



**Mwamunga v Sagalla Lodge Limited (Environment and Land Miscellaneous Application E047 of 2022) [2023] KEELC 17092 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17092 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E047 OF 2022**

**SM KIBUNJA, J**

**MAY 3, 2023**

**BETWEEN**

**ELIZABETH MWAMUNGA ..... APPLICANT**

**AND**

**SAGALLA LODGE LIMITED ..... RESPONDENT**

**RULING**

1. The applicant moved the court through the chamber summons dated July 7, 2022 seeking for inter alia, the setting aside of the entire Taxing Officer's ruling of June 20, 2022 on the defendant's Bill of Costs dated the January 13, 2022, and for the court to adjust the figure, reassess the fees due and allow the sum due to the applicant to be as presented in the plaintiff's Bill of Costs dated the January 13, 2023. The application is premised on the eight (8) grounds on its face and supported by the affidavit sworn by Jamuel Mwakandana Kiwinda advocate on the July 7, 2022. The applicant case is inter alia that the taxing master misdirected herself to the established discretion and principles of the law; failed to give sufficient reasons to justify the manifestly low quantum awarded on item 1 of the defendant's bill of costs; the awards in the ruling on items 1, 3, 4 to 20 of the defendant's bill of costs should be set aside and instead be allowed as presented in the bill of costs; the items on attendances were not granted as the defendant was awarded costs after withdrawal of the suit by the respondent.
2. The application was served and the lower court record in respect of Voi CMCC No E15 of 2020 called for at the instance of the applicant's counsel and availed. The counsel for the applicant filed their written submissions dated the November 25, 2022 on the November 28, 2022. The counsel for the respondent was on March 8, 2023 directed to avail a copy of their reportedly filed submissions before close of that day, but none has been traced on the record as I prepare this ruling today, the April 15, 2023.
3. The learned counsel for the applicant submitted that contrary to the learned taxing master's finding that there was no specific sum claimed in the suit and awarding Kshs 50,000 on item 1, the suit's subject



matter was the lease agreement dated the July 21, 2015 plus the prayer for permanent injunction for the term of 15 years. That the instruction fees charged by an advocate has a correlation with the subject matter or value of the suit. Counsel referred to the case of *Joreth Ltd versus Kigano & Associates [2002] EA* where the court opined that;

' The value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 fees as he considers just, taking into account amongst other factors, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction and all other relevant circumstances.'

The counsel faulted the finding of the taxing master that the suit was not defended while the defendant had defended numerous applications and filed a preliminary objection challenging the validity of the entire suit. On this the learned counsel relied on the case of *Softa Bottling Ltd & Others versus Nairobi City Council (2006) eKLR*, cited in the case of *Masore Nyangau & Co Advocates & Others versus Supplies & Services Ltd [2018 eKLR]*, in which the court stated that;

' With respect to the submission that as no appearance or defence were filed by the respondent instructions fees were not earned, I am afraid that submission was misconceived. In my view, the respondent's preliminary objection was a form of denial and at the end of the day determined the applicant's entire suit. I detect no error of principle on the part of the taxing officer in finding that instruction fee had been earned.'

That the finding that the suit did not go to full trial affected the award in item 1, which was in error. The counsel referred to the Court of Appeal decision in the case of *Joreth Ltd versus Kigano & Associates [supra]* quoted in the case of *Masore Nyangau & Co Advocates & Others versus Supplies & Services Ltd [2018] eKLR*, where it was held that;

' Instruction fees is an independent and static item. It is charged once only and it is not affected or determined by the stage the suit has reached.'

That as the dispute was over the validity of the 15 year lease agreement whose cumulative rental income was Kshs 25,200,000, then that was the amount upon which item was to be determined upon. And that given the protractive litigation that lasted about two years and involved voluminous documents in the applications and counter applications, the taxing officer ought to have awarded the defendant full instruction fees under schedule V1, and increase the same to the amount in the bill of costs of Kshs 700,000. The advocates relied on the case of *Republic versus Minister of Agriculture & 2 Others Ex parte Samuel Muchiri w Njuguna & Others (2006) eKLR*, where the court stated that;

' 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 [sic]. 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 clarified, assessed and simplified, the details of such



initiative by counsel must be specifically indicated apart of cause from the need to show if such works have not already been provided for a different head of costs.'

