Waiganjo v Nairobi City County & 7 others (Environment & Land Petition 38 of 2017) [2023] KEELC 18595 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18595 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 38 OF 2017

J OMANGE, J

JULY 6, 2023

BETWEEN

SAMUEL WAMUTU WAIGANJO ..... PETITIONER

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

THE DIRECTOR OF SURVEY ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

HON. ATTORNEY GENERAL ..... 5TH RESPONDENT

MUCHANGA INVESTMENTS LIMITED ..... 6TH RESPONDENT

JOHN GAKUNGA KAMUNYU AND ELIZABETH WAITHIRA KAMUYU ..... 7TH RESPONDENT

HORATIUS DA GAMA ROSE ..... 8TH RESPONDENT

RULING

1. This Ruling arises from the Taxation of Hon Diana Orago which was delivered on November 10, 2022.
2. The petitioners amended chamber summons dated prays for the following orders;
    a) Spent.
    b) That leave be granted to amend the chamber summons dated January 6, 2023 as follows;

c) That the honourable court be pleased to extend time within which the applicant herein may object to the taxation of the Deputy Registrar made on November 10, 2022.

d) That the application be heard in priority to the Notice of Preliminary Objection filed by the 6th and 8th respondent.

e) That the other grounds be amended as herein below.

f) Stay of execution of the decree/ ruling delivered on November 10, 2022.

g) The decision/ ruling of the Taxing master Hon D. Orago Deputy Registrar delivered on November 10, 2022 in respect to the party and party bill of costs dated April 6, 2022be set aside on the following items of the bill that is number 1 and 2 and the gross total.

h) That the Honourable court be pleased to make such adjustments to the taxation of the above items as proposed or as the justice of the case requires in lieu of remitting the contested matters back to the taxing officer.

i) The gross total is erroneous as it includes Kshs 11,525 not itemized as taxed and not claimed by the 6th and 8th respondents.

j) That the honourable court be pleased to make an order that the adjusted amount be paid in instalments.

k) The costs of the application be provided for.

3. The 6th and 8th respondent filed a notice of preliminary objection on the grounds that the application was incurably and fatally defective as it was filed more than 14 days after delivery of the Ruling. Dimitri Da Gama Rose filed a Replying Affidavit on behalf of the 6th respondent. He averred that the petitioner was in court on the June 15, 2022 when the matter was given a mention date on August 22, 2022 on which the date the petitioner did not attend court. The court then gave a Ruling date on 10th November, 2022 on which date the petitioner did not attend court in spite of having been notified of the Ruling date by way of email.

4. Both counsel have filed submissions which I have duly considered. The issues that the court has to determine are as follows;Whether the court should extend time within which the applicant may object to the taxation Ruling delivered on November 10, 2023.Whether the application dated January 6, 2023 is fatally defective due to the failure to seek extension of time?Whether the court should set aside or adjust the taxation of the Taxing master.Whether the court should allow payment of the decretal amount in instalments.

5. Paragraph 11 of the *Advocates Remuneration Order* (ARO) stipulates as follows on the filing of reference objecting to the decision of the Taxing Master: -

" 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 which he objects.

2) The Taxing Officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 expired." (Emphasis mine).

6. The discretion of this court to enlarge time is elaborately discussed in the case of the *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR where the Supreme Court of Kenya held 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 thecourt. 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 under-lying 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;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 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."

7. In the Court of Appeal, Odek JJA in the *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014]eKLR while considering the factors that ought to guide a court in granting extension of time summed it up thus:

> "Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the

delay, the degree of prejudice to respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

8. In this instance Ruling was delivered by the Learned Taxation Master on November 10, 2022. The petitioner filed the application two months later and sought to seek extension of time after the respondents raised the anomaly in the Preliminary Objection. The reasons the applicant gives for the two-month delay is that they were not notified of the Ruling date as the respondents did not attach a delivery receipt to the email which effected service. Counsel argues that in the absence of this, there was no proof of service.

9. Order 5 Rule 22 B provides for Electronic Mail Services thus;

(1)	Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
(2)	Service shall be deemed to have been effected when the Sender receives a delivery receipt.

(3)	Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
(4)	An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

10. In the instant case it is true that the delivery receipt was not attached to the affidavit. However, as pointed out by the petitioners, the respondents/ Applicants were in court initially when the matter was listed for mention on August 22, 2022 on which the date the Ruing date was given of November 10, 2022. They give no explanation for their failure to attend court on theAugust 22, 2022 which was a date taken by consent.

