



Mwenda & another v Njurarui & 6 others (Environment & Land Case 313 of 2018) [2024] KEELC 3912 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 313 OF 2018**

**AA OMOLLO, J
APRIL 18, 2024**

BETWEEN

SARAH NJUHI MWENDA 1ST PLAINTIFF

EMMANUEL WANDERI MACHARIA (SUING AS THE LEGAL REPRESENTATIVE OF JOHN MACHARIA MWENDA) 2ND PLAINTIFF

AND

LUKA NJURARUHI 1ST DEFENDANT

JOSEPH MUTURI KURUTU 2ND DEFENDANT

MARY WANJIRU MUNGAI 3RD DEFENDANT

PHILISIA NJERI MUNGAI (LEGAL REPRESENTATIVE ANDREW MUNGAI NJUI) 4TH DEFENDANT

ISHAMEL MUTURI GITAU 5TH DEFENDANT

VERONICAH WAMBUI GITAU 6TH DEFENDANT

PETER MUIRURI GITAU (LEGAL REPRESENTATIVE OF DICKSON GITAU MUTE) 7TH DEFENDANT

RULING

1. The Plaintiff being dissatisfied with the decision of the taxing master rendered on 22nd February, 2023 filed a reference vide the Chamber Summons dated 18th May, 2023. The Plaintiff hereafter referred to as Applicants sought for the following orders;

1. This Honourable court be pleased to extend time to file the instant application for reference.



2. Pending the hearing and determination of the application inter partes, the decision of the Taxing Master of 22nd February, 2023 and consequential proceedings be stayed.
 3. The decision of the Taxing Master delivered on 22nd February, 2023 on item 1 in the Bill of Costs dated 17th March, 2022 be set aside and/or vacated.
 4. Item 1 in the bill of Costs dated 17th March, 2022 be taxed afresh.
 5. The costs of this application be provided for.
2. The application was based on the following grounds inter alia;
1. The suit was filed against the Defendants seeking an order of specific performance for the transfer of the property known as L.R No. 4953/71 Thika (hereinafter the suit property) with the Defendants filing a counterclaim seeking inter alia liquidated damages of Kshs.59,500 and general damages.
 2. The Defendants filed the Bill of Costs dated 17th March, 2022 seeking instructions fees of Kshs.950,000/= on the basis that the value of the suit property was Kshs.50,000,000. This value was nowhere in the pleadings.
 3. It is only after reading the decision that it became evident that the Taxing Master based her decision on irrelevant and unknown principles. The Plaintiff thus contends that the Taxing Master erred in Principle by making irrelevant considerations in arriving at the instruction fees. In particulars, the Taxing Master erred in principle by:
 - a. Totally disregarding the value of the subject matter as disclosed in the judgment.
 - b. While correctly finding that the value of the subject matter was not disclosed in the pleadings, proceedings to use the very same subject matter value proposed by the Defendants to arrive at the instructions fees.
 - c. Failing to first determine the calculable instruction fees on the basis of the correct legal provision before enhancing the instruction fees;
 3. In the supporting affidavit of Mr. Kevin Wakwaya learned Counsel for the Applicant, he reiterated the grounds listed on the face of the application. He also deposed that the plaintiff could not file the reference within the time prescribed because there was no formal response to their inquiries of 8th March, 2023; 27th April, 2023; and 15th May, 2023 which correspondences he annexed copies thereof. He also asserted that the delay was for 3 months which is not so inordinate as to cause harm that cannot be compensated by award of costs. He added that the court has jurisdiction to extend time.
 4. In opposing the application, the Defendant/Respondents filed grounds of opposition dated 29th May, 2023. They pleaded inter alia that;
 1. That the application as drawn is fatally defective and incompetent and an attempt to protract this suit.
 2. That this has been a long-standing dispute instituted against the Defendants in 1990. The Plaintiff has severally occasioned the delay to serve their own interest.
 3. That the taxing master delivered a ruling on the bill of costs on 22nd February 2023 and the suit property is prime situated in Thika town from which the Plaintiff continues to draw rent.
 4. The bill of costs was drawn to scale and accurately taxed.



5. The advocates filed respective submissions in support of and against the application. The Applicant submitted that the court had jurisdiction to enlarge time for filing the reference. They argue that they could not file a reference before obtaining the reason of the taxing officer. In buttressing this argument, they rely on the decision of *Addax Kenya Limited Vs. NEMA & Another (2017)* eKLR.
6. On the question instruction fee of Kshs.950,000/=, the Applicant submitted that the value of the subject matter was not disclosed in the pleadings. Hence, the taxing master erred in principle by awarding instructions based on the value of the suit property as determined by the Defendants.
7. The Applicant further submits that schedule 6 of ARO give clear guidelines for determining instruction fee and in this case the value was determined in the judgment (SD sq 500 & SD of 20,000). She cited the case of *Lalji Mehji Pate & Company Pate & Company Limited Vs PCEA Foundation & Another (2020)* eKLR which held thus;

