



Directline Assurance Company Ltd v AKM Investments Limited & 3 others; Insurance Regulatory Authority (Interested Party); Nyagah (Applicant) (Civil Suit E247 of 2022) [2024] KEHC 1051 (KLR) (Commercial and Tax) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E247 OF 2022
PM MULWA, J
FEBRUARY 8, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LTD PLAINTIFF

AND

AKM INVESTMENTS LIMITED 1ST DEFENDANT

TRIAD NETWORKS LIMITED 2ND DEFENDANT

STENNY INVESTMENTS PTY LTD 3RD DEFENDANT

SUREINVEST COMPANY LIMITED 4TH DEFENDANT

AND

INSURANCE REGULATORY AUTHORITY INTERESTED PARTY

AND

EVANS NYAGAH APPLICANT

RULING

1. The applicant, Evans Nyagah, has filed three chamber summonses, under Paragraph 11 (2) of the Advocates (Remuneration) Order 2009, all dated 7th December 2023. The references were triggered by the rulings delivered on 28th November, 2023 by Hon. Stephany Githogori, Deputy Registrar (the 'Taxing Master') to the effect that Evans Nyagah pays the 1st, 3rd and 2nd and 4th defendants' party and party costs, as taxed. The applicant seeks that the Court be pleased to review, vary and or set aside the rulings and that the costs be taxed on merit. The applicant seeks, in the alternative, that the 1st, 3rd



- and 2nd and 4th defendants' respective party and party bill of costs be remitted back for taxation before another taxing officer and that the costs of the applications be awarded to Evans Nyagah.
2. The grounds are set out on the bodies of the applications. The applicant has also filed affidavits sworn on 7th December 2023 in support of the applications.
 3. In a nutshell, the grounds are that the allowed amounts are manifestly excessive, unreasonable and without any legal basis in that the taxing officer erred in finding that the subject matter was determinable from the pleadings filed by the plaintiff and by utilizing one, the plaintiff's entire shareholding of 15,000,000/- shares as the value of the subject matter and two, Schedule 1(b) of the Advocates Remuneration Order (ARO) on the understanding that no denial of liability or defence was filed by the 1st, 3rd and 2nd and 4th defendants' in the matter.

Responses

4. The 1st defendant filed a preliminary objection (PO) dated 13th December 2023 contending that the application offends para. 11(2) of the ARO (2009); that this Court lacks the jurisdiction to grant the orders sought and that the application is frivolous, vexatious, an abuse of the court process and should be struck off with costs.
5. The 1st defendant also filed a replying affidavit sworn by its director Lisa Anyango Amenya on 14th December 2023. The core depositions were that the applicant did not file a reference seeking the reasons for the taxation and that the bill of costs giving rise to the taxation was not taxed against M/s Directline Assurance Company.
6. The 3rd defendant filed a PO dated 13th December 2023 on the grounds that there is no jurisdiction to entertain an appeal from the order of 26th May 2023 when the order it is predicated on made on 28th September 2022 has not been appealed and that no notice of appeal was served on the respondents. It was introduced in the record of appeal. This objection was taken at the hearing of the appellant's notice of motion being Civil Application No. NAI E252 of 2023 – Evans Nyagah v AKM Investment Limited & 3 others.
7. The 3rd defendant filed grounds of opposition dated 14th December 2023 on the grounds that the application lacks merit and is an abuse of the court process; that the application is bad in law and seeks to obtain stay of execution orders under false pretences after this Court and the Court of Appeal have determined that the applicants are not entitled to stay; that the proposed revisions have no reasonable chances of success and are not based on any credible grounds; that the applicant has not offered any security for due performance as may ultimately be binding on them; that the application is yet another delaying tactic designed to bar the respondents from realizing the fruits of the ruling delivered on 28th September, 2022; more than one year after the ruling was delivered; that the application is an abuse of the Court process as the same parties have settled other bills of costs whereby the legal fees were assessed from the same subject matter; that the orders sought are discretionary and to that effect the applicant has failed to demonstrate that they are deserving of this court's discretion given their prior applications and conduct of this matter.
8. The 2nd and 4th defendants also filed a PO dated 13th December 2023 on the grounds that that there is no jurisdiction to entertain the application as the Court of Appeal declined a similar application in a ruling delivered on 8th December 2023 in Civil Application No. NAI E252 of 2023 Evans Nyagah Vs Akm Investment Ltd & 3 Others and that it is an abuse of the court process to file a second application before a lower court.



