Muriu Mungai & Co. Advocates v China Civil Engineering Construction Corporation (K) Limited (Miscellaneous Application 368 of 2016) [2024] KEHC 16929 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEHC 16929 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 368 OF 2016

F WANGARI, J

MAY 2, 2024

BETWEEN

MURIU MUNGAI & CO. ADVOCATES ..... APPLICANT

AND

CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION (K) LIMITED ..... RESPONDENT

RULING

1. This ruling relates to three (3) applications preferred by the parties herein. The first application is a Chamber Summons dated 8/9/2022 filed by the Client and it sought for the following orders: -

    a. That this court be pleased to set aside the Taxing Master's decision delivered on 17/82022 in respect to item no. 1, the instruction fees in the Bill of Costs dated 9/4/2016.

    b. That this court do tax the above item no. 1, the instruction fees

    c. In the alternative, the said Bill of Costs be remitted to a different Taxing Master for consideration.

    d. That the costs of this application be provided for.

2. The grounds in support of the application were that the Taxing Officer's decision on taxation was based on an error of principle and as a result of this error, the Taxing Officer awarded instruction fees that was manifestly high and devoid of reasons as to why the fees was increased by about 130 times.

3. On its part, the Advocate filed two (2) applications. The first is a Chamber Summons dated 26/9/2022 seeking to have the following orders;

    a. Taxing Master's ruling dated 17/8/2022 be set aside.

    b. That the instruction fees be increased by 50% on an advocate –client basis.

c. That the Taxing Master do issue a fresh certificate of taxed costs having taken into account the above.

4. The application was grounded on the fact that the Taxing Master erred in principle by reducing the instruction fees by 25% on the basis of Schedule 6 – Part A (1) (b) of the *Advocates Remuneration Order*. It was stated that this court can correct the error and tax the item afresh.

5. The 2nd application by the Advocate is the Chamber Summons dated 24/4/2023 seeking the following orders;

a. That time be extended for the filing of the Notice of Objection dated 31/8/2022, and be deemed to have been properly filed.

b. That time be extended for the filing of a reference and Chamber Summons dated 26/9/2022 and be deemed to have been properly filed.

6. The above application was grounded on the fact that the reference and Chamber Summons were filed out of time by one (1) day as the advocate in conduct of this matter was engaged in an election petition and delaying in communication with the partners on the way forward.

7. The above application must have been in response to the Notice of Preliminary Objection dated 21/2/2023, which objected to the jurisdiction of this court in hearing the Notice of Objection dated 31/8/2022 and Chamber Summons dated 26/9/2022, as they offended the statutory timelines under Rule 11 (1) of the *Advocates Remuneration Order*, hence defective.

8. Directions were taken that the three applications be disposed of simultaneously by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. Both parties' submissions are dated 19/4/2024.

Analysis and Determination

9. I have considered the applications, the responses, the submissions together with the authorities relied upon by the parties as well as the law. Considering that a preliminary objection was raised, I propose to deal with it first as its outcome has a bearing on the application dated 26/9/2022.

10. The preliminary objection is founded on the fact that the Objection and Chamber Summons by the Advocate are file out of time hence defective. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law.

11. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

At page 701, Sir Charles Newbold, P added: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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…"

12. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.

13. The issue of having the pleadings filed out of time is a point of law. The fact that the pleadings were filed out of time is not in dispute hence needs no evidence in support. Extension of time is not a right of the party seeking for such orders. This is an equitable remedy available at the discretion of the court.

14. Under Order 50 Rule 6 of the *Civil Procedure Rules*, it provides as follows;

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

15. The Advocate has explained the circumstances under which the one-day delay in filing the pleadings happened. I find no reason to lock out the party from these proceeding and I exercise the court's discretion and allow the application, with no orders as to costs.

16. I now turn to the consider the merits of the twin applications dated 8/9/2022 by the Client and the one dated 26/9/, 2022 by the Advocate which are both seeking to set aside the Taxing Master's decision on grounds as stated in the applications among other prayers. Both this Court and the Court of Appeal found for a fact that the subject matter could not be discerned from the pleadings, judgement or settlement. This court exercised its powers on reference by remitting the matter to another Taxing Master other than Hon. D. Wasike, Deputy Registrar.

17. The matter having been re-taxed by Hon. Nyariki, Deputy Registrar, the Learned Taxing Master exercising his discretion re-taxed item 1 on instruction fees at Kshs. 7,360,010/=. In his ruling, the Taxing Master noted as follows: -

> "…In establishing the guiding principle in ascertaining the value of the subject matter and while taking into account that the nature of the subject value is unspecific, I shall be guided by Schedule 6 (1) (j) on other matters which provides for the bare minimum of Kshs. 75,000/=…"

18. Based on the above excerpt, it is clear that the Taxing Master was duly guided on the appropriate scale to adopt and to this end, I see no error whatsoever. The next consideration is whether the Taxing Master was correct in increasing the instruction fees in the manner he did. He made reference to the decision of the Court of Appeal in *Rogan Kamper v Grosvenor* [1989] KLR 362 where the Superior Court considered the expressions "manifestly excessive" and "manifestly inadequate".