11. The applicant's missteps do not end there. The initial reference was filed without seeking extension of time. The respondents contend that the application is thus fatally defective. In any other Civil matter, the court would not take a different position, but I have considered that this was a Constitutional Petition where the burden is higher on the court to administer substantive justice to the parties.

12. The heavy responsibility placed on the courts do justice by our Constitution was emphasised in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015]eKLR, where the Court of Appeal stated that:

"It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from

Wanjiku, by dint of article 159 (1) of *the Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice." (emphasis added).

13. Further I also note that both parties have already submitted on the reference. In these circumstances, there will be no prejudice e suffered by considering the merits of the reference. 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,

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;

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;

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 thecourtis not entitled to upset a taxation because in its opinion, the amount awarded was high;

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 v Shah and others* [2002] 1 EA 64.

14. The provision governing taxation of costs in constitutional mattes is Schedule 6(i) (j) of the *Advocates Remuneration Order* 2019, which provides that the basic instruction fees allowed is Kshs.45,000/=. The Provision provides:-

> " 6(i) (j) Constitutional Petitions and prerogative orders.
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> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the Petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate-
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> i. where the matter is not complex or opposed such sums as may be reasonable but not less than 45,000"

15. In the present case the learned taxing master correctly found that the value of the subject matter was ascertainable from the pleadings which were seeking prerogative orders. The applicants object to this finding as they contend that the prerogative orders were against the other respondents not the 6th and 8th. I have looked that the petition and indeed it is true that the prerogative orders were against the other respondents. However, Schedule 6 (1) (j) of the *Advocates Remuneration Order* applies to Constitutional Petitions and Prerogative orders. My view is that once a matter is filed as a Constitutional Petition it is the relevant schedule even where the party presenting the bill of costs had no direct prerogative orders sought against them. On the question that the taxing master erred by failing to consider that the 6th and 8th respondent did not file a response, I note that the two respondents filed submissions on a point of law which finally determined the matter. The Taxing master considered the years that the matter had been in court and the importance to the parties in enhancing the instruction fees. I find that there was no error in considering the two issues.

16. There was argument that the taxing master erred by multiplying the instruction fees by 11. Jurisprudence on this matter has been varied. While it is settled that the Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle., there are different decisions taking into account the unique circumstances of each case on the number to be used to multiply the instructions fees. In *Danson Mutuku Muema v Julius Muthoka Muema & others* Machakos High Court Civil Appeal No. 6 of 1991 which was cited in *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 others* (*supra*) Mwera, J (as he then was) held that whereas the court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.

17. This court is aware that in *Butt & another vs. Sifuna T/A Sifuna & Company Advocates* Civil Appeal No. 45 of 2005 [2009] KLR 427, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees.

It is therefore a matter of the individual discretion of the Taxing Master. Given that I have found that there was no wrong principle applied by the taxing master I find no reason to interfere with the figure on instruction fees.

18. The second item challenged by the applicant is the getting up fees. Counsel referred the court to the decision of *Joy Msale & Eight others v Director General, NEMA & another* [2010] eKLR. I have looked at the said decision and I note that submissions made in that case on the issue and which were summed up by the court were;

> " Counsel gave as an indication of misdirection on the part of the Taxing Officer, the fact that he had provided for getting-up fees which had not been claimed; and he submitted that such fees were only payable in a case where a denial of liability was filed and the advocate making the claim for fees has had, consequently, to get up and prepare the case for trial; so this would be in addition to the instruction fees. But in the instant case the cause was concerned with prerogative orders, and so it was not a proper case for getting-up fees "

19. The court taxed off the bill. It is surprising that in one breath counsel for the applicant denies that the respondents were entitled to instruction fees applicable to Constitutional Petition and Prerogative orders but in the next breadth, seeks to be exempted from getting up fees by relying on a decision which exempted Judicial review cases from getting up fees.

20. However, apart from the decision cited by counsel for the applicant, I note that Schedule 6(2) provides; Fees for getting up or preparing for trial In any case in which a denial of liability (emphasis mine) is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Given that the 6th and 8th respondents did not file a response I find that Taxing Master erred in principle in awarding getting up fees. Consequently, the amount of 166,66.67 is taxed off the bill.

21. The applicant has sought for leave to pay the costs in instalments. There was no material placed before the court to establish that he is unable to pay the costs. Consequently, this prayer fails. The question of stay, the applicant is granted 45 days stay of execution from the date of issuance of the certificate of Costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Waiganjo for the petitioner

Steve - Court Assistant