Wambui v Mwangi & 3 others (Civil Application 465 of 2019)
[2024] KECA 248 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 248 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 465 OF 2019

F TUIYOTT, JA

MARCH 8, 2024

BETWEEN

EDWARD NDUNGU WAMBUI ..... APPLICANT

AND

FRANCIS KANYANJUA MWANGI ..... 1ST RESPONDENT

COMAT MERCHANTS LIMITED ..... 2ND RESPONDENT

JULIUS MUTUGI MUCHEMI ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an application for reference on taxation from the ruling of the Deputy Registrar (Hon. L.D. Ogombe) dated 28th July, 2023 in Civil Appeal No. 465 of 2019)

RULING

1. There are two references before this Court from a ruling dated 28th July, 2023 by Hon. Ogombe, a taxing officer of this Court, one of which immediately runs aground.

2. Unhappy with that decision the appellant through his advocates, Muchemi & Co. advocates, wrote a letter dated 4th August, 2023 to the Deputy Registrar of this Court seeking that the taxed bill of costs be referred to a Judge for re-assessment or review. The record shows that the letter was filed in Court on 7th August, 2023 with the infirming effect that that it was outside 7 days of the date when the decision was rendered in breach of the period prescribed by Rule 117(4) of the *Court of Appeal Rules*, 2022. As no extension of time was sought or granted for bringing that late reference then it must be struck out. A formal order in those terms shall be made at the end of this decision.

3. The second reference which suffers no such inhibition was by the 1st respondent. Through his advocates, CM Advocates LLP, the 1st respondent presented to the taxing officer a bill of costs of

Kshs.3,009,150/= for taxation. In the end the amount was taxed downwards to Kshs.1,056,016.50. Aggrieved by that ruling and after seeking reference through his advocates' letter of 3rd August 2023 and filed a day later, the 1st respondent moved this Court by way of chamber summons dated 3rd August, 2023 and brought under sections 1A, 3B, 3A of the *Civil procedure Act* and Rule 117 of the Court of Appeal Rules, 2022 seeking two related orders:-

1. Thatthe Honourable Court be pleased to vacate and set aside the Ruling and reasoning of the learned Taxing Master Honourable L.D. Ogombe dated and delivered on 28th July, 2023 taxing the instruction fees in the Party and Party Bill of Costs dated 9th June, 2022 at KSHs. 1,000,000/=.

2. That the Honourable Court be pleased to re-assess the quantum of instruction fees and award KSHs. 3,000,000 as sought in the Bill of Costs dated 9th June, 2022.

4. In the affidavit in support of the summons, he deposes that on 9th June, 2022, the learned Taxing Officer awarded him Kshs.1,056,016.50 as party and party costs. He contends that the sum awarded of Kshs.1,000,000.00 as instruction fees was manifestly low. He asserts that taking into account the value of the subject matter which was in the sum of Kshs.78,173,655.00, the award of Kshs.1,000,000.00 was manifestly low. In this respect, this Court is asked to give regard to Paragraph 9(2) of Schedule 3 of the *Rules* of this Court. He states that the value of the subject matter also speaks to the nature, interest of the parties and importance of the appeal, which are also key considerations in awarding instruction fees. He further contends that the appeal involved complex issues of land law and the conduct of the proceedings involved both oral and written submissions which took a lot of time and research. He deposes that in all the circumstances the said decision was premised on the wrong principles of law, is without basis in law, unreasonable and unjust.

5. The application is opposed by the appellant, Edward Ndung'u Wambui *vide* a replying affidavit sworn on 7th November, 2023. He is at the other end of the pendulum! He contends that the sum awarded of Kshs.1,056,016.50 is manifestly excessive and undermines the basic provisions of Part 3(4)(c) of the Second Schedule which caps the maximum instruction fees at Kshs.100,000. He deposes that this Court ought to be guided by Paragraph 9(2) of the Third Schedule to the *Rules* which sets out the principles a taxing officer ought to consider and while the said considerations are equally important, that provision is silent on the question of quantum of costs, which question, it is suggested, is cured by Part 3(4)(c). That in choosing to rely on Paragraph 9(2) of the Third Schedule while neglecting Part 3(4)(c) of the Second Schedule, the Deputy Registrar erred in principle thereby justifying the timely intervention of this Court to correct the said error. He argues, further, that the main issue in the appeal was whether the appellant was a bonafide purchaser for value without notice and therefore there was no complexity, hence the instruction fees as awarded is excessively high. Having also been a successful litigant in the previous proceedings at the High Court and having lost Kshs.50,000,000.00 as an innocent purchaser for value without notice, it would be unfair to order him to bear a heavy burden of costs. He urges this Court to review/reassess the instructions fees downwards to Kshs.100,000.00.

