



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 406 OF 2008

PURITY GATHONI GITHAE.....1ST PLAINTIFF

SAMUEL KAMAU MACHARIA.....2ND PLAINTIFF

=VERSUS=

EXELLO STRUCTURES LIMITED.....1STDEFENDANT

OCEANFREIGHT TRANSPORT CO. LTD....2NDDEFENDANT

RULING

1. On 3/8/2018, the plaintiffs brought a reference under paragraph 11 of the Advocates (Remuneration) Order through a chamber summons dated 3/8/2018. They sought an order varying or setting aside the decision of the taxing officer contained in her typed ruling delivered on 22/7/2014. The impugned ruling contained the taxing officer's decision in which she taxed the 2nd defendant's bill of costs against the plaintiffs at Kshs 708,189.

2. In the notice of objection dated 2/8/2018, the plaintiffs stated that their objection related to the taxing officer's decision on all the contested items of the 2nd defendant's party and party bill of costs dated 12/2/2014. They did not, however, itemize the contested items. In their submissions before the taxing officer, dated 22/4/2014 and filed on 23/4/2014, the plaintiffs had objected to the following items in the said bill of costs: 1, 2, 3, 4, 5, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24, 31, 32, 33, 34, 41, 43, 47, 48, 51, 52, 53, 54, 55, 58, 59, 61 and 62.

3. I will summarize the taxing officer's findings on the above items. Item 1 related to instruction fees. The taxing officer found that the value of the subject matter was not ascertainable from the pleadings. She noted that the suit related to land and the orders sought in the suit included declarations, injunction and general damages. Exercising her discretion she taxed down the item from Kshs 2,500,000 to Kshs 500,000. Items 2, 3, 4, 5, 11, 18, 31 and 32 related to perusal. The taxing officer adopted the definition of "folio" under rule 17 of the Advocates Remuneration Order and taxed the said items as drawn. Items 12, 21, 23, 24, 33, 34, 41, 42, 47 and 48 related to drawings and copies. The taxing officer similarly applied the definition of folio under rule 17 and taxed the said items as drawn. Item 19 related to court attendance. The taxing officer taxed the item as drawn at Kshs 3,360. Item 20 related to instruction fees on an application. The taxing officer considered that the minimum fee was Kshs 3,300. She exercised discretion and taxed the item from Kshs 20,000 to Kshs 15,000. Items 51, 52, 53 and 54 related to future expenses relating to drawing of certificate of taxation, making copies, and attending court to extract and collect the signed and sealed certificate of taxation. The taxing officer found that the items were merited and taxed them as drawn. On Value Added Tax, the taxing officer found that Value Added Tax was not payable on a party and party bill of costs and taxed off item 55 which related to Value Added Tax. Items 58, 59, 61 and 62 related to disbursements. The taxing officer held that disbursements must be proved and even if the remuneration order did not specifically provide for binding, the items were properly proved. She taxed them as drawn. In summary, the taxing officer interfered with item 1 (instruction fees); 19 (court attendance); 20 (application); and 55 (VAT).

4. The grounds upon which the plaintiffs challenge the taxing officer's decision are set out on the face of the chamber summons dated 3/8/2018. They read as follows:

a. On 22nd July, 2014, the taxing master delivered a ruling in which the 2nd defendant's party and party bill of costs dated 12th February, 2014 was taxed at Kshs 708,189/-.

b. The taxation is illegal in that the learned taxing officer ignored wholly the law as stated by the Court of Appeal in *Joreth Limited v Kigano & Associates* [2001] 1 E.A 92 which held that the value of the subject matter is to be ascertained from the pleadings, judgment or settlement and where it is not ascertainable, the court is to use its discretion to assess the instruction fee but it is not to undertake a valuation of the subject matter or receive from a party, the said value of the subject matter;

c. The taxing master erred in principle while taxing the 2nd defendant's party and party bill of costs dated 12th February,

2014 and in particular;

i. the taxing master erred in taxing the instruction fees in failing to apply the correct principles and factors after finding the value of the subject matter of the suit could not be determined from the pleadings;

ii. the taxing master/officer erred in that the amount of Kshs. 500,000 allowed as instruction fees is manifestly excessive in the circumstances of this case; it is so excessive as to manifest an error of principle;

iii. the taxing officer erred in taxing the rest of the objected items in failing to apply Schedule VI of the Advocates Remuneration Order, 2006.

d. As held in First American Bank of Kenya v Shah and others [2002] 1 EA 64 this is a case where this honourable court can interfere with the discretion of the taxing master where he or she has erred on a matter of principle.

e. The court held in Republic v Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W'njuguna & 6 others (2006) eKLR the law is that:

“...It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...”

“.....it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs....complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction...if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode...if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner...”

f. in taxing instructions fees at Kshs 500,000, the taxing officer exercised her discretion wrongly as it was based on Kshs 40 million, a value supplied by the 2nd defendant without the benefit of any valuation report;

g. the taxing officer failed to appreciate that the legal fees should not be unreasonable or excessive as to deter persons from accessing justice;

h. The taxing officer failed to consider the notion of “reasonableness” in the taxation of costs;

i. The taxing officer misdirected herself on the discretion and awarded a fee that is manifestly excessive as to justify interference from this honourable court;

j. It is in the interest of justice if this application/reference is allowed

5. The 2nd defendant opposed the reference through a notice of preliminary objection dated 17/9/2018. The 2nd defendant urged the court to strike out the reference in its entirety on the following grounds:

1. Violating all the rules of law, practice and procedure of what should be contained and what should never be included in an affidavit.

2. For referring to exhibit documents claimed to be attached, but which have not been annexed to the said affidavit, and

3. For being argumentative and a conveyance of matters of law, argument, submission and surmise which should never be presented to court by way of an affidavit.

6. In the alternative, the 2nd defendant urged that matters of law and argument contained in pages 2, 3 and 4 and paragraph 8 of the affidavit in support of the reference be struck out and the same be expunged from the record of these proceedings.

7. On 8/1/2019, the plaintiffs filed their written submissions dated 15/11/2018. On 11/11/2019, Mr Makori who held brief for Mr Murage, counsel for the 2nd defendant, informed the court that the 2nd defendant would rely on its earlier written submissions filed on 2/6/2017.

8. The plaintiffs urged the court to reject the 2nd defendant’s preliminary objection on the ground that the matters raised in the notice of preliminary objection were not pure points of law. They contended that the issues raised in the notice of preliminary objection required the court to review the plaintiffs’ affidavit. They added that Order 19 rule 1 of the Civil Procedure Rules required that objection to the contents of any affidavit be raised by way of chamber summons or orally and the 2nd defendant had failed to utilize that forum.

9. On instruction fees (item 1), the plaintiffs’ counsel submitted that the taxing officer erred because she did not state the applicable scale

which she had applied in arriving at the instruction fee of Kshs 500,000. Secondly, it was argued that the taxing officer erred in taking into account reliefs sought in the plaint and in failing to appreciate that the orders sought in the plaint were principally against the 1st defendant as opposed to the 2nd defendant.

10. Thirdly, it was argued that the taxing officer erred in assessing instruction fees because she failed to take into account that the claim against the 2nd defendant was determined in a summary manner hence instruction fees ought to have been reckoned at 75%. Fourthly, it was argued that the taxing officer erroneously used the value of Kshs 40,000,000 in assessing instruction fees. Lastly on instruction fees, it was argued that the taxing officer erred in taking into account the length of time the suit against the 2nd defendant had subsisted. The plaintiffs contended that this was not one of the factors that the taxing officer was required to take into account.

11. On items 2, 3, 4, 5, 11, 18, 31, and 32, the plaintiff's counsel submitted that the court should take a folio to mean a page of a document because that is the practice. It was contended that to take a folio to mean 100 words as per rule 17 of the Advocates (Remuneration) Order would almost be impracticable and would require the taxing officer to scan the document in a computer with a word processor that counts words.

12. On items 12, 13, 21, 22, 23, 24, 33, 34, 41, 42, 47 and 28, the plaintiffs urged the court to take a folio to mean a page. Counsel faulted the taxing officer for assessing item 20 at Kshs 15,000 and submitted that the taxing officer did not give cogent reasons save to state that the application was to strike out the suit. Lastly, on item 50, counsel submitted that the taxing officer should have charged each attendance before the Deputy Registrar at Kshs 315 as opposed to Kshs 1,260.