That further, the applicant is entitled to costs on all attendances in addition to the other specified costs ordered to be paid but which the respondent did not pay.

4. The following are the issues for the court's determinations;
  - a. Whether the applicant has shown that the taxing officer erred in the application of the applicable principles and exercise of discretion in taxing the defendant's bill of costs.
  - b. Whether the applicant was entitled to full instruction fees on item 1 when no statement of defence had been filed by the time the suit was withdrawn.
  - c. Who pays the costs in this application.
5. The court has carefully considered the grounds on the application, affidavit evidence by counsel on record for the applicant, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions;
  - a. That the applicant annexed only the notice of objection issued on June 23, 2022 under Rule 11(1) of the Advocates (Remuneration) Order, and the Taxation Ruling of June 20, 2022 to the supporting affidavit. The party to party bill of costs which is essentially the subject matter of this reference was not annexed, and it would have been impossible to make any determination about it without it being before the court. Fortunately, the learned counsel for the applicant moved the court to have the lower court's record availed, and in it is the said party to party bill of costs dated the January 12, 2022 and filed on the January 13, 2022, which the court has perused.
  - b. The court has perused the processes and pleadings filed in Voi CMCC No E15 of 2020, especially the plaint dated the November 9, 2020. That paragraphs 3 to 8 of the said plaint deals with the 15-year lease agreement dated July 21, 2015 between the respondent and the ET Mwamunga, the passing on of ET Mwamunga on the October 18, 1018, and the appointment of the Public Trustee as the administrator of his estate including the suit property. The paragraphs that follow the above, especially paragraphs 9 to 13 concerns the respondent's complaints against the applicant and the reasons for filing this suit, while paragraph 14 has the summary of the reliefs sought as follows;
    - ' 14. In the circumstances, the plaintiff's cause of action against defendant is a permanent restraining order against defendant from trespassing on further interfering with its business during the subsistence of the Tenancy Agreement, damages for trespass, and costs of the suit.'

Below paragraph 17, the prayers are set out as follows;

,

- ' (a) A permanent injunction restraining the defendant/respondent, her servants, agents or any other person acting under her instructions from;
  - I. Disconnecting, further disconnecting water or electricity supply to the property known as CR 3xxx Plot No 12xxx;



- II. Demanding, further demanding any rent from the plaintiff;
- III. Accessing, trespassing, taking/using any property, further trespassing into the property known as CR 36xx Plot No 12xxx without the plaintiff's consent or prior notice;
- IV. Permitting strangers or any unauthorized third parties into property known as CR 36xx Plot No 12xxx;
- V. Harassing and/or in any way interfering with the guests accessing the plaintiff's premises on parcel known as CR 36xx Plot No 12xxx.
- (b) Damages for trespass.
- (c) Costs of this suit.
- (d) Interests on (b) and (c) above at court rates.
- (e) Any other or further relief this honourable court may deem fit and just to grant.

From the particulars set out under item 1 of the bill of costs dated the January 12, 2022, the counsel for the applicant inter alia stated;

' To receiving instructions to come on record on behalf of Elizabeth Mwamunga and defend her in the suit herein for inter alia a permanent injunction over all that property known as CR 36xx Plot No 12xxx in respect of a 15 years lease agreement executed on July 21, 2015 valued at Kshs 25,200,000/- as the cumulative income in respect of the suit property.'