9. The 2nd and 4th defendants also filed grounds of opposition contending that the applicant is not deserving of the court's assistance having regard to the circumstances of the case; that the applicant has been and continues to act in concert with the minority shareholders, who have done everything to subvert the rule of law one of the national values and principles of governance which are binding on all persons that a company has no interest in its own shareholding and the applicant had no business initiating proceedings over a shareholders dispute; that there is no basis for interfering with the taxing master's exercise of discretion and that the applicant is being dishonest in trying to walk away from the value of the shares as the subject matter of the suit when this was clearly pleaded.
10. The 2nd and 4th defendants further put in a replying affidavit sworn by the 4th defendant's director, Kevin Dermot McCourt on 13th December, 2023 deposing that following the striking out of the suit on 28th September 2022, the Court on 26th May 2023 ordered the applicant to bear the costs of the suit personally. The applicant filed an application before the Court of Appeal for stay of the orders. On 8th November 2023, the Court of Appeal declined to grant stay of taxation of the defendant's bill of costs, therefore it is improper for the applicant to raise this issue before this Court. Moreover, the applicant has not deposited security for costs as a condition for stay of the order. The Court of Appeal held that the defendants' substantial shares in the company or any dividends declared can be attached to recover any costs paid.
11. According to the deponent, the applicant is acting in bad faith as the value of the subject matter of KShs. 300,000,000/- was obtained from the plaint and the plaintiff's application, which he authorized.

The Applicant's Reply

12. In reply, the applicant filed a supplementary affidavit sworn on 18th December 2023, deposing that he sought reasons for the ruling on 28th November 2023, the day of delivery of the ruling and again on 30th November 2023; that the ruling was delivered to his advocates on 6th December 2023, a day before filing the application; that he has not alleged that the bill of costs was taxed against Directline Assurance Company; that he stands to suffer substantial loss if his assets are auctioned prior to the determination of the reference as the 1st defendant has filed an application for execution by issue of warrants of attachment of his movable assets.

Analysis and Determination

13. I have considered the pleadings and authorities filed by each party. The main issue for determination is whether the taxing officer's decisions of 28th November 2023 ought to be reviewed and/or set aside. Before determining that issue, there were issues raised by the POs filed by the 1st, 3rd and 2nd and 4th defendants.
14. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 Sir Charles Newbold, P observed that: -

“...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



15. On whether the applications offend para. 11(2) of the Advocates (Remuneration) Order (2009), Rule 11 (1) and (2) of the ARO provide 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...”

16. In *Ahmednasir, Abdikadir & Company Advocates v National Bank of Kenya Limited* [2006] eKLR, the Court held that: -

“Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

17. The impugned ruling was delivered on 28th November, 2023. The notice of objection ought to have been filed on 13th December 2023, since 12th was a public holiday. From the record, the applicant sought reasons for the decision on 28th November 2023 and on 30th November 2023 and obtained the copy of the ruling containing the reasons for the decision on 6th December 2023. The applicant thereafter lodged the applications on 7th December 2023, within the statutory timelines. Therefore, the ground fails.

18. As regards the contention that this Court lacks the jurisdiction to grant the orders sought, I note that Evans Nyaga is not the plaintiff in the suit. However, I also note that the Court through the order of 28th September 2023 ordered that Evans Nyaga, the Chief Executive Officer of the Plaintiff, shall show cause why he should not be ordered to pay costs of the suit personally. On 26th May 2023, the Court ordered Evans Nyaga to pay the costs of the suit and that the said costs to be taxed by the Deputy Registrar. Rule 11 (1) of the ARO allows any party to object to the decision of the taxing officer and it would be against the rules of natural justice to condemn him unheard on a technicality. Therefore, though Evans Nyaga is not a party in the main suit, his presence is necessary for to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit (See Order 1 Rule 10(2)). In any case, the applicant filed a notice of appeal against the orders of 26th May 2023 and was before the Court of Appeal on an application for stay pending appeal, which was heard but declined. I note that the same question was raised before the Court of Appeal but was not interrogated as the applicant did not show that the appeal would be rendered nugatory. Therefore, I find that the contention is without merit.

19. I have noted the objections concerning the interim stay orders in the 3rd defendant’s PO. However, in my understanding, in Civil Application No. NAI E 252 of 2023 – *Evans Nyagah v AKM Investment Limited & 3 others*, the Court of Appeal specifically declined to stay the proceedings herein and to stay



the orders of 23rd May, 2023, not interim stay orders pending determination of the taxation reference. I also find that the 2nd and 4th defendants have not demonstrated that the applications are frivolous, vexatious and an abuse of the court process. In the result, the 1st, 3rd and 2nd and 4th defendant's PO's dated 13th December 2023 are all dismissed for want of merit.

