Maina & another v JM Njenga & Company Advocates & 2 others (Civil Appeal 345 of 2019) [2021] KECA 90 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 90 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 345 OF 2019

MA WARSAME, HA OMONDI & JW LESSIT, JJA

OCTOBER 22, 2021

BETWEEN

FRANCIS CHEGE MAINA ..... 1ST APPELLANT

JOSEPH MACHARIA MAINA ..... 2ND APPELLANT

AND

JM NJENGA & COMPANY ADVOCATES ..... 1ST RESPONDENT

JAMES KIHARA MAINA ..... 2ND RESPONDENT

DEDAN MUTHAIGA MAINA ..... 3RD RESPONDENT

(An Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Grace Nzioka, J) dated 29th April, 2019 in Civil Application No. 345 of 2015)

JUDGMENT

1 Francis Chege Maina and Joseph Macharia Maina, (the appellants) have preferred this appeal against the judgment of the High Court of Kenya at Nairobi (Grace Nzioka, J) dated 29th April, 2019 in Miscellaneous Civil Application No. 144 of 2016, finding that the decision of the taxing master was well reasoned and there was no need to interfere with the same.

2 The appellants filed a chamber summons application dated 25th January, 2018 seeking for stay of execution, review and/or setting aside of the order of costs granted to the respondent on 22nd December, 2017.

3 This application was based on a ruling dated 20th August, 2017 on a notice of motion application by the appellants dated 3rd August, 2016, also seeking for review and/or setting aside. The High Court ruled inter alia that the instruction fees based on the special damages be recalculated based on a period

of 30 months, and that in addition the fees awarded for getting up was to be re-calculated based on the re-calculated instruction fees and the special damages.

4 The background to this is the appellants' contention that the bill of costs which forms the subject matter of the taxation was based on a claim for liquidated damages in the sum of Kshs.1,011,543,539/=. That what the Taxing Officer used to determine the value of the subject matter was the further amended plaint dated 20th November, 2012 which was filed on 22nd November, 2012 where in the further amended plaint there was a claim for special damages in the sum of Kshs.1,011,543,539/=.

5 It is pointed out that when the parent suit HCCC 394 of 2011 Francis Chege Maina & Others vs John Kaguma Maina came up before Hon. Justice Ngenye for hearing on 15th April, 2021 it was adjourned for the court to ascertain whether there was a further amended plaint in the file. It next came up for mention on 7th June, 2021 whereupon the learned Judge held that there was no order in the court file or proceedings granting leave to file the further amended plaint. As a consequence of this finding by the Court, leave was sought to file a further amended plaint on 8th June, 2021 which leave was granted by consent on 9th June, 2021.

6 It is further stated that the upshot of the findings by Hon. Justice Ngenye is that the Taxing Officer used a pleading that was not properly on record to determine the value of the subject matter for purposes of determining instruction fees which in turn also determined the getting up fees. That the proper pleading to be used ought to have been the amended plaint dated 28th May, 2012 in which the prayer was for special damages in the sum of Kshs.620,000,000/=.

7 It is thus contended that by relying on an invalid pleading to determine the value of the subject matter the Taxing Officer made an error of principle which in turn led to an award of instruction fees and getting up fees that was manifestly high.

8 Prior to this application, was a reference filed on 4th August, 2016 with respect to the advocate /client bill of costs taxed on 10th June, 2016, on the basis that the bill of costs was taxed exorbitantly contrary to the law.

9 The application dated 25th January, 2018 is based on Rule 11 (2) of the Advocates (Remuneration) Order that grants jurisdiction to the Superior Court to review and/or set aside the decision of a taxing master on a bill of costs, and the court can set aside such a decision upon demonstration that there was an error in principle on the part of the taxing master or that the decision was manifestly wrong and unjust in the circumstances.

10 It was the appellants' submission in the High Court that the taxing officer was wrong in arriving at the decision in taxing the bill of costs and as such the decision must be interfered with. They relied on the case of Republic vs Minister for Agriculture & 2 Others where Ojwang, J, as he then was held that;

> "A decision of a taxing master cannot be interfered with unless it is shown that the decision was based on an error of principle or the fee award was manifestly excessive."

11 The appellant's case for setting aside and/or review as follows;

i. that the award for Kshs.48,981.771.65/= is manifestly excessive and not relatable to the underlying services alleged to have been rendered by the advocate,

ii. that the instruction fee of Kshs.4,633,794/= was erroneously granted as the advocate only drew and filed a further amended plaint dated 20th

November, 2012 which included a prayer for special damages in the sum of Kshs.1,011,543,59/= and a further claim of Kshs.5 million per month,

iii. that the advocate never attended any substantive hearing and/or proceeding towards the realization of the claim as the underlying work in the matter had been done by the advocate initially on record, M/S Khaminwa & Company Advocates and as such the taxing master failed to take into account that relevant factor that the advocate did not execute the instructions to completion.

