



Kigen & another (Suing as the Administrators of the Estate of the Late Zakayo Sawe Arap Ngasura) v China Hanan International Co-operation Group Co. Limited; National Land Commission & 2 others (Interested Parties) (Environment & Land Case 351 of 2015) [2024] KEELC 124 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 351 OF 2015**

**EO OBAGA, J
JANUARY 25, 2024**

BETWEEN

**JAMES KIGEN 1ST PLAINTIFF
JOHANA KIPKORIR KIGEN 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ZAKAYO
SAWE ARAP NGASURA**

AND

**CHINA HANAN INTERNATIONAL CO-OPERATION GROUP CO.
LIMITED DEFENDANT**

AND

**NATIONAL LAND COMMISSION INTERESTED PARTY
THE ATTORNEY GENERAL INTERESTED PARTY
COUNTY GOVERNMENT OF UASIN-GISHU INTERESTED PARTY**

RULING

1. This is a ruling in respect of a chamber summons dated 17.8.2023 brought by way of reference under Rule 11(2) of *Advocates Remuneration Order*. The Applicant through its counsel seeks the setting aside of the taxing officer’s ruling of 12.5.2023 in so far as the same relates to items 1,2,3 and 4 of the Defendant/Applicant’s party and party bill of costs dated 17.12.2021.
2. The Applicant contends that the taxing officer was wrong in applying the lease amount and in holding that he could not ascertain the value of the subject matter in the counter- claim hence resorting to applying schedule 6A of the *Advocates Remuneration (Amendment) Order* of 2014.



3. The Applicant further contends that the value of the subject matter could easily be ascertained from the further amended plaint which was a liquidated claim and the taxing officer was wrong in relying on the lease amount which was not the subject of the Respondent's claim.
4. The Applicant argued that in its counter-claim, it sought to carry away 30,000/= tons of ballast. The Respondent had placed a ton of ballast at Kshs 1000/= thus translating into Kshs 30,000,000/= which could easily be ascertained from the pleadings and or judgement.
5. The Respondents opposed the Applicant's reference based on a preliminary objection dated and filed in court on 18.10.2023 and grounds of opposition dated and filed in court on even date. The Respondents contend that a reference or an appeal cannot be filed in the same file and that the reference should have been filed in a separate file.
6. The Respondents further contend that there is stay of proceedings issued by the Court of Appeal in Eldoret Civil Appeal No. 55 of 2022 (James Kigen & Johana Kipkorir Kigen –Vs- China Intel Coop Group Co. Ltd & others) and that any further proceedings in this matter will delay the finalization of the Appeal before the Court of Appeal.
7. As far as grounds of opposition are concerned, the Respondents contend that the Applicant's application is fatally defective and offends the provisions of the law; that the taxing officer's ruling on instruction fees was sound as the subject matter of the suit was a lease agreement made on 30.10.2024; that the judge declined to make any decision on the Plaintiff's case and that there was no specific amount sought in the counter-claim.
8. I have considered the Applicant's application together with the opposition to the same by the Respondents. I have also considered the submissions by the parties herein. The only issues for determination in this reference are firstly whether the reference should have been brought under a separate file and secondly whether the taxing officer applied the correct amount in arriving at the instruction fees in both main claim and counter-claim.
9. On the first issue, there is no legal requirement that a reference must be brought in a separate cause. It is in fact convenient when the reference is filed in the same file. This enables the judge considering the reference to make a quick reference to the issues at hand. There is therefore nothing wrong in bringing a reference in the same file.
10. In his ruling and reasons, the taxing officer stated that this was a land matter and that he could not ascertain the value of the subject matter from the pleadings and thus he resorted to the value of the lease amount. I have perused the judgement which was delivered on 10.12.2022. The Respondents' suit was dismissed with costs.
11. It is clear that when it comes to taxation, a taxing officer can ascertain the value of the subject matter, from the pleadings, judgement or settlement. In the instant case, the value of the subject matter in respect of the Respondents' claim could not be ascertained from the judgment. In this case, the taxing officer had the option of ascertaining the value of the subject matter from the pleadings. There was a further amended plaint filed on 31.10.2018. The Respondents sought a sum of Kshs 124,227,900/= being compensation for the ballast and materials used for construction of Jua Kali –Sugoi –Turbo Road and Limo Hospital Road and Illula Roads, compensation for 3 ½ extra land forcefully taken and converted into a quarry at the cost of Kshs 800,000/= per acre for the period of 2 years, compensation of Kshs 40,000,000/= in respect of 40,000 tons of ballast for construction of Kabenes - Kachibora Road and Kshs 2,617, 400/= being costs of building perimeter wall.



12. The above amounts were liquidated claims whose value could be ascertained from the pleadings. The claim was not based on lease sum. The taxing officer was therefore wrong and he committed an error of principle by holding that he could not ascertain the amount on instruction fees in respect of the plaint from the pleadings.
13. Equally the value of the subject matter could easily be ascertained from the counter-claim which the Applicant had filed. The Applicant had prayed in the alternative for refund of cash equivalent to 30,000 tons at commercial rates. The Respondents themselves had put the market value of one ton at Kshs 1000/=. It therefore follows that the value of the subject matter of this counter-claim was Kshs 30,000,000/=
14. It is trite law that a court cannot interfere with a taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle or the sums awarded are manifestly high or low as to lead to an injustice (see Nairobi ELC No. 3009 of 1983 (*Kariuki Njuguna & 17 others -Vs- Ngatho Kairu & 2 others*)).
15. From the above analysis, it is clear that the taxing officer committed an error of principle by not ascertaining the value of the subject matter in the plaint which was clear. This is the same case with the counter-claim. I am therefore forced to interfere with the taxing officer's decision as regards both the instruction fee and getting up fee in both the main suit and counter-claim. The 1st, 2nd, 3rd and 4th Items in the bill of costs dated 17.12.2022 are hereby set aside. The bill of costs is remitted back to the same taxing officer to be re-taxed in accordance with the directions given hereinabove. The Applicant shall have costs of this reference.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF JANUARY, 2024.

E. O. OBAGA

JUDGE

