Ndeno v James & another (Environment & Land Case 43 of 2016) [2023] KEELC 18457 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18457 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 43 OF 2016

SM KIBUNJA, J

JULY 5, 2023

BETWEEN

JOAN JEPTOO NDENO ..... PLAINTIFF

AND

STEPEHEN MUTHOKA JAMES ..... 1ST DEFENDANT

LAND RESGISTRAR MOMBASA ..... 2ND DEFENDANT

RULING

1. The application was initiated by a chamber summons dated October 3rd, 2022, pursuant to Rule 1 of the Advocates Remunerations Amendment Order 2014 and section 3A of the *Civil Procedure Act* chapter 21 of the Laws of Kenya. The Applicant seeks for the following orders;

    a. This Honorable court be pleased to set aside in its entirety the decision of the taxing officer delivered on 21/09/2022 in respect of the party and party bill of costs dated 25/11/2020, the quantum awarded and the reasoning thereon.

    b. This Honorable Court be pleased to re-tax the said party and party bill of costs dated 25/11/2020.

    c. In the alternative to prayer 2 above, this Honorable Court be pleased to remit the party and party bill of costs dated 25/11/2020 for re-taxation before a different taxing officer other than Hon. Nyariki J.M, DR.

    d. The taxing officer other than Hon. Nyariki J.M do assess instructions fee based on the value of the subject matter of the suit to be ascertained from the pleadings and documents filed in the suit itself.

e. The Taxing officer, other than Hon. Nyariki J.M do assess instruction fees based on the value of the subject matter of the suit to be ascertained from the pleadings and documents filed in the suit itself.

f. The taxing officer other, other than Hon. Nyariki J.M, do assess the getting up fees as contemplated by schedule 6 of the Advocates (Remuneration) (Amendment) order 2014.

g. The costs of the application provided for.

2. The application was supported by an affidavit from Daniel M. Ngonze, an Advocate of the High Court. He affirmed his personal involvement in the matter on behalf of the 1st Defendant. He stated that the Plaintiff had jointly and severally sued the Defendant seeking declarations of ownership of the property in question and injunctive relief. According to a judgment delivered on March 11, 2020, the Honorable Court upheld the Plaintiff's claim and ordered the Defendant to bear the costs of the claim jointly and severally. Consequently, the Plaintiff filed the present Party-and-Party bill of costs on November 25, 2020. In a ruling delivered on September 21, 2022, he averred that the taxing master confirmed that the value of the subject matter was unascertainable as no exact value appeared in the proceedings. However, without any basis for such an assessment, the taxing master assessed instruction fees at Ksh.510,000. It was asserted that it was impossible to assess instruction fees outside the parameters of Schedule 6, Paragraph 1(L)(i) of the Advocates Remuneration Order,2014 which provides for a basic instruction fee of Ksh. 75,000 where the value is not pleaded. Additionally, the taxing master unreasonably increased the basic instruction fee to Ksh.510,000 without providing any plausible justification for this irregular outcome. The getting-up fee, set at Ksh.170,000, was also based on an erroneous and exaggerated assessment of instruction fees at Ksh.510,000. The taxing master committed errors in law, fact, and principle by making this assessment outside the boundaries of established legal norms. On September 22, 2022, the 1st Defendant requested concise, written reasons for the assessment of the respective awards, but no such reasons were provided.

3. The Plaintiff submitted grounds of application dated November 24, 2020, in response to the 1st Defendant's chamber summons. They contended that the taxing officer judiciously exercised the discretion conferred by Schedule 6 of the Advocates (Remuneration Amendment) Order 2014 in the taxation of the bill of costs dated November 25, 2020.

4. The counsel for the 1st Defendant, Ms. Ngonze and Ngonze Advocates filed their submissions on March 1, 2023 while Ms. Kogweno & Bubi Advocates, LLP, for the plaintiff filed theirs on March 22, 2023.

