in the schedule and I find no basis to disturb the amounts awarded.

d. On the issue of Value Added Tax, the plaintiffs argued that a party to party bill of costs does not fall within the taxable income described in Section 5 of VAT. The Section provides,

> "(1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—
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> (a) a taxable supply made by a registered person in Kenya;
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> (b) the importation of taxable goods; and
>
> (c) a supply of imported taxable services.
>
> (2) The rate of tax shall be—
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> (a) in the case of a zero-rated supply, zero per cent; or
>
> (b) in any other case, sixteen per cent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services."

The plaintiffs' counsel cited in their submissions the decision of the High Court in the case of *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR, where the court was of the view that there was no taxable supply in a party to party bill of costs, and that VAT could not apply since neither of them fetched nor received services from the other. The counsel further submitted that the above decision has been cited with approval in the case of *James Nyangiye & Others versus Attorney General* [2020] eKLR. A different position was taken in the case of Four Farms Limited v Agricultural Finance Corporation [2015] eKLR, where the High Court held that:

> " The final point raised in the Reference was whether VAT was payable upon a Party and Party Bill of Costs. To answer this question, it is necessary to ask another question, namely, what is the basis of a Party and Party Bill of Costs. This question was answered by the learned Taxing Officer when she cited the decision of the court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR where the court said:-

> "the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the case."
>
> The "fight" referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts V.A.T. under section 5 of the *Value Added Tax Act*, 2013 (No. 35 of 2013). It was properly charged on the basic instruction fee of Kshs. 332,675/=. The contention to the contrary has no basis, and this leg of the reference also fails."

The counsel for the 3rd respondent cited in their submissions the Court of Appeal case of *E. A. Building Society Ltd versus A. C. A D'Souza & Another* C.A. No. 59 of 1995, where the court inter alia held that;

> "I hold that VAT is a lawful disbursement properly claimable as such in the bill of costs and I allow 15% VAT ...."

Though the above Court of Appeal decision was made years before that of the High Court in *Pyramid Motors Ltd versus Langata Gardens Ltd* [supra] and *James Nyangaiye & Others versus Attorney General* [supra], there is no indication whether it was brought to the attention of the courts dealing with those two cases. The decision of the Court of Appeal in the above case on the place of VAT in bill of costs is binding to this court, and I am in agreement with the position taken by the court on a similar issue in the case of the *Four Farms Limited v Agricultural Finance Corporation* [2015] eKLR.

e. The upshot of this ruling is that the reference dated 11th August 2022 has totally failed and under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya the plaintiffs should pay the costs to the 3rd respondent.

1. The court therefore finds and order as follows;

   a. The reference [chamber summons] dated the 11th August 2022 has no merit and is hereby dismissed.

   b. The plaintiffs are to pay the 3rd defendant's costs in the reference.

   c. The taxing master's decision in the ruling of 20th July 2022 in respect of the bill of costs dated the 28th July 2021 is hereby upheld.

6 It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF MARCH 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs: Absent.

Defendants : Absent

Counsel : M/s Rimunga for Plaintiffs. M/s Osino for 3rd Defendant.

Wilson – Court Assistant.

S. M. KIBUNJA, J.