



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 104 OF 2016

PRIYAT SHAH

MONA SHAH..... PLAINTIFF

VERSUS

MYENDA DEVCHAND MEGHJL.....DEFENDANT

RULING

1. This suit was commenced by a plaint dated 17th October, 2016 and simultaneously accompanied by an application by way of Notice of Motion seeking injunctive orders against the Defendant by the plaintiff on even dates.

2. The suit and the Notice of Motion application were opposed by the Defendant who filed a defence dated 2nd November, 2016 and a replying affidavit dated 31st October, 2016.

3. And vide a Notice of Motion application dated 29th November, 2016, brought under Order 2 Rule 15(1)(a) and (d), Order 40 Rule 7 and Order 51 Rule 3 and 15 of the Civil Procedure Rules, 2010, the Defendant successfully held the suit struck out with costs to him in its nascent on 31st May, 2017.

4. Subsequently, the Defendant filed his bill of costs dated 30th November, 2017, which was taxed by the Taxing Master, who in her considered ruling dated and delivered on 28th February, 2018, awarded the Defendant Kshs894,590/= as party and party costs, being instructive fees and other matters.

5. Dissatisfied with this ruling, the Plaintiffs/Applicants filed a reference vide a Chamber Summons application dated 12th March, 2018 in which the main issue in contention in said ruling is the increase of instructive fees from Kshs75,000/= to Kshs750,000/=, which is an increase of 100% by the Deputy Registrar (Taxing Master). Specifically item No. 17 in the bill of costs whose claim was expressed to include;

“Receiving instructions to defend this suit and to apply to strike out the same wherein the subject matter as determined from the affidavit evidence is assessed at Kshs78 million.... Kshs1,390,000,00.

6. In her ruling, the learned Taxing Master found as a fact, and agreed with the Applicant that the value of the subject matter in the suit could be discerned from the pleadings. She cited the definition of pleadings as defined under Section 2 of the Civil Procedure Act and stated that it includes affidavits.

7. At paragraph 1 of page 3, of the ruling, the Taxing Master found as a fact that the affidavit of Priyat Shah on 17th October, 2016 gave the value of accounts was more or less than Kshs78,000,000/=. The said affidavit compliments paragraph 8 of the plaint and prayers (a) and (c) of the same plaint. It is this finding that influenced the Taxing Master to increase the amount from Kshs75,000/= to Kshs750,000/= and taxed off Kshs640,000.00.

8. The above finding elicited opposition, with the Applicant/Plaintiff claiming that the value was not established or known, and in their application or known, and in their application dated 12th March, 2018, the applicant sought inter-alia that;

“the ruling on the taxation delivered on 28th February, 2018 be set aside and the Honourable Court be pleased to reassess the fees awarded in item number 17 of the bill of costs.”

9. In my consideration, the prayer covers all the other prayers sought for in the application. The Applicant set out ten (10) grounds whose sum total amounts to attacking the Taxing Master's failure to exercise her discretion judicially. At paragraph (g) of the application the Applicant states that the instructive fee as ruled by the Taxing Master was baseless in law and against the principle that costs should not be awarded as a punitive measure against a losing litigant, especially in matters such as in the instant case which involves inheritance issues and proceedings by a Defendant/beneficiary of the Estate.

10. This was opposed by the Respondent who raised four (4) grounds in their statement of grounds of opposition dated 22nd day of March, 2018. He stated that the reference filed by the Applicant was misconceived and supported the reasoning of the Taxing Master. He stated that she had exercised her discretion judicially and took into consideration relevant factors. He accused the Applicant for failing to show that there was an error. Both parties, on 9th May, 2018, agreed to dispose of the application dated 12th March, 2018 by way of written submission.

11. The Applicants filed their submissions dated 16th July, 2018 on 17th July, 2018 wherein they cited the decisions of **NYAGITO AND CO. ADVOCATES VERSUS DOINYO LESSOS CREAMERIES LTD (2014) eKLR** where other cases on the same principles were considered and urged the court to allow the application.

12. The respondent, on the other hand filed submissions dated 23rd May, 2018 in which he supported the ruling of the Taxing Master and cited the decision of **DESAI SARVIA & PALLAN ADVOCATES VERSUS TAUSI ASSURANCE CO. LTD (2015) eKLR**, where the principle that a party contesting a taxation ought to show that there was an error of principle or that the award was manifestly excessive, was discussed.

13. And on 6th February, 2019, the parties appeared before court for highlighting of their respective submissions and they urged their rival positions.

14. I have considered all the matters presented by the parties in respect of the application dated 12th March, 2018, and make the following observations;

a. In the ruling, the Taxing Master found as a fact that the value of the subject matter that was given by Priyat Shah in his affidavit of 17th October, 2016 is Kshs78 million. This figure has not been disputed by the said Shah or counsel in either the replying affidavit or submissions.

b. The main attack on this ruling was fueled by the Taxing Masters assertion that the subject matter could be discerned from the pleadings and ascertained for purposes of taxation to be that which was given by the plaintiff/Applicant, Priyat Shah. This realization was after the Taxing Master had already asserted the value as being unknown. This statement was not meant to be a conclusive finding, but rather a cursory look at the pleadings.

c. The last paragraph on page 2 as read with paragraph 1 of page 3 of the Taxing Master's ruling compliment each other; hence the Taxing Master ought to have used Kshs78,000,000/= as the value of the subject matter.

15. In conclusion, I find that the Taxing Master made the correct finding of fact that the amount of the value of the subject matter ought to have been discerned from the pleading (affidavit of Priyat Shah) as Kshs78,000,00/=. So that after making this finding, she ought to have used this figure to determine the fee chargeable.

In view of this, it is ordered that this matter be and is hereby referred back to the Taxing Master for taxation of item no. 17 of the Bill of Cost dated 30th November, 2017.

Costs of the application to abide by the final taxation.

SIGNED, DELIVERED and DATED at MOMBASA this 14th day of March, 2019.

D. CHEPKWONY

JUDGE.

IN THE PRESENCE OF:

Mr. Kagram, counsel holding brief for Mr Balala, counsel for Plaintiff/Applicant

No appearance for Mr. Khanna

Court Assistant; Beja