5. The learned counsel for the 1st defendant submitted inter alia that the law provides clear provisions for assessing the value of the subject matter of a suit, party and party costs based on the value of the subject matter, the extent of the proceedings taken, and getting up fees based on properly assessed instruction fees. That the taxing officer's ruling did not provide cogent reasons for the assessment of the outlined costs. That it was discernible from the entire court proceeding that the value of the subject matter was ascertainable, and the taxation officer should have allowed costs and charges that were reasonably incurred for the attainment of justice. However, costs should not have been allowed if they appeared to be extravagant. It was submitted that the role of party-to-party costs was not to enrich the victorious party or punish the losing party but to compensate the victorious party for the actual costs incurred. Reference was made to the case of Peter Muthoka & Another v. Ochieng & 3 others (2019). It was submitted that according to the Advocates Remuneration Order, 2014 itself, the relevant factors to consider include the nature and importance of the subject matter, interests of the parties, general conduct of the proceedings, and any directions by the trial judge. The taxing master should have considered relevant matters to the particular case and if the court found an error in the

taxing officer's assessment, the matter should be remitted back to the taxing master for reassessment. Reference was made to the case of First American Bank of Kenya v. Shah & Others (2002) 1 EA 64. It was further submitted that there was nothing substantial in research, skill, or engagement to justify an enhanced award of instruction fees and getting-up fees. Reference was made to the cases of Republic v. Minister of Agriculture and Joreth Limited v. Kigano & Associates (2002) 1 EA 92. The learned counsel argued that the issues raised were threefold: errors in principle, failing to ascertain the value of the subject matter from the pleadings; failing to specify or clarify the nature, importance, interest, and find capability of the parties to the suit, and failing to provide cogent reasons for basing instruction fees at Ksh.510,000.00 and costs of the motion. That the applicable scale is Schedule 6 of the Advocates Remuneration Order 2014 Laws of Kenya, and the specified amount is Ksh. 75,000. Regarding the costs of the motion, it was submitted that costs should follow the event and relied on Section 27 of the *Civil Procedure Act* Cap 21, Order 51 Rule 11 of the Civil Procedure Rules 2010 Laws of Kenya, and relevant case law. Reference was made to the cases of Osapil v. Kaddu (2001) EA 193 and *Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another (2016)* eKLR.

6. The learned counsel for the Plaintiff opposed the 1st defendant's dated October 3, 2022 and submitted inter alia that the main points of contention was item 1, covering the instruction fee, and item 2, being the getting-up fee. The Plaintiff had prayed for Ksh.2,000,000 under item 1 and Ksh.666,666.70 under item 2, and the Deputy Registrar awarded Ksh.510,000 under item 1, and on item 2 the amount awarded came to Ksh.170,000. That the counsel argued that the Deputy Registrar clearly indicated in the ruling that he applied Schedule 6 (1)(1) of the Remuneration Order, which provides for an instruction fee of Ksh.75,000 when the value of the subject matter is not ascertainable. The Deputy Registrar also referred to judicial precedent to justify awarding the Plaintiff Ksh.510,000 under item 1. The award of Ksh.170,000, one-third of the instruction fee, was made under Schedule 6(2) of the Remuneration Order. That the Deputy Registrar also referred to relevant case law to establish the value of the subject matter. The counsel for the Plaintiff adopted the previous submissions made on August 30, 2022, and submitted that the taxed costs were justified as the suit property involved prime property located in Miritini, adjacent to the Mombasa-Nairobi Highway, that had great sentimental attachment. That the counsel had to employ a great deal of skill and labor to prepare the pleadings and supporting documents simultaneously with the application of interim orders under a certificate of urgency to protect the Plaintiff's interest in the property. The Plaintiff also had to engage the services of the Directorate of Criminal Investigations (DCI) to carry out investigations on the authenticity of the signature on the Agreement of Sale and Transfer of Lease and constantly reminded the 1st Defendant's Advocate of the need to comply with the Court order dated April 25, 2019. The proceedings also demonstrated objections to the 1st Defendant's various attempts to adjourn the hearing of the matter in order to delay justice for the Plaintiff. The Counsel further asserted that even after the delivery of judgment on January 26, 2021, the 1st Defendant filed a frivolous application seeking to review the said judgment and to stay the taxation of the bill of costs dated November 25, 2020. Counsel submitted that the court could only interfere with the exercise of the taxing officer where there was an error in principle or exceptional circumstances, as provided by relevant case law. However, the 1st Defendant did not demonstrate to the court the error of principle committed by the taxing officer to justify setting aside the ruling of September 21, 2021, in its entirety. It was argued that the ruling should be upheld, and the 1st Defendant's application should be dismissed with costs.

7. The following are the issues that commend themselves for determination by the court;

   a. Whether the 1st Defendant's application is merited.

   b. What reliefs, if any, are due to the 1st Defendant.

c. Who pays the costs of the application.

8. The court has considered the grounds on the reference and in opposition, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the followings findings;

a. It is well legal position established that a higher court can only interfere with the decision of a taxing master decision if it is established that an error of principle was made. Various court decisions have affirmed this principle over time. In the case of First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, the court stated that it can only interfere with the taxing officer's decision if it is shown that either the decision was based on an error of principle or the fee awarded was so manifestly excessive as to indicate an error of principle. Relevant factors to consider in taxation include the nature and importance of the case, the amount or value of the subject matter, the parties' interests, the general conduct of the proceedings, and any direction by the trial judge. The higher court may remit the taxing master's decision back for re-assessment if errors of principle are found. In the case of Kamunyori & Company Advocates v Development Bank Of Kenya Limited [2015] eKLR, it was emphasized that failure to ascertain the correct subject matter or value in a suit for the purpose of taxation constitutes an error of principle.

b. Referring to the ruling made by Honorable Nyariki on September 21, 2022, only items 1, 2, and 18 of the plaintiff's bill of costs dated November 25, 2020, were taxed. Regarding item 1, the value of the subject matter could not be ascertained, and the 6th schedule paragraph 1 of the Remuneration Order was applied, providing for a minimum instruction fee of Ksh.75,000. The taxing officer considered the principle of reasonableness in taxation, as highlighted in the case of Joreth Ltd V Kigano & Assocciates Civil Appeal No. 66 of 1999 [2022] and Rogan Kamper VS Grosverner KLR 362, and awarded Ksh.510,000 on item 1. It is undisputed that the subject matter value was not provided in the suit, and as a result, the applicable scale for determining the instruction fee was Schedule 6 of the Advocates Remuneration Order 2014 Laws of Kenya. According to Schedule 6, in cases where the value of the subject matter is not specified, the court has the discretion to determine a reasonable amount, provided it is not less than Ksh.75,000. This clause sets the minimum mandatory amount at Ksh.75,000, and grants the court the authority to determine an amount that is deemed reasonable in the circumstances.

c. In the present case, the taxing officer considered the decisions in the cases of Rogan Kamper v Grosverner (1989) KLR and Joreth Ltd V Kigano & Associates Civil Appeal No.66 of 1999 [2022] eKLR in awarding instructions fee at Ksh.510,000. The taxing officer exercised his discretion wisely, taking into account the nature of the prayers sought by the plaintiff, which included permanent injunctions, temporary injunctions, revocation of the 1st Defendant's titles; declaration of the plaintiff as the registered owner of title parcel No. MSA/MN/BLOCK 2/264; declaration of the 1st Defendant as a trespasser, and costs of the suit, all factors that influenced the reasonableness of the award.

d. Considering the above, it is evident that the taxing officer carefully considered all relevant factors in arriving at Ksh.75,000 regarding item number 1. And on item number 2, the taxing officer awarded a 1/3 of the amount awarded in item 1 which represents one-third of the instruction fee under Schedule 6(2) Advocates Remuneration Order, 2014. In my assessment, the taxing officer's decision was grounded on the correct principles, and there is no justifiable reason to interfere with his determination.

e. In the context of legal costs, the general principle is that costs follow the event, which means that the party who is successful in the litigation is typically entitled to be awarded costs. This principle encourages parties to litigate responsibly and provides an incentive for parties to pursue legitimate claims. There are numerous decisions of the superior courts that support the principle of costs following the event, including the following;

i. Harun Mutwiri v Nairobi City County Government [2018] eKLR: In this case, the court held that costs should follow the event, stating that "the general rule is that costs should follow the event unless there are reasons to the contrary."

ii. Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR: The court in this case reiterated the principle of costs following the event, stating that "the general rule is that the successful party is entitled to his costs unless the court for good reason directs otherwise."

iii. Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR: The court held that "it is trite law that costs follow the event, and in the absence of any other compelling reasons, the successful party is entitled to costs."

These cases demonstrate the consistent application of the principle that costs should generally be awarded to the successful party. In the present case the 1st Defendant application is unmerited, and hence the costs are awarded to the Plaintiff.

9. In conclusion, the court finds and orders as follows;

a. That the reference on the party to party bill of costs is without merit, and the chamber summons application dated October 3, 2022, is hereby dismissed.

b. The 1st defendant/applicant will meet the plaintiff's costs in the reference.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 5th DAY OF JULY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Plaintiff : Absent

Defendants : Absent

Counsel : M/s Koiten for Mwangi for Plaintiff

M/s Wambani for Ngonze for 1st Defendant

Mr Penda for Kiti for 2nd Defendant.

Wilson – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.