



REPUBLIC OF KENYA



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Mount Elgon Beach Properties Limited v Mwanongo & another (Civil Appeal 102 of 2018) [2023] KECA 277 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 277 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 102 OF 2018
GV ODUNGA, JA
MARCH 17, 2023

BETWEEN

MOUNT ELGON BEACH PROPERTIES LIMITED APPELLANT

AND

HARRISON SHIKARU MWANONGO 1ST RESPONDENT

KALUME MWANONGO MAGARO 2ND RESPONDENT

(Being an Appeal from the Judgement of the Environment and Land Court at Malindi (Hon. Justice O. A. ANGOTE) dated at Machakos on 18th September, 2017 and delivered at Malindi by Hon. Justice J. O. Olola on 5th October, 2017 in Malindi ELC No. 85 of 2015))

RULING

1. On July 25, 2017, this court delivered a judgement in this appeal by which this appeal was allowed and the judgement of the ELC Case No 85 of 2015 Malindi set aside. In allowing the said appeal, the court dismissed the respondent's originating summons dated August 2, 2012. The appellant was awarded the costs of the appeal as well as those of the proceedings in the ELC. The suit in the ELC was in respect of claim by the respondents of land reference No 18664 (CR No 25183) by virtue of adverse possession.
2. On February 8, 2022, the taxing officer (Hon H Adika), the deputy registrar of this court, upon hearing the parties herein, taxed the appellant's bill of costs in the sum of Kshs 1,160,510/-. In his ruling the learned deputy registrar found that though the appellant had in the bill of costs attempted to give the value of the property, that value was not authenticated and there was no evidence to confirm any price hence the amount was left to the discretion of the taxing officer.
3. The learned deputy registrar then stated that after considering the relevant principles such as the person who was to pay the amount and the nature of the case, the appropriate instructions fees was Kshs 1,000,000/-and taxed that item in the said sum.



4. The matter before me is a reference brought pursuant to rule 112 of the 2010 [Rules of this Court](#) (now Rule 117 of the 2022 edition of the said Rules) which provides that:
 1. A person who is dissatisfied with a decision of the registrar in his or her capacity as taxing officer may require any matter of law or principle to be referred to a judge for the judge's decision and the judge shall determine the matter as the justice of the case may require.
 2. For the purpose of sub rule (1), any decision extending or refusing to extend time for the lodging of a bill of costs or any exercise by the registrar of the over-riding discretion given the registrar by paragraph 12 of the third schedule shall be deemed to involve a matter of principle.
 3. A person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge and the judge shall have power to make such deduction or addition as will render the bill reasonable and except as provided in this sub-rule, there shall be no reference on a question of quantum only.
5. In this motion the respondents are seeking that the said taxation be reviewed as concerns the instructions fees as the same is excessive and unjustified. In the supporting affidavit sworn by Gikandi Ngibuini, learned counsel for the respondent, it was deposed that the award of costs to the appellant in the matter of Kshs 1,160,510/- was excessive to almost represent an entirely erroneous taxation. It was deposed that there is no similar case where the costs have been taxed in excess of Kshs 100,000/- and that the maximum costs allowed under part 3 of the second schedule at paragraph 9(c) of the [Court of Appeal Rules](#) is Kshs 100,000/-. It was therefore averred that the costs allowed by the learned deputy registrar was over 100% of the costs allowed by the law.
6. Before me, Mr Gikandi relied on part 1 of rule 105 of the Rules of this court which provides that if the value of the subject matter is more than 210,000/- the instructions fees is 100,000.00. However, the deputy registrar is given discretion by rule 111 where the value is not disclosed, as was the case in the instant matter. Learned counsel however submitted that since rule 105 part III talks of a maximum of Kshs 100,000.00 for any case where the subject matter is more than 210,000/-, it follows by parity of reasoning that even in cases where the value of the subject matter is not disclosed the ceiling of Kshs 100,000/- applies. It was his case that it was not conceivable and realistic to expect the instructions fees to jump to 1,000,000.00. It was submitted that based on the decision in the case of [Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna](#) [2006] eKLR, the taxing master's discretion must be exercised on well known principles and not on caprice hence a figure cannot be plucked from the air.
7. In this case it was submitted that no reason was given such as the complexity of the matter in exercising the discretion hence the exercise of the discretion was unreasonable.
8. In opposing the reference, Ms Chepkoyo, learned counsel for the appellant submitted that rule 111 of the Rules of this court gives the deputy registrar the power to tax costs. According to learned counsel, part IX of the schedule is clear that the power to tax costs is discretionary. It was noted that the only dispute in this reference was as regards the instructions fees of Kshs 1,000,000.00. It was submitted that the instructions fee is based on the value of the subject matter as was held in [Joreth Ltd v Kigano & Associates](#) civilappeal No 66 of 1999 [2002] EA 92.



