



Dewdrops Enterprises Limited v City Council of Nairobi & another (Civil Appeal (Application) 71 of 2013) [2022] KECA 1327 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1327 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 71 OF 2013
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 2, 2022**

BETWEEN

DEWDROPS ENTERPRISES LIMITED APPLICANT

AND

CITY COUNCIL OF NAIROBI 1ST RESPONDENT

BOMCO BUILDING CONTRACTORS LIMITED 2ND RESPONDENT

(Being an application to reverse the decision of M. Warsame, J.A. dated 5th November, 2021 issued in Reference on Taxation by Hon. L. Ogombe, Deputy Registrar, dated 24th June, 2021 in HCCA NO. 71 OF 2013)

RULING

1. This is a reference to a full court, pursuant to rule 112(5) of the [Court of Appeal Rules, 2010](#) [now rule 117(6) [Court of Appeal Rules, 2022](#)], from the decision dated November 5, 2021 of a single judge of this court (Warsame, JA). The learned judge's ruling was made pursuant to a reference challenging the decision of the taxing officer, Hon Ogombe, and the applicant being aggrieved by the outcome, has applied to the full bench of this court to reverse the same.
2. The background to this matter is that the applicant was dissatisfied with the decision of the High Court in High Court Civil Case No 892 of 2002 delivered on July 31, 2012. Civil Appeal No E027 of 2021 challenging the decision of the High Court was filed and the Court of Appeal *vide* a judgment dated October 6, 2017 dismissed it with costs to the 1st and 2nd respondents.
3. Subsequently, the 2nd respondent through its advocates filed the party and party bill of costs dated November 30, 2020 for the sum of Kshs 1,015,010/00.00 which included the instruction fees to oppose the appeal drawn in the sum of Kshs 750,000.00. This was opposed by the applicant who proposed a sum of Kshs 1,500.00. The taxing officer acknowledged the principles to consider as being inter alia: the nature and importance of the petition; the complexity of the issues raised; the difficulty



- or novelty of the questions raised; the time expended by the advocates; and the value of the subject matter. Ultimately, the instruction fee was taxed at Kshs 500,000.00.
4. The taxing officer allowed costs on drawing and copying various documents, as they were drawn to scale; taxed off Kshs 1000.00 on court attendances; and allowed disbursements related to court fees, as the receipts were available in the court record. Drawing from part 5 of the second schedule of the [Court of Appeal Rules](#) and rule 20 thereof, the taxing officer also awarded a taxation fee of Kshs 25,320.00 being taxation fee of 5% due on the costs. The total sum allowed on the 2nd respondent's the bill of costs was Kshs 506,560.00.
 5. The applicant then preferred a reference from the ruling of the taxing officer, under rule 112 of the [Court of Appeal Rules, 2010](#), contending that the bill as taxed on the instructions fee was manifestly excessive, and not in accordance with the applicable law. Warsame, JA, in his ruling dated November 5, 2021 noted that there was no evidence that the taxing officer exercised her discretion wrongly, as she took into consideration all the relevant principles of law, being duly guided by the provisions of paragraph 9(2) of the third schedule to the [Court of Appeal Rules](#) which gives discretion to the taxing officer to consider all issues and place a fair value upon the work and processes involved in the appeal; and that the amount awarded as instruction fees was reasonable and in accordance with the relevant provisions of the law.
 6. The applicant being dissatisfied with the ruling of Warsame, JA, sought a reference to a full bench of this court, arguing that a successful party in court proceedings is not entitled to recover his entire advocate's fees from the unsuccessful party; further, that the applicant was not privy to the contract between the 2nd respondent and its advocate; that it is trite that the applicant cannot incur liabilities under any such contract and that if the 2nd respondent was not prepared to pay its portion of the advocates fees, it should have personally argued its case before the court.
 7. The applicant faults the learned judge for failing to find that the award of instruction fees violated article 10 of the [Constitution](#), and that the taxing officer acted *ultra vires* in awarding instruction fees in variance with the legislated sum of Kshs 1,500.00 as fees for opposing an appeal. It is contended that the lawmakers in making provision for the said Kshs 1,500.00 considered all reasonable factors and that no prejudice would be occasioned to the respondent if instruction fees was granted at Kshs 1,500.00.
 8. The applicant also contends that both the taxing officer and the learned judge lacked jurisdiction to consider the alleged proceedings carried out by JA Guserwa & Co Advocates on behalf of the 2nd respondent without evidence of the 2nd respondent's sealed copy of the resolution for appointment of advocate. We are urged to find that the bill of costs as axed is manifestly excessive and reverse the ruling of Warsame, JA, so that the reference to taxation dated June 24, 2021 is re-heard and re-determined.
 9. The 2nd respondent submits that its party & party bill of costs was based on the [Advocates Remuneration Order](#) in force, and that scales were properly applied by the taxing officer; that the provisions of [Fair Administrative Action Act](#) of 2015 have no application in a taxation dispute and that reference to an appeal is of no relevance to the subject of taxation.
 10. For purposes of clarity, the jurisdiction of a single judge to hear a reference where a party is dissatisfied with the decision of the taxing officer, flows from rule 117(1) and (3) of this [Court's Rules](#). We recognize that in an application of this nature, the single judge exercises unfettered discretion which ought to be exercised based on proper principles of law. It thus follows that a full bench would only interfere with the exercise of such discretion if it is apparent that the single judge took into account an irrelevant matter which he or she ought not to have taken into account or failed to take into account a relevant



