



**Kassam v Majid & 3 others (Environment & Land Case
203 of 2015) [2024] KEELC 3310 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 203 OF 2015
SM KIBUNJA, J
APRIL 24, 2024**

BETWEEN

MOHAMED SHABIR KASSAM PLAINTIFF

AND

**HAFEEZ ABDUL MAJEED ALIAS ABDUL MAJEED ALIAS ABDUL MAJID
ALIAS ABDUL MAJEED 1ST DEFENDANT
ALBERT KUBAI MBOGORI 2ND DEFENDANT
COCO APARTMENT LIMITED 3RD DEFENDANT
REGISTRAR OF TITLES, MOMBASA 4TH DEFENDANT**

RULING

1. The 3rd defendant filed the application dated the 20th July 2023 seeking for inter alia:
 - a. The taxation ruling dated the 12th July 2023 to be set aside and or varied.
 - b. That in the alternative, the 3rd defendant's party and party bill of costs dated the 29th December 2021 to be taxed afresh before another taxing officer.

The application is based on the five (5) grounds on its face, and supported by the affidavit of Godfrey Mutubia, sworn on the 20th July 2023, expounding on the same grounds. It is the 3rd defendant's case that the taxing officer erred and misdirected himself as their party and party bill of costs is dated the 29th December 2021 and was for Kshs 1,611,625 and was not dated 30th May 2023 for Kshs 62,407,905 captured in the ruling; that the taxation officer erred and misdirected himself on the judgement delivered on 3rd December 2021 as it did not contain Kshs 3,000,000 as valuation of the suit property; that the taxation officer failed to appreciate that the suit was commenced in 2015, and the *Advocates Remuneration Order*, 2014 was the one applicable in assessing item 1 on instructions; that the taxation officer had failed to appreciate that the 3rd defendant had in the sale agreement dated



the 2nd August 2013, that he produced as exhibit 1, indicated the purchase price of the suit property as Kshs 45,000,000, and its value must have appreciated at the time of the delivery of the judgement eight years later.

2. In response to the application, the plaintiff filed the grounds of opposition raising two grounds that:
 - a. The defendant has not made out a case for grant of the orders sought.
 - b. The application is premised on mere technicalities without any substance in law and lacks merit.
3. On his part, the plaintiff filed the chamber summons dated the 26th July 2023 seeking for among others:
 - a. That the taxing officer's ruling delivered on 12th July 2023 with respect to items 1, 33, 43, 45, and 46 in the 3rd defendant's party and party bill of costs dated the 29th December 2021 be set aside and taxed afresh.
 - b. That in the alternative, the court to order that the said items be taxed afresh by the taxation officer.

The application is premised on the three (3) grounds on its face and supported by the affidavit of Mohamed Shabir Kassam, the plaintiff, sworn on the 26th July 2023. It is the plaintiff's case that the taxing officer misapplied the law and principles in determining the value of the subject matter, and in assessing instruction fees under items 1 and 33 of the bill of costs; that the taxing officer erred in principle in taxing items 43, 54 and 46 as drawn, which was excessive; that the judgement does not give Kshs 3,000,000 or any other figure as the value of the suit property.

4. The court gave directions on filing and exchanging submissions in respect of the two applications on the 9th October 2023. The learned counsel for the 3rd defendant filed their submissions dated the 20th November 2023, which the court has considered. By the time the two applications were set down for ruling on the 29th January 2024, no submissions had been filed by the plaintiff.
5. The following are the issues for the court's determinations:
 - a. Whether the applicants have established that, the taxing officer had erred in law and principle in taxing the 3rd defendant's party and party bill of costs.
 - b. Whether the taxing officer's ruling of 12th July 2023, on the 3rd defendant's party and party bill of costs, should be set aside.
 - c. Whether the 3rd defendant's party and party bill of costs should be taxed afresh before a different taxing officer.
 - d. Who pays the costs in each of the chamber summons?
6. The court has carefully considered the grounds on the applications, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
 - a. That the starting point in determining the applications herein, is to first confirm whether the judgement delivered on the 3rd December 2021, had determined the value of the suit



property. The learned judge captured the value of the suit property from the plaintiff's and 3rd defendant's perspective at paragraph 3 and 12 in the following words:

“ 3. The plaintiff avers that on the 28th August 2007, the 1st defendant and the said Abdul Waheed entered into an agreement with the plaintiff for sale of the suit property to the plaintiff on terms inter alia, that the consideration for the sale was Kshs 3,000,000 “

12. DW2 was Ishak Mohamed Kassim Haji Ibrahim, the 3rd defendant's director. He testified that on 2nd August 2013, the 2nd defendant offered the 3rd defendant through its sister company, Texas Alarms Limited, the suit property at an agreed purchase price of Kshs 33,000,000.”

There is nowhere in the said judgement that the trial court pronounced itself on the value of the suit property. Probably that was not one of the issues live for determination then.

b. In his ruling delivered on the 12th July 2023 on the 3rd defendant's party and party bill of costs, the taxing officer, at paragraph 3 headed '1. Item 1' stated that:

“This item provides for instruction fees where the value of the suit as per the judgement delivered on 3rd day of December 2021 was Kshs 3,000,000/- as the value of the suit property.”

That statement is a misapprehension of the facts that are otherwise clear in the judgement. The figure of Kshs 3,000,000 was value or consideration for the sale of the land according to the plaintiff as of 28th August 2007. This suit was filed in 2015, which was about eight (8) years later, and that value must have changed by that time. Indeed, according to the 3rd defendant, it bought the suit property from the 2nd defendant on 2nd August 2013 at Kshs 33,000,000.

c. In the case of *Peter Muthoka & Another versus Chieng & 3 Others* [2019] eKLR, the Court of Appeal rendered itself as follows:

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgement 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 judgement or 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 use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

The edict in the foregoing decision, will be useful to the taxing officers in assessing the instructions fees.



- d. The 3rd defendant's party and party bill of costs is dated the 29th December 2021 and sought for it to be taxed at Kshs 1,611,625. As submitted by counsel for the 3rd defendant and confirmed upon perusing the first paragraph of the ruling of 12th July 2023, the taxing officer appear to have addressed a different bill of costs. The paragraph reads;

“ The 3rd defendant's has filed a party and party bill of costs dated 30th May 2023 seeking the sum of Kshs 62,407,905/- as costs..... “

This clearly amounts to a misdirection on the part of the taxing officer that is likely to affect the outcome of the taxation exercise.

- e. The fact that both the 3rd defendant and the plaintiff separately moved the court for the setting aside of the ruling of 12th July 2023 and for fresh taxation of the 3rd defendant's party and party bill of costs dated the 29th December 2021, and the foregoing findings shows the prayers have merit.
- f. That as section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events, unless where otherwise ordered, I am of the view that each party bears their own costs in the chamber summons.
7. In the upshot of the foregoing determinations, the court finds and orders as follows:
- a. That the taxing officer's ruling of 12th July 2023 on the 3rd defendant's party and party bill of costs dated the 29th December 2021 be and is hereby set aside.
- b. That the 3rd defendant's party and party bill of costs dated the 29th December 2021 be taxed afresh before another taxing officer other than Hon. Nyariki J.
- c. Each party to bear their own costs in the references.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON 24TH THIS DAY OF APRIL 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Plaintiff: M/s Odira

Defendants : M/s Juma for M/s Taka for 3rd Defendant

Wilson – Court Assistant.