20. Moving back to the main issue of whether to set aside or vary the rulings, in a taxation reference, the overriding principle is that the Court will not interfere with a taxing officer's decision unless it is shown that there was an error of principle such as taking into account irrelevant factors or failing to take into account relevant factors. In *First American Bank Ltd v Shah & Another* [2002] 1 EA 64, Hon. Ringera J., aptly put it that: -

“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...”

21. The issue that is in contest here is with respect to the subject matter for purposes of the instruction fees. The applicant contends that the taxing officer erred in finding that the subject matter was determinable from the pleadings filed by the plaintiff and by utilizing the plaintiff's entire shareholding of 15,000,000 shares as the value of the subject matter and Schedule 1(b) of the ARO on the understanding that no denial of liability or defence was filed by the 1st, 3rd and 2nd and 4th defendants' in the matter and that in the result, the allowed amounts are manifestly excessive, unreasonable and without any legal basis. On the other hand the 2nd, 3rd and 4th defendants took the position that the value of the subject matter of Kshs. 300,000,000/- was obtained from the plaint and the plaintiff's application, which he authorized and that the applicant is undeserving of the orders sought as he is acting in bad faith or being dishonest.

22. I have perused the rulings that triggered the references. I note that the taxing officer considered the principles for taxation as set out in *Premchand Reichand v Quarry Services of EA Ltd & others* EALR (1972) EA 162. The taxing officer also considered the case of *Joreth Limited v Kigano & Associates* [2002] eKLR on the subject matter of a suit for the purposes of taxation, and expressed that:-

“The value of the subject matter can be determined from the pleadings filed at Kshs. 300,000,000/- (Being Kshs. 15,000,000 shares each at Kshs. 20) which can be gotten from paragraph 8 of the plaint as read with paragraph 24 of the Notice of motion dated 4th July 2022 and page 3 of the plaintiff's bundle of documents”

23. The Court of Appeal in *Joreth Limited v Kigano & Associates* [supra], observed as follows: -

“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, judgment 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 fee as he considers just, taking into account, among other matters, the nature



and importance of the cause or matter the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all relevant circumstances.”

24. With the above in mind, I have looked at the plaint and the notice of motion. Para. 8 of the Plaint dated 4th July 2022, reads:

“The 1st Defendant in an endeavour to circumvent the provisions of Section 23 (4A) of the Insurance Act executed illegal contracts concealed as trust deeds in favour of the 2nd, 3rd and 4th Defendants appointing them as its nominees under its direct control, which mischief resulted in the 1st Defendant having direct control of 10,550,407 shares of all the 15,000,000 shares issued by the Plaintiff, which translates to 70% holding in the Plaintiff herein, contrary to the provisions of the Insurance Act.”

25. Para. 24 of the notice of motion dated 4th July, 2022 reads:-

“THAT in the years 2012, 2013 and 2014 the applicant herein declared dividends to the tune of Kshs. 88,365,400, Kshs. 119,184,400 and Kshs. 300,000,000 respectively to be paid out to all the shareholders, however, the dividends were only paid out to the 1st Respondents herein and Janus Limited.”

26. In view of the foregoing, it is my considered view that the subject matter of the suit is ascertainable from para. 8 of the Plaint, as being 10,550,407 shares in the plaintiff. These are the shares that plaintiff claimed the 1st defendant had mischievously taken control of. I therefore find that the taxing officer erred by taking into consideration the entire 15,000,000 shares in the company in computing the value of the subject matter. I also find that the taxing officer took into account an irrelevant factor in her decisions as the subject matter is not ascertainable from para. 24 of the notice of motion. Perhaps the correct paragraph for consideration is para. 7 of the notice of motion which mirrors para. 8 of the Plaint above.

27. I find no merit in the contention that the taxing officer applied the wrong schedule, and should have applied schedule 1(b) of the ARO.

28. Accordingly, the references are allowed and the taxing officer’s decisions on item no. 1 on instruction fees are set aside. The 1st, 3rd, 2nd and 4th respondents bills of costs dated 7th June 2023, 30th May 2023 and 18th January 2023, are remitted to the taxing officer with directions to reconsider item 1 on instruction fees only by applying 10,550,407 shares as the subject matter.

29. Each party to bear own costs of the references.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Kamotho & Mr. Ogembo for the Applicant (Evans Nyaga)

Mr. Mugo h/b for Mrs. Wambugu for the 1st Respondent as well as h/b for Mr. Ndumia for the 3rd Defendant



Ms. Sirawa h/b for Mr. Kiragu for the 2nd & 4th Defendants

Court Assistant: Carlos