“The value of the subject matter of a suit for 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, among other matters, the nature and importance of the cause or matter the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all relevant circumstances.”
8. It is also submitted that the taxing master can only enhance instructions fee after correctly identifying the instructions fee chargeable. Thus, failing to do so was an error in principle. The Applicant relied on the case of *First American Bank of Kenya Ltd Vs. Gulab P. Shah & 2 Others (2002)* eKLR and urged the Court to allow the orders prayed.
9. The Respondents filed their submissions dated 17th November, 2023 and cited the provisions of paragraph 11 of the ARO and the case of *County Assembly of Kisumu versus County Government of Kisumu and 8 others (2017)*eKLR where the Supreme Court of Kenya held;

(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:

 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
10. The Defendants submit that the Plaintiff has not sufficiently explained the reasons for delay or stated when they received the reasons for the taxation. They contend that without the disclosures, the court



has no business in holding that the reasons from the taxing master were received after 4th of May 2023. He urged that because the applicants have slept on their rights, the court should not extend time.

11. It is further submitted by the Defendants that despite being served with the bill of costs, the applicant neither filed written submissions nor attended court during the taxation. They averred that the taxing master did not err as she relied on the right principles set out in schedule 6 and cited the decision of *Del Monte Kenya Limited vs Kenya National Chamber of Commerce and Industry, Muranga chapter and 2 others (2021)* eKLR. The Defendants urged the court not to set aside the Ruling and instead dismiss the reference with costs.
12. There are two questions for determination; whether to extend time to file the reference and whether to grant the reference if the time is extended. There is no dispute that the Reference was filed after a delay of 3 months. The principles to be considered whether to extend time include, if the Applicant has explained the reasons for the delay and whether the Respondent will suffer prejudice if the extension is given. The Applicant herein has stated that he wrote to the taxing master on 8th March 2023 seeking for reasons for the taxation but did not receive any response. By 8th March, 2023 15 days had elapsed after the delivery of the ruling which means that the time for filing the reference had expired by one day.
13. The Applicant instead of filing a reference when they did not receive any response to their letter of 8th March 2023, proceeded to write reminders in April and May 2023. This in my view was not a diligent litigant as the law does not require a party to wait for a response before filing a reference. However, on account that no execution process had commenced, the reference is already filed and the Respondent will have an opportunity to defend it, this court admits reference filed out of time for hearing. The Respondent shall be compensated by way of costs for the prejudice.
14. On the second limb of setting aside the instructions fee taxed, I have perused the plaint and confirm that the value of the property was not stated. The taxing officer appreciated as much and stated that it is a matter which called for the exercise of her discretion. While exercising her discretion, she considered the location of the suit property, the amount of Kshs 595000 which the Applicant stated was used to purchase the property in 1983 and which amount must have appreciated over time, and the time taken to dispose of the suit and proceeded to tax the instruction fee as drawn.
15. It is trite law that the court will not interfere with the discretion of the taxing master unless the officer acted in error of principle. This was the holding by the Supreme Court of Uganda in the case of Bank of Uganda versus Banco Arabe Espanol SC Civil Application No. 23 of 1999, thus;

“save 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 with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case is where it is shown expressly or by inference in assessing or arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred of an award of an amount which is manifestly excessive or manifestly low.” (underline mine for emphasis)
16. The Applicant pleaded the error in principle to be failure by the taxing officer to look at the value given in the judgement. Probably the Applicant had in mind the amounts stated in the judgement with regard to the purchase price referred to in the sale agreement produced in evidence and which amount the taxing officer referred as Kshs 595000 and which she stated the land must have subsequently



appreciated in value. While there is no doubt that values of immovable properties appreciate, there was no evidence placed before the taxing master that it had appreciated to Kshs 50,000,000 as stated on the bill of costs drawn by the Respondent.

17. Secondly, the fact that the bill was not defended is not a bar to the Applicant from filing an appeal when they feel the amount awarded was excessive neither did it stop the taxing officer from exercising her discretion judiciously. As regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in *Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others*, (2006) e KLR :

- “ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
5. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
6. where novelty is taken into account, its nature is to be clarified;
7. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

18. In the instant reference, a reading of the judgement annexed to the chamber summons as KW1 show the number of witnesses who testified were no more than two and the nature of the case was not that required skilled research. The Applicant prayed for orders of vacant possession therefore the taxing master while considering the appreciation of the value of the suit property ought to have been guided by the value stated on record. The taxing master instead relied on the value as determined by the Defendants and not what was on record. For this reason, I am persuaded to hold that the instructions fee awarded was manifestly excessive. Consequently, I find merit in the reference and allow it. The instruction fee is re-assessed from Kshs 950000 to Kshs 200,000. The costs of this reference to the Respondents in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2024.

A. OMOLLO

JUDGE