13. The 2nd defendant adopted its previous written submissions filed before the taxing officer on 2/6/2017. Counsel for the 2nd defendant argued that unless there is a clear error of principle or the sums awarded are either manifestly high or low, this court does not interfere with the taxing officer's decision. It was argued that other than some vague and generalized complaints on minor and inconsequential matters, the plaintiffs had failed to demonstrate or show any errors of principle or any irrelevant factors which the taxing officer wrongly took into account or some relevant factors which she failed to take into account. Counsel submitted that the taxing officer properly took into account all relevant matters and reminded herself of all the relevant factors which she needed to keep in mind. Counsel urged the court to dismiss the reference.

14. I have considered the reference together with the parties' respective submissions. I have also considered the relevant legal frameworks and principles upon which a taxing officer exercises jurisdiction and the principles upon which a superior court interferes with the discretionary jurisdiction of the taxing officer. The single question falling for determination in this reference is whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to interfere with the discretionary decision of a taxing officer.

15. Before I make a brief analysis and determination of that key question, I will briefly discuss the preliminary objection which the 2nd defendant filed in this reference. No relevant written or oral submissions were put forth by the 2nd defendant to ventilate the preliminary objection. Instead, the 2nd defendant adopted its written submissions dated 31/5/2017 and filed on 2/6/2017. Those submissions did not address the preliminary objection dated 17/9/2018. In fact they were filed before the preliminary objection was filed. Consequently, the preliminary objection remains unargued and unprosecuted. In the circumstances, I dismiss the preliminary objection for lack of merit. I now turn to the key question in this reference.

16. It is now a settled principle of law in Kenya that superior courts do not liberally interfere with the taxing officer's decision; they do so when there is a clear error of principle or when the taxing officer has failed to take into account a factor which ought to have been taken into account or when the sum awarded is manifestly high or manifestly low as to amount to an injustice [see **Republic v Ministry of Agriculture and 2 others; Ex-parte Muchiri W'Njuguna & Others (2006)eKLR**; (ii) **First American Bank of Kenya v Shah & Others (2002) EALR 64**; and (iii) **Desai Sarvia & Dallan Advocates v Jambo Biscuits (K) Ltd (2014)eKLR**].

17. The first complaint of the plaintiffs relates to the taxing officer's assessment and award in respect of instruction fee. The plaintiffs contend that the taxing officer erred in failing to state the applicable scale. I have looked at the bill of costs and the submissions placed before the taxing officer. I have also looked at her ruling. The bill of costs did not specify the schedule under which it was drawn and under which the taxing officer was required to tax it. It is clear that there was strong objection to the item relating to instruction fees. It is also true that the taxing officer arrived at an instruction fee of Kshs 500,000 without stating the schedule under which she was awarding the said sum. The suit against the 2nd defendant had been terminated before trial begun. It was therefore necessary for the taxing officer to categorically state the scale upon which the award of Kshs 500,000 was based and further indicate whether or not she had taken into account the fact that the suit against the 2nd defendant was terminated before going to full trial. The taxing officer failed to state the schedule and scale under which she was making the award.

18. Secondly, the taxing officer rendered herself thus

"I have also taken into consideration how long the matter was pending in court against the 2nd defendant, the general conduct of the suit, and even the fact that if I were to use the value of Kshs 40,000,000 the instruction fees would have been Kshs 614,000/- and using my discretion I will award the second defendant instruction fees of Kshs 500,000/-. Item Number 1 is therefore taxed at Kshs 500,000.

19. Without saying much, it is clear from the above excerpt that the taxing officer considered the purported value of the suit property as proffered by the 2nd defendant [Kshs 40,000,000]. She did so after she had clearly stated that the value of the subject matter was not the subject of the suit. In my view, she took into account matters which she should not have taken into account. Put differently, she took into account the sum of Kshs 40,000,000 and the probable instruction fee of Kshs 614,000 which would accrue were she to accept Kshs 40,000,000 as the value of the suit property. She should not have done that.

20. In light of the foregoing, I find that the taxing officer committed errors of principle and took into account factors which she should not have taken into account. The errors committed by the taxing officer go to the root of the entire exercise.

21. Because the above errors go to the very foundation of the impugned decision, I hereby set aside the entire decision of the taxing officer rendered on 22/7/2014 and direct that the 2nd defendant's bill of costs be taxed afresh before a different taxing officer of this court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Court Clerk - June Nafula