Mombasa Cement Limited v Ministry of Lands and Physical Planning & 3 others; Vipingo Estate Limited (Interested Party) (Environment & Land Petition 17 of 2018) [2024] KEELC 3 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 3 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 17 OF 2018

SM KIBUNJA, J

JANUARY 17, 2024

BETWEEN

MOMBASA CEMENT LIMITED ..... PETITIONER

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY ..... 2ND RESPONDENT

THE NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

VIPINGO ESTATE LIMITED ..... INTERESTED PARTY

RULING

1. The 2nd respondent vide an application dated 1st September 2023 moved the court for the following prayers;

> " 1. Spent.
>
> 2. Spent.
>
> 3. This Honourable Court be pleased to vacate and set aside in its entirety the Ruling of the Honourable C.A. Ogweno, Deputy Registrar delivered by Hon. Nyariki on 12th April 2023 and the Certificate of Costs dated 12th April 2023.
>
> 4. The Court be pleased to refer the Petitioner's Bill of Costs dated 27th May 2020, for fresh taxation before a different taxing master.

5. The costs of this application be provided for."

The application is premised on the ten (10) grounds on its face marked (a) to (j) and supported by the affidavit of Samuel Njoroge, clerk of the National Assembly, sworn on the 1st September 2023 in which he inter alia deposed that the taxing master did not consider the 2nd respondent's submissions in opposition to the bill of costs; that amount of Kshs. 7,212,126.67 taxed was unreasonable and exorbitant; that the taxing master failed to appreciate the need for evidence of services rendered in taxation; that the taxing master failed to give reasons for allowing the items listed as attendances; that the Petition was not novel or complex to warrant the amount awarded; that the learned taxing master erred in failing to appreciate the petition was of public interest litigation and not commercial in nature; that the learned taxing master wrongly based the determination of the instruction fees on the value of the property which was not the subject matter of the petition; that if the application is not granted substantial and irreparable loss will be occasioned to public funds contrary to Article 201 of *the Constitution* since the 2nd respondent is a state organ and the costs to be paid will be out of public coffers.

2. The application is opposed by the Petitioner through the replying affidavit of Cyprian Onyony Advocate, sworn on the 6th October 2023, in which he inter alia deposed that the Petitioner's bill of costs dated 27th May 2020 was undefended despite the respondents having been given sufficient opportunity to do so; that the Court of Appeal delivered its judgement among others, upholding the award of costs to the petitioner on the 20th January 2023; that the 2nd respondent filed their submissions in the bill of costs on 20th January 2021 which was inordinately late; that the taxation of the instruction fees was not based on the value of the property as it was never a factor, but was tabulated on the basis of the complexity of the issues canvassed at both the trial and appeal levels; that there is no decree on record, and as leave for partial execution has not been obtained under section 94 of the *Civil Procedure Act*, there is no need for stay of execution; that the 2nd respondent failed to seek leave and file the reference within 14 days after receiving the afore mentioned ruling of Hon. Ogweno, as required under section 11 (4) of the Advocates Remuneration Order.

3. The court gave directions on filing and serving submissions on the 11th October 2023. The learned counsel for the 2nd respondent and petitioner filed theirs dated the 3rd November 2023 and 14th November 2023 respectively, which the court has considered.

4. The following are the issues for the determination by the court:

   a. Whether the 2nd respondent has established reasonable grounds for this the court to interfere with the ruling of the taxing master.

   b. What orders to issue.

   c. Who pays the costs of the application?

5. The court has carefully considered the grounds on the chamber summons, affidavit evidence tendered, submissions by the learned counsel, the record and come to the following conclusions:

   a. The prayers remaining determinations are numbers 3 to 5 that are set out above. The petitioner has pointed out the taxing master's ruling subject matter of the instant application was

delivered on the 12th April 2023. The 2nd respondent then filed the notice of objection dated the 18th April 2023 which reads as follows:

> " Take Notice that pursuant to Rule 11 (1) of the Advocates Remuneration Order (Cap 16) the 2nd Respondent objects to your having on 12th April, 2023 taxed items 1 and 2 and the entire Petitioner's Party and Party Bill of Costs dated 21st May 2020 in the sum of Kshs 7,212,126.67..... "

b. My understanding is that the 2nd respondent was objecting to the ruling on all the items including item 1 and 2. Upon receipt of the 2nd respondent's objection, Order 11 (2) which states as follows kicked in:

> " The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."[underlining mine].

The operative word is "shall", but I have perused the record and find there is no reply by the taxing master to that objection. Though the 2nd respondent has not attempted to explain the delay of over four (4) months before making this application, the court will take it that it was still waiting for the taxing master to respond to their objection by giving reasons for the taxation. The petitioner's claim that the 2nd respondent needed to apply for leave to file the application outside the 14 days has no merit as the said period would have started to run from the date of the taxing master's reply which was never done.

c. The ruling of 12th April 2023 had provided reason for taxing items 1 & 2 in the amounts allowed. The taxing master under the heading of "1. Instruction fees" at pages 2 to 5 of the ruling set out the prayers in the petition and then summarised the petitioner's basis for item 1 as follows;

> " The petitioner now seeks the sun of Kshs.40 million as instruction fees earned. This they claim based on the value of the suit properties namely Title No. MN/111/191/2 measuring 173.7 Ha and Title No. MN/111/4391 measuring 499.0 Ha all valued at Kshs.700,000,000/-"

Contrary to the 2nd respondent's claim that the value of the properties was considered in tabulating the instruction fees item, the taxing master at page 5 of the ruling held as follows;

> " I have perused the pleadings and note the value of the subject matter cannot be discerned from the pleadings or from the court's judgement. There is no valuation report to support this value. To allow the same would be unjust as the same is speculative and its basis has not been supported by any documents."

