



**Kuria v Kiru Tea Factory Co. Ltd (Civil Appeal 69 of 2017)
[2022] KECA 832 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 832 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 69 OF 2017
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JULY 29, 2022**

BETWEEN

JOSEPH GIOCHE KURIA APPELLANT

AND

KIRU TEA FACTORY CO. LTD RESPONDENT

*(Appeal from High Court of Kenya at Nyeri against the Ruling and Orders
of (Mshila, J.) dated 30th March, 2017 In Civil Appeal No. 136 of 2012)*

JUDGMENT

1. This is a second appeal against the ruling and order of Mshila J delivered on March 30, 2017 following a reference by the appellant disputing the bill of costs by the taxing master. The taxing master had taxed the bill from Kshs. 105,395 to Kshs. 49,830. This aggrieved the appellant who filed the said reference which was dismissed by the High Court leading to this appeal.
2. In dismissing the reference, the High Court agreed with the taxing master in the application of the Advocates Remuneration Orders (ARO) of the years 2009 and 2014 as set out in the taxation ruling dated September 23, 2016 followed by Certificate of Costs dated October 14, 2016.
3. We consider it necessary to put the dispute in perspective. The appellant sued the respondent in the magistrate's court claiming tea dues amounting to Kshs. 458,887. The respondent denied the claim which prompted the appellant to file an application to strike out the defence which application was allowed. The respondent's appeal against the dismissal was unsuccessful leading to the bill of costs, the subject of this appeal.
4. On the instruction fees, the learned judge found that the subject matter of the appeal arose from the wrongful striking out of the defence by the trial court, and the minimum fees by the Advocates Remuneration Order of 2009 was Kshs. 6,300. That by the taxing master awarding Kshs. 35,000, she



had exercised her discretion well and there was nothing in law that warranted her to interfere with the same.

5. The superior court as well considered the items 3,8,20,21 & 22, 16-25 and found the appellant's contention on the same lacking any merit to warrant her indulgence. The reference was therefore dismissed. It is that ruling that provoked this appeal.
6. The appellant has raised two grounds in the memorandum of appeal dated May 22, 2017. It is the appellant's case that the learned judge failed to appreciate the basis of taxation hence erred in principle; and that there was failure to appreciate the basis of the law as far as the remuneration order provides for minimum fees.
7. The matter was canvassed by way of written submissions and when the same came up on May 16, 2022 for hearing before us, only the appellant who had filed submissions appeared and informed us that he entirely wished to rely on his written submissions. The respondent did not attend the hearing of the appeal but had opposed the appeal through written submissions dated September 3, 2018.
8. According to the appellant's submissions, the proceedings in the subordinate court involved a claim for a liquidated claim in the sum of Kshs. 458,887 and an order for injunction against future refusal to pay the appellant his tea dues as and when they arose. As such, the value of the subject matter was ascertainable from the pleadings and the decree granted.
9. It therefore follows according to the appellant, that the superior court was to adhere to the principle that instruction fees should have been pegged on the value of the subject matter as the same was known from the parent pleadings. That by basing the instruction fees on the subject matter of the appeal, the learned judge erred.
10. The appellant while relying on the case of *Joreth Ltd vs. Kigano & Associates* [2002] 1 E.A. 92 submitted that the two courts below fell into error when they failed to pay homage to the well settled principle for consideration on instruction fees.
11. The appellant further submitted that item 3 on the bill of costs presented before the taxing master was clearly indicated as having been undertaken on October 16, 2014 and as such, it followed without doubt that the applicable ARO was that of 2014 and not that of 2009 as wrongfully decided by the taxing master and confirmed by the High Court. The appellant thus prayed for his appeal to be allowed as prayed in the memorandum of appeal.
12. In its submissions the respondent reiterated that the substance of the appellant's complaint in the High Court was the striking out of its defence, and this had nothing to do with the monetary value of the claim filed in the Magistrate's Court, nor could that monetary value be used as a basis for taxation in the High Court.
13. Being a second appeal, Section 72(1) *Civil Procedure Act* restricts this Court to consideration of matters of law only. That position has been amplified in several decisions of this Court among them *Kenya Breweries Ltd v. Godfrey Odongo, Civil Appeal No. 127 of 2007* and *Stanley N. Muriithi & Another v. Bernard Munene Ithiga* (2016) eKLR, where this Court held, inter alia, that a second Appellate Court ought to confine itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.



14. We have considered the pleadings, and the party’s submissions, and guided by the principles espoused in the established case of *Mbogo & Another vs Shab* [1968] EA, p.15 that;

“ An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

15. More particularly, in the case of *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR this Court observed;

“ 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.”

17. There are two issues to this appeal; whether the value of the subject matter was ascertainable and, secondly whether in assessing the party and party bill of costs the two courts below fell into error.

18. However, before rendering our opinion on those two issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. The High Court or even this Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in mis-justice, as was rightly put in the case of *Mbogo vs. Shab* (1968) EA 93. Specific to taxation the Court in *Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR was categorical 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.”

19. The exercise of discretion by the taxing officers was considered further by this court in the case of *Kamunyori & Company Advocates vs. Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006*, which reminds us 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”

20. Was the learned Judge in error, as claimed by the appellant, when she found that the taxing officer committed no error in principle in the manner she exercised her discretion?



21. As pertains to party and party costs, the role of the taxing officer was clearly spelt out by this Court, in the case of *Peter Muthoka & another vs Ochieng & 3 others* [2019] eKLR thus;

“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.”

22. Further in the case of *Joreth Ltd vs. Kigano & Associates* [2002] 1 E.A. 92, which has been cited by the appellant, it was held that the value of the subject matter can be discerned or determined from the pleadings, the judgment or the settlement, as the case may be. The Court in that case stated that;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

23. In this case although the principal sum or value was in the pleadings, an application was made to have the defence struck out and which application was successful. The value of the subject matter in the suit before the Magistrate’s Court was the amount stated in the pleadings, and this was ascertainable in so far as the party and party costs in the chief magistrate’s court was concerned, but that is not the issue before us. The issue before us arises from the party and party costs in the High Court which arose from the appeal against the order by the Chief Magistrates Court striking out the defence, which appeal was dismissed, and that is what led to the party and party bill of costs dated April 12, 2016.

24. The case never went to full hearing, so the subject matter before the High Court was the striking out of the defence, and this subject matter was not ascertainable. The taxing master gave reasons for the application of the 2009 and 2014 ARO. The discretion applied cannot be faulted. The High Court was right to dismiss the reference. We see no merit in the appeal which is hereby dismissed. We make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....



JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

