REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 391 OF 2016

MAKUPA TRANSIT SHADE CFS.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA....DEFENDANT

RULING

(Objection to taxation of party and party costs; suit having been commenced through a plaint; suit withdrawn with costs to the defendant; defendant filing a party and party bill of costs; taxing officer of opinion that the suit though commenced by way of plaint was actually one which sought prerogative orders and proceeding to tax the bill under the paragraph touching on taxation of bills of costs for suits commenced by way of constitutional petition or judicial review; error of principle on the part of the taxing officer to tax the bill under the paragraph for constitutional petitions and judicial review as the suit was commenced through a plaint; bill remitted back to the taxing officer for taxation to be conducted following the rule on taxation of a suit commenced by way of plaint)

1. What is before me is an objection to the decision of a taxing officer under Rule 11 (4) of the Advocates Remuneration Order. The objection has been filed by the defendant who is aggrieved by the manner in which the taxing officer taxed the party and party costs.

2. To put matters into context, the respondent commenced this suit through a plaint which was filed on 9 December 2016. In the plaint, the respondent averred that it owns two parcels of land at Kipevu area off Makupa causeway, Mombasa. In the years 2012 and 2013, it wished to construct an overpass across the Makupa Creek so as to link its land to Kibarani Highway. The respondent applied for and was granted approval by the National Environment Management Authority (NEMA) and commenced Stage I of the project which it completed in November 2014. In the year 2016, it put in motion plans to implement Stage 2 of the project, which consisted of reclamation of some land, and it obtained approval from NEMA, Kenya Forest Service, Water Resource Management Authority, the National Land Commission and the County Government of Mombasa (applicant and defendant in the suit). On 27 October 2016, the applicant's County Director of Planning and Architecture wrote to the respondent suspending its approvals. In its plaint, the respondent averred that the suspension led to the project, worth about 500 million stalling.

3. In the suit, the respondent sought the following orders :-

> *i. A declaration that the plaintiff, in undertaking the reclamation and construction works on Plot No 4016.MN/IV is acting in accordance with the conditions set in the respective licences and approval by the relevant concerned governmental authorities so tasked therefore.*
>
> *ii. A declaration that the defendant's purported decision to suspend reclamation and construction works on plot no. 4106/MN/IV is arbitrary, illegal, actuated by sheer malice and is contrary to the rules of natural justice.*
>
> *iii. A declaration that the construction works being undertaken by the plaintiff are not being done on land constituting part of disputed public private land or public utility land at all.*
>
> *iv. An order of injunction directed at the defendant either by herself, her employees, officers, servants and or through any other person(s) acting under her authority and or direction from barring them from either entering, stopping construction inspecting and or in any other way interfering with the plaintiff's reclamation and construction works on Plot No. 4106/MN/IV.*
>
> *v. An order directed at the defendant to lift the suspension of approval for reclamation and construction works on Plot No. 4106/MN/IV.*
>
> *vi. Costs of the suit borne by the defendant.*

vii. Any other or further remedy at the discretion of the court.

4. The applicant entered appearance and filed defence. Inter alia , it asserted that what the respondent actually wanted was to carve out for itself 9 acres from the Indian Ocean. It also pleaded that the stoppage of the project was an action under the Physical Planning Act, Cap 286 (now repealed) and that the matter ought to have first been brought to the Physical Planning Liaison Committee for determination of the dispute. With the defence, the applicant filed an application to have the suit struck out, so that the matter may be heard by the Physical Planning Liaison Committee.

5. On 3 February 2017, the respondent filed a notice to withdraw the suit. On 9 February 2017, the parties appeared before Komingoi J, and agreed by consent to have the suit discontinued with costs to the defendant, the same to be agreed or to be taxed. It seems as if the parties could not agree and the applicant filed a party and party bill of Kshs. 18,554,035/= for taxation. The parties filed written submissions in respect of the bill and a ruling was delivered on 21 June 2017 by Hon. G. Kiage, Deputy Registrar. In his decision, the taxing officer was of opinion that the value of the land was not the subject matter of the suit and was only mentioned because it was the property upon which the development was being undertaken. In his view, the real issue was the revocation of the licences issued to the respondent. The taxing officer was of opinion that in essence, the respondent was challenging the administrative action of the applicant and ideally the suit ought to have been brought through a Judicial Review application. He stated that although the sum of Kshs. 500,000,000/= was mentioned in the plaint, this was only set out to demonstrate the magnitude of the investment which the respondent intended to undertake. The taxing officer continued as follows :-

> *"As stated above the plaintiff's claim as ascertained from the orders which were sought which were essentially judicial review orders, I find that the true nature of the suit herein is Judicial Review and the same is to be taxed under Paragraph 1 (j) (ii) which deals with taxation of Constitutional Petitions and Prerogative Order (sic). Under the said paragraph the taxing officer is empowered to award a reasonable sum which should not be less than Kshs. 100,000/=.*
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> *Taking all the factors together and considering the circumstances of the present suit I hereby tax the instruction fees at Kshs. 500,000/= which in my view is reasonable all factors considered Kshs. 18,000,000 is taxed off from item 3.*
>
> *I have perused the rest of the items and I will not interfere with them as they are drawn to scale and I therefore tax them as drawn.*
>
> *The Bill of Costs is therefore taxed as follows ;*
>
> *Amount taxed off : Kshs. 18,000,000*
>
> *Bill of Costs taxed at Kshs. 554, 035."*

6. The defendant/applicant, aggrieved by the above decision thus preferred this reference. It is the position of the applicant that the taxing officer was in error in failing to tax the bill as one commenced through a plaint and used the wrong paragraph of the Schedule, that is, that touching on Constitutional Petitions and Prerogative Orders. It is asserted that the value of the subject matter was in the plaint, that is the sum of Kshs. 500,000,000/=, and therefore this was the value of the subject matter. The applicant contends that the taxing officer erred in concluding that the respondent's claim had nothing to do with the value of the land as this was the value of the construction works as given by the respondent. The applicant believes that there was an error of principle, with the taxing officer considering extraneous matters to the exclusion of germane matters that were before him.

7. I have gone through the written submissions of Mr. Buti, learned counsel for the applicant, and he basically asserts that the bill ought to have been taxed based on the value of Kshs. 500,000,000/= with consideration that this was a suit that was defended. He was of the strong opinion that the taxing officer made a serious error of principle in classifying the proceedings as judicial review proceedings or considering the bill under the provision relating to taxation of constitutional petitions and judicial review proceedings. He submitted that the bill could not be taxed under "other matters" when it was clearly commenced through a plaint. I have also taken note of the submissions of Mr. Akanga, learned counsel for the respondent, who I can see was of opinion that the taxation ought to have been under the residual head ("other matters") where there is no applicable scale. I have also read and internalised the various decisions relied upon by him.

I take the following view of the matter :-

8. The taxation of party and party costs in the High Court (and that would include the Environment and Land Court) is governed by Schedule 6 of the Advocates Remuneration Order. Schedule 6 has various paragraphs, but I do not think that it is necessary, for our purposes here, for me to set out all the paragraphs in Schedule 6, save for paragraphs 1 (a) and (b) and (j). I say paragraph 1 (a) because this is the paragraph that mentions the taxation of proceedings "whether commenced by plaint, petition, originating summons or notice of motion" and (b) because it is the paragraph that applies where there is filed a defence or other denial of liability. I have also singled out paragraph 1 (j) because it is this paragraph that the taxing officer opted to use. So that there we are clear, paragraphs 1 (a) (b) and (j) are drawn as follows :-

> *a. To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (amounts provided) ...*
>
> *b. 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 (amounts provided)…*
>
> *(j) Constitutional petitions and prerogative orders*

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate (amounts provided) …

9. In taxing the bill, it will be noted that the taxing officer applied paragraph 1 (j) above. He did so because he thought that the true nature of the suit was one of judicial review. With respect, I am of the opinion that the taxing officer proceeded on the wrong principle.

10. It is clear that paragraph 1 (j) is only applicable where the proceeding is a constitutional petition or one for judicial review. The suit before the court was neither a constitutional petition nor a suit for judicial review. It was a suit commenced by way of a plaint and which sought various orders. It was not for the taxing officer to speculate on what the respondent wanted from the court or believe that the respondent was better off if it had brought a suit by way of judicial review, or indeed consider that the plaint was actually a judicial review proceeding. This suit was filed by the respondent, and before filing suit, the respondent must have considered all the legal avenues available and thought that filing a plaint would suit it best. If the respondent wished to file a constitutional petition, or a case for judicial review, they would have done that, but what they wanted to bring before court was a plaint. That being the case, the taxation thus had to be conducted following the principles applicable in taxing a suit that has been commenced by way of plaint and not by way of a constitutional petition or judicial review.

11. It was an error in principle to thus tax the bill under paragraph 1 (j).

12. Given the foregoing, I set aside the whole decision of the taxing officer. The applicant has asked that the bill be remitted for taxation before a different taxing officer or by this court. In my view, the best avenue to take is to remit it back for taxation to the same taxing officer, if he/she is still stationed in this court. This is following the principle in the case of *Steel Construction & Petroleum Engineering (E.A) Limited vs Uganda Sugar Factory Limited (1970) EA 141*. If the taxing officer has since been transferred to another station, then it may be taxed by any other taxing officer.

13. The sole direction that I give to the taxing officer is to proceed and tax the bill as if it was one that was commenced by way of plaint. The arguments of what figure to use as the basis for taxation, or whether the taxation ought to be under the residual head (taxation for "other matters") and not paragraph 1 (b), will be arguments to be made before the taxing officer, and I make no directions or orders on that. All I am saying is that the taxation should proceed as if the suit was commenced by way of plaint. Other issues will be subject of arguments before the taxing officer.

14. The costs of this objection will be to the applicant.

15. Orders accordingly.

DATED and delivered this 21st day of APRIL 2020

JUSTICE MUNYAO SILA JUDGE,

ENVIRONMENT AND LAND COURT

AT MOMBA