12 The appellant also submits that the taxing master was wrong to calculate the instruction fees based only on the amount pleaded, as it is not the only factor for consideration and as such the taxing master was under a legal obligation to consider other material factors relevant to the computation and award of instruction fees. The appellant cites Schedule 6 (1) (b) of the *Advocates (Remuneration) (Amendment) Order 2014* which states in the provision that;

> "The fees for instructions in suits shall be as follows unless the taxing officer in his discretion shall increase (unless otherwise provided) reduce it."

13 The appellant's interpretation of the above schedule is that the taxing master in the exercise of her discretion would be enjoined to reduce the instruction fees based on her consideration of other relevant factors to come up with a fair and equitable award on costs. The appellants cited several cases in support of their position.

14 The appellants in the alternative submit that the taxing master applied the wrong scale in determining the instruction fees and therefore arrived at the incorrect figure. The appellants contend that the basis of the computation of the instruction fees was the further amended plaint dated 20th November, 2012, to submit that the taxing officer failed to consider whether the amended plaint had been opposed. The appellants further submit that there was no denial of liability for the amended claim and as such the application of ***Schedule V1 paragraph*** *1 (b)* was based on the assumption that the claim was defended, which was a wrong assumption.

15 That the taxing master ought to have proceeded under Schedule VI paragraph 1(a) of the Advocates (Remuneration) (Amendment) Order 2014. That the application of the wrong Schedule is an error in principle that invites the setting aside of the award of costs.

16 The 1st respondent submits that the taxing master's role was re-calculating the amount due on specific terms as per the directions of the High Court in the ruling dated 20th January, 2017, and unless it is shown that the re-calculation was wrong and/or she went outside the perimeters as directed by the High Court, then the calculations cannot be subject of reference to the High Court.

17 That the High Court had fully addressed itself in its ruling dated 20th July, 2017 on the appellant's notice of motion dated 3rd August, 2016 (a reference from the ruling dated 10th July, 2016) on the amended bill of costs dated 14th December, 2015 and is now functus officio, and any issues raised e.g. whether the advocate was entitled to full fees based on the stage at which they joined the parent matter, allegations of some fees already paid to the advocate, the issue of value of subject matter are res judicata.

18 That if any reference can be filed and/or entertained on the orders of 22nd December, 2017 the same can only be limited to the issues raised by the taxing master as directed by the Honorable Judge as follows;

i. that the taxing master did not deal with any of the issues referred to her by the Honorable Judge's ruling of 20th July, 2017,

ii. that the taxing master dealt with other issues other than those referred to her by the Honorable Judge,

iii. that the taxing master misdirected herself and/or erred in her calculations.

19 The 1st respondent further avers that none of the grounds set out in the notice of motion dated 25th January, 2018 addresses any sustainable contention on the issue of error, misdirection and/or miscalculation, and that the issues raised were not subject of the orders dated 10th July, 2017 nor were they canvassed before the taxing master leading to the orders of 22nd December, 2017 which ruling remains unchallenged.

20 The 1st respondent then filed an application dated 10th January, 2018 for judgment for the sum of Kshs.48,981,771.65/= plus accrued interest at 12%. The basis of this application was that the High Court delivered ruling on 20th July, 2017 on a reference to the taxation orders of 10th June, 2016. The said ruling directed that the matter be referred back to the taxing master for recalculating the amount due as per the directions of the Honourable Judge.

21 That the taxing master in line with the directions of the High Court delivered a ruling detailing the recalculations and a certificate of taxation in favor of the applicant issued for the sum of Kshs.48,981,771.65/= dated 9th January, 2018.

22 In a ruling dated 29th April, 2019 the High Court determined applications dated 10th January, 2018 and 25th January, 2018. The upshot of the ruling was that the superior court found that the decision of the taxing master was well reasoned and as such there was no merit in the appellants' chamber summons application dated 25th January, 2018 and dismissed the same. As a consequence of the dismissal the Superior Court allowed the respondent's application dated 10th January, 2018 in terms of prayer (1), save that the alleged sum of Kshs.8,751,600/= allegedly paid for be provided. That ruling is what provoked the appeal before us for determination.

23 The appellant challenges the ruling of the superior court on 8 grounds of appeal, and we proceed to deal with them as hereunder;

1. The appellants submit that it is common ground that bill of costs that is the subject matter of the taxation was based on a claim for liquidated damages in the sum of Kshs.1, 011,543,539/= and that the taxing master used the amended plaint dated 20th November, 2012, in which further amended Plaint there was a claim for special damages in the sum of Kshs.1,011,543,539/=, to determine the value of the subject matter.