That as can easily be confirmed from the averments in the paragraphs of the respondent's plaint referred to above, the subject matter in the suit between the parties herein was never about the cumulative value or sum of the lease agreement dated the July 15, 2015, but rather the alleged acts of trespass onto the lease property by the applicant. If the dispute was over the terms of the lease agreement, the respondent would have instituted a suit against the Public Trustee, who had been appointed the administrator of the estate of the late ET Mwamunga, and not against the applicant. In deed the lower court record confirms that the applicant had raised a preliminary objection dated the August 12, 2021 that she has no capacity to be sued as she is not the legal administrator of the estate of the deceased, and the court rejected the objection upon finding that she was not sued as the administrator but in her personal capacity 'for interfering with the running of the leased premises of her father.' The position taken by the applicant that the suit was over the lease agreement and that the cumulative sum or value was relevant in determining the instruction fees payable is therefore erroneous. That even if the suit was over the lease agreement, the value that would have been relevant was the outstanding amount for the period remaining and not the whole lease agreement life time. There being no value at all attached to any of the prayers in the plaint, and the suit having been terminated without the court determining how much damages if any was payable, the court finds the taxing officer did not err or misdirect or misapply the principles of the applicable law when awarding Kshs 50,000 on item 1. The schedule the taxing officer used in the taxation is crystal clear at paragraph 4 of the ruling of June 20, 2022 where it stated that 'The court has assessed costs under schedule 7 party & party costs for proceedings in subordinate court.'

- c. That going by the deposition at paragraph 3 of the supporting affidavit, the awards on attendances the applicant has raised complaints on are in respect of items 3 to 20. On items 3, 4, 5, and 13 the applicant had sought for Kshs 5000 on each but the taxing officer taxed off



Kshs 3600 on each item. On items 6 the whole amount sought of Kshs 17,100 was taxed off. Items 7 to 12, 14 to 20 had sought Kshs 2,100 and the taxing officer taxed off Kshs 700 on each. Under Schedule 7 of the Advocates Remuneration Order, fees for attendances before a magistrate are as provided under Rules 6 to 8 at Kshs 1,400 for necessary attendances before the magistrate, Kshs 5,000 for first full day of hearing and Kshs 2,100 for any other part after the first. The suit was withdrawn before the main hearing could commence and the items in the bill of costs where Kshs 5,000 and Kshs 2,100 was claimed was beyond what is provided for in the Order. The Taxing officer taxed off the said items leaving Kshs 1,400 which is the amount provided for under Rule 6 for necessary attendances before the magistrate.

- d. That going back to item 6 on costs awarded in favour of the defendant totalling Kshs 17,100 that was taxed off, the court has noted the respondent did not present any opposition to the claim before the lower court and even before this court. That paragraph 14 of the ruling dated June 20, 2022 indicates that the learned taxing officer had declined to award that item for reason that the court could not determine whether it had already been paid. I am of the view that as no evidence of payment was presented before the trial court by the respondent at the time of taxation of the party and party bill of costs, the taxing officer erred in not awarding the Applicant the amount under that item. The amount claimed under item 6 of the bill of costs is hereby awarded to the applicant herein. In case payment under this item will later be found to have already been made, the same may be subtracted from the total at the execution stage.
- e. The court finds that the taxing officer gave sufficient reasons in the ruling dated June 20, 2022 that informed the decision in the taxation of the party and party bill of costs. That accordingly, other than the claim on item 6 that the court has allowed, no basis has been presented to fault the taxing officer's exercise of discretion on items 1, 3 to 5, 7 to 20 of the bill of costs dated the January 12, 2022. The taxing officer's ruling dated the June 20, 2022 on the items 1, 3 to 5, and 7 to 20 is hereby confirmed by the court. There was no challenge on the taxing officer's findings on the other items and the court do not need to pronounce itself on them. In the taxing officer's ruling dated the June 20, 2022, the defendant's/applicant's party to party bill of costs was assessed at Kshs 62,845. To that figure will now be added Kshs 17,100 awarded under item 6 of the bill of costs making a new total of Kshs 79,945.
  1. Flowing from the above conclusions, the court finds and orders as follows;
    - a. That the taxing officer's ruling of June 20, 2022 is upheld, save in respect of item 6 of the party to party bill of costs dated the January 12, 2022 and filed on the January 13, 2022, that is awarded as prayed at Kshs 17,100/-.
    - b. That the said party to party bill of costs is adjusted from Kshs 62,845 to Kshs 79,945/-[seventy nine thousand nine hundred forty five].
    - c. The applicant is granted the costs in the chamber summons application.

7 Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 3<sup>rd</sup> DAY OF MAY 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of;

Applicant: Absent



Respondent: Absent

Counsel: Mr. Kiwinda and Nyang'oro for Applicant and Respondent respectively.

Wilson – Court Assistant.

S. M. Kibunja, J.

Elc Mombasa.