9. That value, according to learned counsel, can be ascertained from the pleadings, judgement or settlement and if the value cannot be determined, the taxing officer can assess the costs considering *inter alia* the nature of the matter. In this case it was submitted that the learned deputy registrar disclosed his reasons for assessing the instructions fees in the sum of Kshs 1,000,000.00 as including the person who was to pay the costs, the nature of the case and the fairness and was clear as to why he assessed the costs in the sum stated.
10. Learned counsel submitted that the taxing officer is an officer of this court and unless there is clear error of principle, his discretion ought not to be interfered with as was held in [Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna](#) [2006] eKLR. It was submitted that taxation is not a mathematical exercise but is based on experience and ought not to be interfered with simply because it is too high or too low. In this case it was submitted that the challenge is solely based on the quantum without demonstrating any error in principle. The court was urged not to interfere with the amount taxed since the law does not curb any amount to be taxed, simply because the court may feel that the amount is too high.
11. I have considered the submissions made before me in this matter. It is clear from the foregoing that a judge of this court should only interfere with the decision of the taxing officer where there has been an error in principle. I therefore agree with the views expressed by Ojwang J (as he then was) in [Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna](#) [2006] eKLR that:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularized justification of the mode of exercise of any discretion provided for...The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and



simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.”

12. It is therefore clear that mere allegation that the amount taxed was excessive would not justify interference with the deputy registrar’s exercise of discretion. In fact, rule 112(3) bars any reference based only on quantum. However, the taxed costs might so manifestly excessive as to amount to an error of principle. This position was restated by the Supreme Court of Uganda (Mulenga, JSC) in *Bank of Uganda v Banco Arabe Espaniol*, civil application No 29 of 2019 where it held that:

“...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”

13. In this case it is contended that by parity of reasoning under no circumstances should the costs be taxed in excess of Kshs 100,000/- either where the amount is specified or otherwise. With due respect this submission cannot be correct.

Firstly, part 3 of the second schedule does not deal with payment of costs. It deals with fees chargeable. Accordingly, it is not the provision upon which costs are to be taxed. Taxation of costs is provided for in the third schedule and paragraph 9(2) thereof provides that:

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.

14. Those are the factors that the taxing officer is required to take into account.

If he takes into account irrelevant factors, that would amount to an error of principle. Similarly, if he does not take the same into account, it would amount to an error of principle. He is not expected to just pluck a figure from the air but is expected to exercise the discretion judiciously which means he has to do so in accordance with the laid down principles. The only way in which it can be shown that the laid down principles have been taken into account is by the setting out not only the general factors to be considered, but also stating how the application of the said factors impacted on the exercise of the said discretion. I agree that the elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction.

15. This is my understanding of the decision in *Opa Pharmacy Ltd v Howse & Mc George Ltd* [1972] EA 233 where it was stated:

“Whereas the taxing officer is given discretion of taking into account other fees and allowance to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instructions fees, the taxing officer in this case gave



no reason whatsoever for doubling the instructions fees. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer's mind. The failure to give any reason for the choice, surely, must therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one's discretion."

16. In this case the learned taxing officer stated the factors that ought to be considered in taxing of costs. What he did not do was to explain how those factors he had identified were relevant to the matter before him so as to justify the exercise of his discretion one way or the other. In my view, it is not enough to simply set out the relevant factors. The taxing officer ought to go further and connect those factors that he feels are relevant to the matter before him. If, as the taxing officer stated in this case, some of the factors he considered were who was to pay the amount and the nature of the case, he ought to have gone further and explained what is it as regards that person and the nature of the case that influenced the exercise of the discretion. In the absence of this, this court cannot determine what factors were taken into account.

17. However, once the taxing officer sets out the manner in which the factors influenced his exercise of discretion, the judge ought not to interfere therewith. Further, as was held in *Bank of Uganda v Banco Arabe Espaniol*, Civil application No 29 of 2019:

"Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

18. In this case based on the material placed before me, it is not possible for me to conclude that the error in principle arising from the omission to explain the nexus between the principles identified and the matter before the taxing officer did not affect the decision on quantum. Accordingly, I find merit in this reference, set aside the decision of the taxing officer and direct that the matter be taxed afresh by the Hon deputy registrar, taking into account the sentiments expressed herein.

19. There will be no order as to the costs of this reference.

20. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

*I certify that this is a true copy of the original
signed*

DEPUTY REGISTRAR