2. Further, that when the parent file HCCC 394 of 2011 Francis Chege Maina & Others vs John Kaguma Maina came for hearing before Ngenye, J on 15th April, 2021 the same was adjourned for the court to ascertain whether there was a further amended plaint in the file. The matter came up for mention on the 7th June, 2021 where the learned Judge held that there was no order in the court file nor proceedings granting leave to file a further amended plaint, which finding prompted plaintiffs' counsel to seek leave to file a further amended plaint on 8th June, 2021 which leave was granted by consent on 9th June, 2021.

3. It is therefore the appellants contention that the taxing master used a pleading that was not properly on record to determine the value of the subject matter for purposes of determining instruction fees and consequently getting up fees.

It is the appellants' contention that the proper pleading ought to have been the amended plaint dated 28th May 2012.

4. The appellants also further contend that the parent suit HCCC 394 of 2011 was still pending hearing and determination and that the learned Judge erred by upholding the taxing master's ruling on the advocate client bill of costs on a matter yet to be determined.

5. The appellants also submit that the taxing master awarded instruction fees without considering the actual amount of work and complexity of the work undertaken by the advocate and further that the taxing master awarded getting up fees when the advocate did not participate in or handle the hearing of the substantive suit.

24. The appellant also submit that the learned judge erred in entering judgment on a certificate of taxation yet the issue of accounts had not been settled and without taking into account the sum of Kshs.7 million paid to the advocate pursuant to consent dated 28th June, 2016.

25 The 1st respondent submits that the issue of the pending parent file was not raised in the superior court, and even if it was, once an advocate/client relationship ceases, the advocate does not have to wait for the conclusion of the parent matter before filing the advocate/client bill of costs. The respondent relies on the case of *Joreth vs Kigano & Associates*[2002] eKLR where the court held that;

> "Instruction fee is static and is only charged once and is not affected by the stage at which the suit has reached."

26 The 1st respondent argues that the issue of the actual work done by the advocate had already been dealt with in the ruling of 20th July, 2017 and was not the subject of the ruling of 22nd December, 2017 and the only remedy open to the appellants was to appeal against the ruling of 20th July, 2017 and that the second reference ought to have been confined to the tax master's ruling of 22nd December, 2017.

27 It is further contended that there was a certificate of taxation before the superior court that had not been stayed, set aside and/or reviewed and the learned judge was obliged by Section 51 of the *Advocates Act* to enter judgment. That further the learned judge in her ruling directed that credit be given for the Kshs.8,751,000/= paid at various stages. In any event the respondent submits that the balance of final figure owing upon the bill of costs being taxed to its logical conclusion is known to the parties and is for the parties to work out.

28 This being a first appeal it is this Court's primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 29 (1)(a) of the *Court of Appeal Rules*.

29 The main issues in our view in this appeal are:

Whether there was an error of principle to warrant interference by this Court?

The appellant raises the issue of the pleading used by the taxing master, which is the further amended plaint dated 20th November, 2012 which brought in a claim of special damages for Ksh.1,011,543,539/=. It is the appellant's submission that the further amended plaint was not the correct pleading to be used rather the amended plaint dated 28th May, 2012 reason being that the leave to file the further amended plaint was only granted on 9th June, 2021 in the parent file HCCC 394 of 2011 Francis Chege Maina vs John Kaguma Maina . It is the appellant's submission that this was an error of principle on the part of the taxing master.

30 The respondent submits that the issue of the parent file, now being raised by the appellant was never an issue raised in the superior court. The respondent further submits that the appellant makes reference to events that took place after the subject appeal was filed i.e. the orders made by Ngenye, J which orders the 1st respondent is unaware of, and cannot be the basis of the subject appeal as it is not the basis of the ruling under appeal.

31 The respondent further contends that Item 1 of the bill of costs was based on a liquidated sum of over Kshs.1 billion, a sum calculated using the further amended plaint dated 20th November, 2012 a sum admitted to by the appellants, and that they cannot now be heard to state that the wrong pleading was used. That this issue of the further amended plaint being the wrong pleading is an afterthought as it was never the basis of the reference.

32 The learned Judge stated:

> "However, instead of the applicants addressing the issue referred to by the Hon. Taxing master they choose to argue the reference on all issues as though it was the first reference, and in the course of that, they lost sight on the particular issues the taxing master was directed to deal with. As such I cannot find any particular argument and/or submission on how the taxing master erred and/or misdirected herself."