19. Having reproduced the relevant paragraph of the Court of Appeal decision, the Taxing Master went on to hold as follows: -

> "...I have considered the nature of the suit, interest of the parties, the general conduct of the proceedings and all other relevant factors. It is not hard to pick up from the pleadings that the subject matter was of much importance to the parties considering the potential foreseeable damage that could have occurred had the parties not reached a consent. Further, while the court takes cognizance of the complexity in this matter, such complexity would have become operative had the matter proceeded to its full conclusion..."

20. The role of this court on a reference from taxation by the Taxing Master is clearly delineated. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal held as follows: -

> "...On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs..."

21. The question is whether the Taxing Master erred in principle when he increased item 1 on instructions fees to Kshs. 9,750.000. In *Tom Ojienda v County Government of Meru* [2021] eKLR cited by the Taxing Master, it was held as follows: -

> "...The law remains that the task of taxing costs invokes judicial discretion and on reference this court can only interfere if it is satisfied that in coming to the conclusion it reached, the master made an error in principle, failed to take into account a relevant matter or took into consideration an irrelevant matter and thus reached a conclusion and a sum that was obviously too high or too low as to demonstrate an injustice upon one of the parties. In taxation, the master is expected to take into account the nature of the matters in dispute, the novelty and complexity involved and therefore responsibility upon counsel, the need to promote access to justice and the resultant development of jurisprudence in the new areas of like the system of government. Bills are taxed by the master pursuant to special jurisdiction vested upon the taxing master and the court must always refrain from always interference lest it be seen to usurp that special jurisdiction..." (Emphasis Added)

22. This court and the Court of Appeal has in its various decisions considered the circumstances in which a judge of the high court may interfere with the taxation of a taxing master are not unfettered but must be in limited situations when the taxation is based on an error of principle which include failure to consider relevant factors.

23. In the South African decision of *Visser v Gubb* 1981 (3) 753 (C) cited in Tom Ojienda (above), it was held as follows: -

> "...the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. The court must be of the view that the taxing master was clearly wrong, i.e.

its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal..."

24. There is no mathematical formula to calculate instruction fees especially where the value of the subject matter cannot be discerned from the pleadings, judgement or settlement such as the present case. The exercise involves weighing the diverse general principles, maintaining consistency in the level of costs and that the reviewing court cannot lightly interfere with what in the Taxing Master's opinion is reasonable fee.

25. In *Peter Muthoka & Another v Ochieng & 3 Others* [2019] eKLR, the Court of Appeal restated this position of not lightly interfering with the Taxing Master's discretion by holding as follows: -

> " ...It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in injustice, to borrow the holding in *Mbogo v Shah* [1968] EA 93 then though the decision is discretionary may be properly interfered with..."

26. It should not be lost that the Client/Respondent had been adjudged to pay the Advocate/Applicant a sum of Kshs. 148,856,561.90/= before this court directed that the Bill of Costs be re-taxed. The matter was settled after three months and it is trite that an Advocate is entitled to full instructions fees once he accepts the brief and starts working on it. Therefore, the prayer seeking to set aside the Taxing Master's finding on instruction fees lacks merit and the same is hereby dismissed.

27. On increasing the instruction fees by 50% as sought by the Advocate/ Applicant, the relevant part is Schedule 6, part B of the *Advocates Remuneration Order, 2014*. What is chargeable between the Advocate and client is aptly expressed in Part B, of Schedule 6, which specifies that: -

> " As between advocate and client the minimum fee shall be—
>
> (a) the fees prescribed in A above, increased by 50%; or
>
> (b) the fees ordered by the court, increased by 50%; or
>
> (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences". (Emphasis added)

28. The Taxing Master having exercised his discretion by increasing instruction fees to Kshs. 7,360,010, it was incumbent for the Taxing Master to increase the fees it ordered by 50%. This was an error which this court proceeds to correct by increasing the taxed amount by 50% and thus the application dated 26/9/2022 succeeds in part to the above extent.

29. Other than failing to increase the instructions fees by 50%, I do find that the Taxing Master carefully and properly applied his mind to the principles set out in the case of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162.

30. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to a party or not. This

was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

31. Both parties preferred applications. As for the Advocate's/Applicant's application dated 24/4/2023, the same is allowed with no order as to costs. The Client's/Respondent's application dated 8/9/2022 is devoid of merits and the same is dismissed with costs. On the Advocate's/Applicant's application is allowed to the extent that the taxed amount of Kshs. 7,312,500/= is upheld and the amount increased by 50%.

32. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The Application dated 24/4/2023 is allowed with no orders as to costs;

    b. The Application dated 8th September, 2022 is devoid of merit and the same is hereby dismissed with costs to the Advocate/Applicant;

    c. The application dated 26th September, 2022 succeeds only to the extent that the taxed costs of Kshs. 7,312,500/= is increased by 50%;

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MAY, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Kongere Advocate for the Applicant

Mr. Muthee Advocate for the Respondent

Mr. Barille, Court Assistant