matter; or that there was misapprehension of the law applicable, and the evidence presented; or that his decision was plainly wrong.

11. The above position was reiterated by this court in [*John Koyi Waluke v Moses Masika Wetangula & 2 others*](#), Civil Appeal (Application) No 307 of 2009, (unreported) where the Court stated *inter alia*:

“Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion ... a single judge of the court is doing so on behalf of the whole court, and the full bench of the court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full court that had it been sitting in place of the single judge, it would have arrived at a different result.”

12. It is apparent to us, that making a proposition that if the full court had sat in place of the single judge, it would have arrived at a different result, is not enough. This is because that would be replacing the single judge’s exercise of discretion with its own, which would contradict rule 55 of this court’s [*Rules*](#), as regards matters to be heard by a single Judge, and the role of a full bench under rule 57(1) (b). We hasten to add that a reference under that rule is not an appeal to the full court, although rule 117(6) allows a full bench to vary, discharge or reverse a decision made by a single judge in a reference.

13. In an application of this nature, the threshold required to be met is for the applicant to demonstrate that the learned judge disregarded a relevant matter, regarded an irrelevant matter or acted on a misapprehension of evidence or applicable law. More particularly this court in the case of [*Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board*](#) [2005] eKLR, this court observed:

“On reference to a judge from the taxation by the taxing officer, the judge will normally not interfere with the discretion by the taxing officer unless the taxing officer erred in principle in assessing costs.”

14. With these principles in mind, the issue for determination is whether the learned single judge judiciously exercised his discretion in upholding the taxing master’s taxation. Our reading of the contested decision discloses that the learned judge was alive to the parameters and guidelines to be applied when considering a reference under rule 117(3) of the [*Rules*](#) of this court – the litmus test being reasonability. The learned judge appreciated that in awarding instructions, fees, the guiding compass for the taxing officer was paragraph 9(2) of the third schedule of the [*Court of Appeal Rules*](#) that:

“the fees to be allowed for instruction 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.”



15. The trial judge also took note of the provisions of paragraph 9(4) pertaining to other taxation costs in any matter for which no provision is made. The sub paragraph states:

“Other costs shall subject to the provisions of paragraphs 10, 11 and 12, be awarded in accordance with the scale set out below or in respect of any other matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.”

16. Drawing from on the material that was placed before the learned single judge, this court is satisfied that he did not consider any irrelevant matters or disregard any relevant matters that would have influenced his decision. We are satisfied that the learned judge acted within the parameters set in exercise of discretion, and there would be no basis whatsoever for interfering with the decision. Consequently, we hold that the reference is devoid of merit and is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI, THIS 2ND DAY OF DECEMBER, 2022.

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**HA OMONDI
JUDGE OF APPEAL**

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**DR. KI LAIBUTA
JUDGE OF APPEAL**

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**M GACHOKA – CI Arb, FCIARB
JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