The foregoing shows that the values of the properties were not considered in arriving at the amount of the instruction fees. In the case of Kamunyori & Company Advocates versus.

Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006, the Court of Appeal held that;

> " .. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside"

The applicant has therefore failed to establish that the taxing master committed an error of principle in determining the instruction fees in this matter.

d. The ruling also indicates under "3. Attendances" that the taxing master had agreed with the amounts claimed under the items thereunder, to have been drawn to scale, while the rest of the items were taxed off. I have however noted that item 66 is appearing twice between items 60 & 70 and 98 & 74. In the case of *Kipkorir, Tito & Kiara Advocates versus Deposit Protection Fund Board [2005]* eKLR the court held that;

> " On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs."

And, in the case of *Peter Muthoka & Another versus Ochieng & 3 Others [2019]* eKLR the court held that;

> " It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive." (emphasis ours)"

In the case of *Ilongo Tokole Jean versus Pallet Logistics Limited & 2 Others [2021]* eKLR it was held that,

> " This Court only interferes with the decision of the Taxing Master where there has been an error in principle but should not do so on questions solely of quantum as that is an area where the Taxing Master is more experienced and therefore more apt to the job. A Court can therefore only interfere with the decision of the Taxing Master in the event that while taxing the bill of costs, he considered factors that he ought not have been considered in the first place or failed to consider facts which he ought to have considered."

e. The relevant provision in taxation of constitutional petitions is Schedule 6 (1) paragraph J, which provides as follows:

> " 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—
>
> (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
>
> (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000"

The taxing master applied the above provision and exercised her discretion when she held that;

> " The applicable scale would be paragraph (j) of Schedule 6 (1), Advocates (Remuneration) Order, 2014.....
>
> I have noted there was substantial amount of research involved based on the volume of authorities filed, the large volume of pleadings and the extensive issues that parties addressed themselves to during trial. The suit was of much importance to the petitioner and respondents based on the issues framed by the court for determination.
>
> The suit was heard and concluded within two years.
>
> .....
>
> Guided by these principles, and taking into account the complexity of the issues raised at the trial .....
>
> I do find reason to increase the basic instruction fees and hereby do so from Kshs.100,000/- to Kshs.5,000,000/- which I find to be fair remuneration for work done. The sum of Kshs.40 million was not justified and thus Kshs.35 million is taxed off.
>
> 2. Item 2
>
> Item 2 is thus taxed at Kshs.1,666,666,67/- being 1/3 of item 1."

The court in the case of William Kabogo Gitau v Ferdinand Ndung'u Waititu [2019] eKLR held that,

> " From the above and considering the provisions of schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014, and the assessed costs being fifty (50) times in respect of instruction fees in an opposed constitutional petition, I have no doubt in finding the sum of Kshs.5,000,000/- to be astronomical and excessive for instruction fees for a constitutional petition, and taking into account that the petition was determined on a preliminary point of law and did not proceed to full hearing.

I am further of the view, that the taxing master having in her ruling found, that the petition was not complex, that it did not go to full hearing and that no experts were involved made an error in principle in arriving at the payable instruction fees. I find the taxing officer erred in awarding the sum of Kshs.5, 000,000/- as instruction fees. This without doubt was a manifest error in principle on the award of instruction fees which in the interest of justice ought to be varied and/or set aside."

It is apparent the value of the suit properties was not disclosed in the pleadings filed and or the court's judgement. The taxing master therefore exercised her discretion and taxed the instruction fees item according to the complexity of the suit and not the value of the suit properties as alleged. Unlike in the case of William Kabogo Gitau v Ferdinand Ndung'u Waititu [supra], that was determined at the interlocutory stage, this was a hotly contested petition that was heard and determined on merit to the Court of Appeal stage, and I find the Kshs. 5,000,000 awarded as instruction fees not to be manifestly excessive to warrant this court interfering with it.

f. That as all the other items were taxed to scale, the court finds no error of principle or basis of interfering with the awards by the taxing master through the ruling of 12th April 2023, except correcting the error apparent thereon of double or repeat award on item 66, by reducing the total by Kshs.7,100/- only. The 2nd respondent's chamber summons application dated the 1st September 2023 is otherwise, without merit.

g. As the application has been found to be without merit, the 2nd respondent should pay the petitioner's costs as in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs should follow the event unless for good cause otherwise ordered. I find no good cause to depart from that prescription.

6. Flowing from the foregoing determinations, the court finds and orders as follows:

a. That the 2nd respondent's chamber summons application dated the 1st September 2023 is without merit.

b. That the said application is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JANUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.