



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 3 OF 2017

LALJI MEHJI PATE & COMPANY LIMITED.....PLAINTIFF

VERSUS

PCEA FOUNDATION.....1ST DEFENDANT

IMPERIAL CONCEPTS LIMITED.....2ND DEFENDANT

RULING

1. This is a reference dated 8th March 2019 brought against the decision of the taxing officer dated 4th March 2019. In that decision, the taxing officer taxed the respondent party and party Bill of costs dated 13th November 2018 at Kshs. 4,548,312 on instruction fee. The reference is brought by way of summons under paragraph 11 of the Advocates Remuneration Order, section 3A and 95 of the Civil Procedure Rules and all enabling provisions of the law. The reference seeks an order setting aside the decision of the taxing officer and a further order that the respondent's Party and Party Bill of costs be taxed afresh.
2. The reference is based on the grounds on the face of the summons and the affidavit by Lucille Obel, sworn on 25th November, 2019. According to the grounds on the face of the summons, the applicant complains that the taxing officer erred in principle by disregarding the subject matter which was clear in the consent order dated 13th March 2018 for Kshs. 17,000,000, instead of Kshs, 348,118, 513 which was on the claim; that the Kshs. 102,591,337.75 was only used by the respondent in court as the subject matter and that the taxing officer failed to consider their submissions on the issue of instruction fee, item 1 of the Bill of Costs.
3. In the supporting affidavit, the Ms. Obel deposed that the respondent filed a suit against the applicant claiming Kshs,96,585,271.03 in a plaint dated 13th February 2017 for breach of contract; that the applicant raised a preliminary objection that the matter should be referred to arbitration and that the preliminary objection was upheld and the suit referred for arbitration.
4. She also stated that the respondent filed a memorandum of claim before the arbitrator claiming Kshs, 102,591,337.78 and that on 13th March 18, parties recorded a consent for Kshs. 17,000,000, bringing the matter to a close.
5. Thereafter, she deposes, the respondent filed Party and Party Bill of Costs for Kshs, 5,421,778 on item 1, instruction fee, based on the construction costs of Kshs. 348,118,513.92 which was not the subject matter. She stated that the subject matter was narrowed to Kshs. 17,000,000 as the consent order showed and therefore the taxing officer fell into error in applying the wrong subject matter.
6. The respondent filed a replying affidavit of some 47 paragraphs by Parbat Premji Patel, sworn on 13th December 2019 and filed on 16th December 2019. He admitted that the respondent filed a claim for Kshs, 102,591,337.78 before the arbitrator; that parties entered into a contract for construction of a mall whose project cost was Kshs. 348,118,513 and that the respondent was awarded costs of the claim by the arbitrator. He stated that the value of the subject matter was the project cost that; is Kshs.348, 118,513.95.
7. The deponent deposed that the summons is an abuse of the Civil Process; is vexatious and slanderous and should be dismissed. He maintained that the taxing officer was right in his decision. According to the deponent, the reference is defective as it was filed out of time.
8. During the hearing of the reference, Mr. Rono for the applicant, submitted highlighting their written submissions, that the taxing officer was wrong in basing determination on item 1 on the cost of construction instead of the amount of 17 million recorded in the consent and adopted by the court as the final judgment of the court. Counsel relied on *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others* [2014] eKLR. He urged the court to allow the reference.
9. Mr. Osundwa, counsel for the respondent, submitted highlighting their written submissions dated 13th December 2019, that instruction fee can be obtained from pleadings; that the taxing officer allowed instruction fee of Kshs. 5,406,634 and that the basis of that figure was obtained from the pleadings that is; the plaint being Kshs. 348,118,513.92/=. He also submitted that the claim before the arbitrator indicated

the value of the subject matter of the suit.

10. According to counsel, the applicant has no basis for questioning the taxing officer's decision since the figure complained of had been derived from the pleadings. He relied on *KTK Advocates v Baringo County Government*, Misc. Cause No. 1 of 2017 for the submission that the court will not interfere with the taxing officer's discretion unless there is evidence that the taxing officer disregarded essential factors that he should have considered.

11. He also relied on *First American Bank of Kenya Ltd v Shah & others* [2002] 1 EA 64, to argue that the applicant had failed to prove that the taxing officer erred in principle. Counsel again cited *Joreth Limited v Kigano & Associates* [200] 1 EA 92 for the submission that the value of the subject matter for purposes of taxation may be determined from the pleadings, judgment or settlement. Further reliance was placed on *Republic v Minister for Agriculture & 2 others Ex parte Samuel Muchiri W'njuguna* [2006] eKLR on the considerations a taxing officer should take into account, and *Paul Ssemogerere & Olum v Attorney General* (Civil Application No. 5 of 2001) for the argument that there is no formula for calculating instruction fee. He urged the court to dismiss the reference with costs.

12. I have considered the reference, the reply and submissions by counsel for the parties. I have also considered the decisions relied on. The facts leading to this reference are not in dispute. The respondent entered into a contract with the applicant to construct a mall for it. The cost of the project was Kshs. 348,118,513.92. A dispute then arose between the two parties over fees. The respondent filed a suit in this court to recover its fees but the matter was referred to arbitration following a successful preliminary objection by the applicant. The claim before this court had been stated to be Kshs. 96,588,271.03, Before the arbitrator, the claim was stated as about Kshs.102, 591,337.75.

13. Parties recorded consent before the arbitrator for Kshs. 17 million settling the matter. The arbitrator awarded the respondent costs of the arbitration proceedings. The consent was adopted as a final judgment of the court and, thereafter, the respondent filed its party and party Bill of costs for taxation. It was taxed on 4th March 2019 and item 1 was allowed at Kshs. 4,066,334 being 75% of amount allowed, namely; 5,421,778, prompting this reference.

14. The applicant has argued that the taxing officer erred by using the cost of the project as the subject matter and therefore arrived at a wrong decision. In the applicant's view, the subject matter should have been the judgment sum in the consent recorded before the arbitrator and adopted by the court as the final judgment. The respondent on their part have maintained that the taxing officer was right and that he took into account the relevant subject matter. They urged the court not to interfere with the taxing officer's discretion and dismiss the reference.

15. I have considered respective parties' arguments and perused the taxing master's decision dated 4th March 2019. From the outset, the taxing officer was alive to the principles applicable in taxing bills of costs and referred to relevant decisions. He considered *Republic v Minister for Agriculture & 2 others Ex parte Samuel Muchiri W'njuguna* (supra) on the guiding principles when determining item 1 in the bill of costs. He also considered the decisions of *Premchand Raichand Limited & another v Quarry Services of East Africa Ltd & another* [1972] E A and *Joreth Limited v Kigano & Associates* (supra), and then stated:

“The Applicant's claim was in relation to a shopping mall in Ngong whose construction cost came to Kshs. 348,118,513.92. as per the provisions of section 1(b) of schedule six of the 2014 ARO, the instruction fee comes to Kshs. 5,421, 778. But as aforementioned, only 75% of this amount is awardable owing to the fact that did not proceed to full trial. 75% of Kshs. 5,421,778 is Kshs. 4066,334. I therefore award Kshs4066,334 as instruction fee.”

16. There is no doubt that the taxing officer applied the cost of construction as the subject matter when determining item 1 on instruction fee, thus the applicant's complaint. I have to state here that taxing of bills of costs involves exercise of discretion and this court will not ordinarily interfere with the taxing officer's discretion unless it is shown that he took into account irrelevant factors or failed to take into account relevant factors thereby arriving at a wrong decision.

17. In *First American Bank Ltd v Shah & another* [2002] 1 EA 64, *Ringera J*, (as he then was), expressed himself thus;

“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...”(Emphasis)

18. I have perused the taxing master's decision that gave rise to this reference. I have also perused the claim filed before the arbitrator as well as the consent recorded before him. There is no doubt that the applicable Order was the Advocate's Remuneration Order, 2014 as correctly stated by the taxing officer. The question however is what the subject matter was for purposes of instruction fee.

19. The applicant has argued that the subject matter should have been the amount in the consent judgment recorded before the arbitrator and adopted by the court as the final judgment, that; is Kshs. 17,000,000. The respondent on the other hand maintained that the cost of the project namely Kshs. 348,118,513.92 was the subject matter and supported the taxing officer's decision to apply that amount.

20. In determining the subject matter, the court stated in *Joreth Limited v Kigano & Associates Advocates* [2002] EA 92 that:

“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.”

21. The subject matter is discernible from pleadings, judgment or settlement and if not ascertainable from any of the above, the taxing officer uses discretion. In the Bill of costs before him, the taxing office used the project cost as the subject matter although the issue before the arbitrator was not about the construction of the mall but the fee. The respondent had claimed Kshs102, 591,337.75 but the matter was settled by consent and judgment was entered for Kshs. 17,000,000.

22. Could the taxing officer use the project cost as the basis for determining instruction fee? The answer must be in the negative. There was no dispute between the parties on what the project cost was. The dispute was what the respondent's fee was. It filed a suit before this court for Kshs 96, 588,271.03. The matter was referred for arbitration where he claimed Kshs. 102, 591,337.75. As already stated above, the matter was resolved by consent for Kshs. 17,000,000. The respondent having obtained a judgment, it should have been the basis for determining instruction fee being the subject matter. It was wrong for the taxing officer to use the cost of constructing the mall as the subject matter when determining instruction fee.

23. Where a suit has been concluded and the judgment sum is discernible, that is the subject matter for purposes of determining instruction fee and not what is pleaded in the suit. The figures in the pleadings should not be used at the expense of the amount in the judgment because that is what has been found to be due. A party may plead any amount for purposes of enhancing the chances of getting higher instruction fee if this was to be allowed. The dispute having been settled for Kshs 17,000,000, that became the subject matter for purposes of the respondent's party and party bill of costs and more so item 1 on instruction fee.

24. The above position was adopted in ***Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others*** (supra), where the court observed that the taxing officer was right in awarding the instructions fee based on the amount that was allowed by the Court and not what had been pleaded. The court stated:

“[26] If an advocate taxes his bill of costs before a matter is determined, then the taxing officer is supposed to base the instruction fees on the basis of the pleaded amount in the pleadings. However, once an award has been made by the court, then the taxing officer is supposed to use the figure awarded by the court in calculating the payable instruction fees while taking into account the other perimeters in increasing such fees, if at all.”

25. Further in ***Lubullellah & Associates Advocates v N K Brother Limited*** [2014] eKLR, the court disagreed with the argument that in determining instruction fee the taxing officer should consider the amount pleaded observing that if that was to be allowed, nothing would stop an advocate from plucking figures from the blue because he would know that his instruction fees would be based on the figures indicated in the pleadings, despite knowing very well that he would not succeed in such a claim at the end of the day which would be a travesty and miscarriage of justice.

26. I am in agreement with the above observation and this is clearly discernible from the respondent's own cases. The sentiments are borne by the fact that even in the suit before this court, the respondent had claimed Kshs.96, 588,271.03, while before the arbitrator, the amount changed to Kshs. 102,591,337.75. This reinforces the view why the taxing officer should consider the amount in the judgment or settlement and not that pleaded in determining instruction fee.

27. In the circumstances, I am satisfied that the taxing officer took into account a wrong factor and fell into error by applying the cost of the project as the subject matter for purposes of determining instruction fee.

28. For the reasons stated above, the reference is allowed and the taxing officer's decision on item 1 instruction fee set aside. The respondent's bill of costs dated 15th November 2018, is remitted to the taxing officer with directions to reconsider item 1 on instruction fee only by applying the judgment sum as the subject matter. Each party to bear own costs of the reference.

Dated, signed Dated and delivered at Kajiado this 7th day of December, 2020.

E. C MWITA

JUDGE