6. The 1st respondent, in rebuttal to the assertion made by the appellant, filed a reply sworn on 10th November, 2023. He strongly contends that the argument that the Deputy Registrar ought to have relied on Part 3(4)(c) of the Second Schedule is misleading and baseless. Rule 109, it is submitted, provides that fees under the Second Schedule is the fees payable to the Court at the point of lodgement of applications and appeal and not for assessment of party and party costs.

7. The parties have filed written submissions. I will not rehash them as they are substantially a regurgitation of the positions taken in the respective affidavits.

8. In *Kipkorir, Titoo & Kiara v Deposit Protection Fund Board* (2005) eKLR, this Court held:-

> " On a 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
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> > "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".
> >
> > An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (*supra*) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D'Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (*supra*)."

9. The first issue that I need to resolve is whether, as posited by counsel for the appellant, there is a place for the Second Schedule of the *Rules* of this Court in considering instruction fees. To understand the nature of fees referred to in the Second Schedule one starts with Rule 109 which reads;

> " 109. Fees payable
>
> Subject to rules 113 and 114, the fees set out in the Second Schedule shall be payable in respect of the matters and services set out therein:
>
> Provided that—
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> a. no fees shall be payable upon any appeal from a superior court in exercise of its original jurisdiction in a criminal case, or on any application in connection with any such appeal, or for the supply of the copy of the record of appeal to any party to any such appeal;
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> b. no fee shall be payable by the Government in respect of any criminal application or appeal; and
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> c. copies of any documents may be issued without fees to such persons as the President may nominate or at such reduced fees as the President may direct."

10. This clearly is in respect of fees of court, also known as court fees. Drawing from the Second Schedule itself the following are examples of those fees; for lodging of documents with the Court; for work done by the Court on behalf of a party (falling in this category is fees set out under Part 2 (2) for preparing

a record of appeal in criminal appeals); sealing of orders; preparation of certified copies of documents; and security for costs in civil appeals. Counsel for the appellant misapprehends the *Rules* when he suggests that Part 4.2 of the Second Schedule or any part at all is relevant in assessing instruction fees due to an advocate.

11. Perhaps it is worth underscoring that the only controversy raised in this reference is in respect to the amount allowed by the Taxing Officer on instruction fees. On this, the learned Taxing Officer correctly cited Paragraph 9(2) of the Third Schedule as the guide. It reads;

> "(2) The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

12. The first argument put forward by the 1st respondent is that the value of the subject matter being Kshs.78,173,755 is indicative of the nature, interest of the parties and importance of the appeal. It seems clear to me, at least from the language of the relevant provision, that the amount involved, in this case the value of the subject matter, is a distinct yardstick from the nature, interest or importance of the appeal. The amount cannot be used to weigh the nature, interest and importance of an appeal. The monetary value of a subject matter of an appeal may be insubstantial yet the appeal involves a matter of significant public interest. The converse may be true. It has not been demonstrated by the 1st respondent that the nature of the appeal was of such importance or nature and drawing extraordinary interest from the parties as to call for an award of three times the amount which the taxing officer, in her discretion, thought to be fair.

13. A related argument made in supporting of the reference, but without giving a figure, is that the fees awarded is manifestly lower that those computed under Schedule 6 if the *Advocates Remuneration Order*, presumably in respect of matters before the High Court and Courts of equal status. Intrigued by this argument I first sought to find out what the instruction fees would be at the Environment and Land Court for the stated value of the subject matter. It is, I believe, in the region of Kshs.1,378,000.00. To assert, therefore, that the amount of Kshs.1,000,000.00 awarded by the Taxing Officer of this Court is manifestly low is disingenuous.

14. Further, the argument is flawed for at least two reasons. First, if the intention of the makers of the rule was that the instruction fees should be pegged on those allowed by the *Remuneration Order* then nothing would have been easier than to expressly say so. Second, it is debatable whether every appeal to this Court will always be more taxing and involved than the trial or appeal from which it arises. Each matter must turn on its own peculiarities. The 1st respondent ought to have demonstrated that defending this particular appeal was more involving and taxing to his advocates than the trial.

15. The final contention that the appeal was complex and novel must equally fail because the 1st respondent did not point out the alleged complexity or novelty. I have read the Judgment of this Court, although a lengthy 76 paragraph decision, it discussed and resolved issues that were old hat and familiar.

16. Clearly there is no reason to fault the taxing officer. The reference of 4th August, 2023 filed on 7th August, 2023 is struck out and the application of 3rd August, 2023 is dismissed. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR