



REPUBLIC OF KENYA



Kabanya v Schabus (Civil Suit 4 of 2021) [2024] KEHC 4889 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 4 OF 2021
SM GITHINJI, J
MAY 13, 2024**

BETWEEN

DORIS NYAMBURA KABANYA PETITIONER

AND

GUNTER SCHABUS RESPONDENT

RULING

1. This ruling relates to a chamber summons application dated 4th April 2023 filed by the Respondent/Applicant for orders: -
 1. That the ruling and decision of Hon. D. Wasike, the taxing master delivered on 22/03/2023 in respect to instruction fees particularly item no. 2 on the respondent's party and party bill of costs dated 27/01/2023, awarding the Applicant Kshs 100,000 and taxing off Kshs 627,000 be set aside or varied.
 2. That the respondent's party and party bill of costs dated 27/01/2023 be remitted back for taxation before any other taxing master other than Hon. D. Wasike.
 3. That in the alternative this court exercises its inherent jurisdiction and be pleased to re-tax item No. 2 of the Respondent's party to party bill of costs dated 27/01/2023 afresh in accordance with the relevant law.
 4. That costs be provided for.
2. The application is premised on the grounds set out on the face of the motion and in the supporting affidavit sworn on 4th April 2023 by Oscar Litoro, counsel for the respondent/applicant.
3. In opposition, the Petitioner/respondent filed a replying affidavit which she swore on 22nd September 2023 stating that the application is unmerited and should be dismissed. To her, the present suit being a matrimonial cause, the value of the subject matter could not be ascertained from the pleadings or



judgment. Further, seeing that the suit was summarily dismissed, the value could not be ascertained and the decision of the taxing officer was therefore not erroneous.

4. The application was canvassed by way of written submissions. Notably, only the respondent/applicant filed submissions which I have carefully perused.
5. I have considered the Reference in light of the grounds advanced and the submissions filed. I find the following issues have arisen for determination: -
 1. Whether the Applicants have satisfied the criteria for setting aside the decision of the taxing officer;
 2. Whether the court should grant the prayers sought.
 3. Who should bear the costs.

Analysis and Determination

6. It is clear that the Applicant is challenging the taxation of item No. 2 on the party and party bill of costs dated 27/01/2023, erroneously referred to as item No. 1 on the ruling of the taxing master dated 22/3/2023. The said item is particularized as “instruction fees to enter appearance and challenge the matrimonial suit and application by the petitioner commenced by an originating summons and notice of motion seeking orders inter alia for declaration that property ... (all acquired and valued at Kshs 13,800,000 as at 2013) and ... (acquired and valued at Kshs 20,000,000 as at 2018) are matrimonial property...” According to the Applicant, the taxing master ought to have relied on the stated amounts as value of the subject matter as opposed to finding that the value of the subject matter could not be ascertained. According to the applicant therefore, the applicable provision ought to have been paragraph 1b of part A, schedule 6 of the *Advocates Remuneration Order (2014)* which provides-

“To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and-.....”

7. The taxing master applied the paragraph on “other matters” which provides that to sue or defend in any case not provided for above; such sum as may be reasonable but not less than Kshs 45,000 if undefended and Kshs 75,000 if matter was defended. According to her ruling, she relied on this paragraph since the value of the subject matter could not be ascertained. I agree with the taxing master. I say so because no doubt as per the sale agreements relied upon by the applicant, the purchase price of the subject properties was as Kshs 13,800,000/- and Kshs 20,000,000 respectively. The agreements were entered into in the year 2013 and 2018. In his replying affidavit in the main suit, the applicant admitted that he had improved and developed the properties. This in my view means that the value of the properties had appreciated and as at the time the suit was dismissed and bill of costs taxed the actual value of the subject property had not been ascertained.

In the circumstances, I am not satisfied that the taxing master misdirected herself or misinterpreted the facts and law to arrive at a wrong conclusion. The outcome is that the chamber summons dated 4th April 2023 is unmerited. It is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF MAY, 2024.



.....

S.M. GITHINJI

JUDGE

In the Presence of:

Mr Kinyanjui holding brief for Mr Litoo for the Defendant/Applicant

Ms Mutua is for the Applicant/respondent(absent)