33 On the issue of the amount of Kshs.7,000,000/= paid to the advocate by Messrs Llyod Masika, and the amount of Kshs.8,751,600/=, the appellant argues that these amounts ought to have been deducted from the judgment sum, and that failure by the taxing master to do so amounts to an error in principle. The respondent on this issue is of the view that the said amounts are not in contention and as such the parties are able to work out what is owing after the deduction and that does not amount to an error in principle.

34 The appellant also raises the issue that the taxing master ought to have taken into account a sum of Kshs.12,000,000/= paid vide consent order of 28th May, 2019. The respondent argues, that there is no way the taxing master would in her ruling of 22nd December, 2018 take into account a future payment on 28th May, Civil Appeal No. 328 of 2017 *Peter Muthoka & Another vs Ochieng, Onyango, Kibet & Ohaga Advocates* [2019] eKLR held that the court will interfere with the decisions when there has been an error in principle but questions solely of quantum should be interfered with only in exceptional cases. This is a long settled position which was discussed in the fore-cited decision in the following terms;

> "...It has long been the Law as was stated in Arthur vs Nyeri Electricity (supra) that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the Court will interfere only in exceptional cases. What we have to now decide is whether there was an error of principle which would have called upon the learned Judge to interfere with the taxing master's decision."

For this Court to interfere with the taxing officer's decision, we must consider:

a. whether the amount awarded was inordinately high,

b. whether the taxing officer considered irrelevant issue or omitted issues vital and fundamental to the decision,

c. did the judge consider the pleadings before her,

d. what was the value of the subject matter relied on, in determining the instruction fee the bill of costs that is the subject matter of the taxation was based on acclaim for liquidated damages in the sum of Kshs.1,011,543,539/=. (The bill of costs is at pages 5-18 of the record of appeal).

35 From the record, there is no dispute that the pleading which the Taxing Officer used to determine the value of the subject matter was the further amended plaint dated 20th November, 2012 which was filed on 22nd November, 2012 which was a claim for special damages in the sum of Kshs.1,011,543,539/=.

36 When the parent suit HCCC 394 of 2011 Francis Chege Maina & Others vs John Kaguma Maina came up before Ngenye, J for hearing on 15th April, 2021 the same was adjourned for the court to ascertain whether there was a further amended plaint in the file. The matter came up for mention on 7th June, 2021 and the learned judge pointed out that there was no order in the court file or proceedings granting leave to file the further amended plaint. This finding by the court prompted the plaintiffs' counsel to seek leave to file a further amended plaint on 8th June, 2021 which leave was granted by consent on 9th June, 2021.

37 The sum total of the finding by Ngenye, J is that the Taxing Officer used a pleading that was not properly on record to determine the value of the subject matter for purposes of determining instruction fees which in turn also determined the getting up fees. We are therefore persuaded that the proper pleading to be used ought to have been the amended plaint dated 28th May, 2012 in which the prayer was for special damages in the sum of Kshs.620,000,000/=.

38 Undoubtedly, by relying on an invalid futuristic pleading to determine the value of the subject matter the Taxing Officer made an error of principle which in turn led to an award of instruction fees and getting up fees that was manifestly excessive, and which the respondents were not entitled to.

39 On 28th July, 2016 the Parties appeared before the superior court where at a consent Order was recorded at Clause 2 of the consent order that: The Messrs Lloyd Masika Limited do pay to the firm of J. M. Njenga & Company Advocates the sum of Kshs.7,000,000/= as part of the taxed costs, that they are holding as security within Seven (7) days of today's date. This amount was not deducted from the amount entered in judgment entered by the superior court on 29th April, 2019 and the subsequent decree allowed the prayer for Kshs.48,981,888.65/= whilst at the same time held that the sum of Kshs.8,751,600/= be provided for. We are in agreement that this amount ought to have been deducted from the Judgment sum as it automatically affects the principal sum payable and therefore the interest. This failure by the learned Judge was an error of principle.

40 The learned Judge ought to have taken away this amount as it was paid to the advocate as part of the taxed costs. In our view there was sufficient reason to warrant interfering with the quantum of the certificate of taxation so as to give effect to the consent and avoid what would otherwise lead to double payment/unjust enrichment.

41 We have read through the decision and find that the judge considered the amended plaint which no leave was sought and granted, hence not properly and legally before her, to determine the subject matter, thereby arriving at an inordinately high figure. As a matter of fact, the judge failed to take into consideration the subject matter whose value was not before her.

42 Consequently, it is our finding that the appellant has shown an error in principle by the taxing master to warrant interference by this court. We therefore allow the appeal and set aside the ruling dated 29th April, 2019. We order that the taxation file be placed before another judge to make a proper

determination, taking into consideration all the factors enumerated herein above. The appellants shall have the costs of this appeal, and that of the High Court.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

M. WARSAME

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR