Sheikh & another v Mas Construction Limited & 5 others (Environment and Land Case 1480 of 2014) [2024] KEELC 4351 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4351 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 1480 OF 2014

OA ANGOTE, J

MAY 30, 2024

BETWEEN

ABDUL WAHEED SHEIKH ..... 1ST PLAINTIFF

ABDUL HAMEED SHEIKH ..... 2ND PLAINTIFF

AND

MAS CONSTRUCTION LIMITED ..... 1ST DEFENDANT

JOSEPH NDERITU T/A JOGAMDRIES AUCTIONEERS ..... 2ND DEFENDANT

HASSAN ABDI SALAN ..... 3RD DEFENDANT

MAHAT ADAN ABDIRAHMAN IBRAHIM ..... 4TH DEFENDANT

NAIROBI CITY COUNTY ..... 5TH DEFENDANT

CHIEF LAND REGISTRAR ..... 6TH DEFENDANT

RULING

1. *Vide* the Chamber Summons dated 13th February, 2023[2024] brought pursuant to the provisions of Rule 11(2), (3) and (4) of the *Advocates Remuneration Order*, the 1st Defendant/Applicant seeks the following reliefs;

    i. That the Honourable Court be pleased to refer the Plaintiffs' Bill of Costs dated 3rd October, 2023 for fresh taxation before a new Taxing Master and with suitable directions.

    ii. That in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit items No 1, 27, 35, 48, 73, 89, 142, 177, 185, 226, 235, 243, 303, 26, 121, 128, 135, 272, 29, 30, 31, 32, 50, 51, 52, 53, 54, 55, 60, 75, 76, 77, 78, 91, 92, 93, 114, 145, 146, 157, 179, 180, 181, 182, 219, 237, 238, 239, 240, 245, 28, 49, 74, 90, 143, 326, 244, 83, 84, 218, 263, 294, 250, 251, 253, 256, 256, 257, 264, 266, 270, 271, 274, 297, 309 in the Party/

Party Bill of Costs dated 10th November, 2023 for review and reconsideration with directions on the taxation.

iii. That the costs of this Application be provided.

2. The application is based on the grounds on the face thereof and supported by the Affidavit of Chueb Adan Ali, the 1st Defendant herein of an even date.

3. The 1st Defendant deponed that he wishes to object to the taxation of the Plaintiffs' Bill of Costs dated 3rd October, 2023; that he is dissatisfied with the entire process for the reasons that the Taxing Master failed to consider the submissions filed by his Counsel despite the same having been prepared and availed to Court and that he objects to items numbers 1, 27, 35, 48, 73, 89, 142, 177, 185, 226, 235, 243, 303, 261, 121, 128, 135, 271, 29, 30, 31, 32, 50, 51, 52, 53, 54, 55, 60, 75, 76, 77, 78, 91, 92, 114, 145, 146, 147, 179, 180, 181, 182, 219, 237, 238, 239, 240, 245, 28, 49, 74, 90, 143, 336, 244, 83, 84, 218, 263, 294, 250,251, 252, 253, 256, 257, 264, 266, 270, 271, 274, 297, 309 as they were taxed unreasonably high and the taxing officer failed to take into account the value of the subject matter.

4. According to the deponent, the primary suit forming the basis of the taxation was a dispute with respect to the ownership of L.R No 209/1916/5(IR 94707) and that under item 1, the Plaintiffs' Advocates were seeking legal fees for instructions in which they sought, at the Plaintiffs' behest, to invalidate the parallel title by the 1st Defendant in respect of the suit property.

5. The 1st Defendant deposed that the Plaintiff filed his Bill, basing the value of the subject matter of the suit under Part A of Schedule VI of the *Advocates Remuneration Orde*r and assessing the instruction fees at Kshs 6,000,000; that in so assessing, he took into account the fact that the property in dispute is situate in parklands and that he was condemned to pay damages of Kshs 10,000,000.

6. Mr Ali deponed that as advised by Counsel, the Court of Appeal held that the value of the subject matter for purposes of taxation ought to be determined from the pleadings, judgement or settlement as the case may be and that the Taxing Master was obligated to first determine the value of the subject matter for purposes of assessing instruction fees.

7. He averred that the Taxing Master erroneously used the wrong value of the subject matter thus erring in principle by assessing the Advocate's instructions fees based on the development of the suit property and the award given as damages as opposed to the value of the parcel of land in dispute, and that in arriving at the sum of Kshs 3, 426,966.00, he misdirected himself and acted contrary to the principles of taxation of party-party bill of costs.

8. He urged that justice dictates that the Motion is allowed as the Taxing Master failed to properly exercise his discretion based on the set-out principles and his decision should be interfered with.

9. In response, the Plaintiffs, through their Counsel, swore a Replying Affidavit on 26th February, 2024, in which he deponed that the 1st Defendant has not exhibited the Ruling of the Taxing Master delivered on the 16th January, 2024 to justify the objection set out in the Supporting Affidavit.

10. It was deposed by the Plaintiffs' counsel that instruction fees in the Bill of Costs dated 3rd October, 2023 was premised on the value of the subject matter being Kshs 126,000,000 and was justified on the basis of the arguments elaborated in the submissions dated 21st November, 2023 and the other items which were drawn to scale.

11. According to Counsel, the 1st Defendant has not demonstrated any error in principle made by the Taxing Officer or demonstrated that the costs certified by the Taxing Officer upon taxation are excessive

or unreasonable and that the summons is unmerited and should be dismissed. The Plaintiff's counsel filed submissions and a list of authorities which I have considered.

Analysis & Determination

12. Having considered the Summons, Affidavit in support and opposition thereto and submissions, the issues that arise for determination are;

    i. Whether the Reference is competent?

    ii. Whether sufficient grounds have been demonstrated warranting interference with the Taxing Master's decision of 16th January, 2024.

13. Vide the present Reference, the 1st Defendant/ Applicant seeks to impugn the decision of the Taxing Master dated 16th January, 2024. It is not disputed that neither the Ruling seeking to be impugned nor the reasons thereof have been attached to the Summons. The Plaintiffs considers that this renders the same fatal.

14. The procedure for filing a Reference is set out in Paragraph 11 of the of the *Advocates Remuneration Order*. Rules 1-4 provide thus;

> "(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of this objection.
>
> (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
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> (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

15. According to the aforesaid provisions, the procedure for impugning a Taxing Masters' decision begins with the issuance of an objection to the Taxing Master setting out the specific taxed items to be impugned and seeking written reasons thereof. The Reference is thereafter filed upon receipt of the reasons.

16. In the present case, the Taxing Masters' Ruling was rendered on 16th January, 2024. Thereafter, by a letter dated 30th January, 2024, the 1st Defendant's Counsel wrote to the Taxing Master seeking reasons for the set out items. The 1st Defendant states that he has yet to receive any response on the same. There is no evidence to the contrary.

17. Indeed, pursuant to paragraph *11*(2), upon receipt of the letter, the Taxing Master was required to give reasons for his decision. Having not done so, was the 1st Defendant precluded from filing the Reference? Does the absence of reasons render the Reference fatal?

18. This question has been the subject of diverse interpretation by the Courts. In the matter of *Independent Electoral and Boundaries Commission vs John Omollo t/a Ganijee & Sons* [2021] eKLR, the court held as follows;

> " Under Paragraph 11 (2) of the *Advocates Remuneration Order*, it is a requirement that after a Taxing Master has received an objection from any party, he or she is mandated to respond to the objector and thereafter the objector may file a Reference before a Judge. It is therefore true that the Applicant was under a mandate to wait for such reasons from the Taxing Master."

19. Contrary jurisprudence states that seeking reasons for a Ruling, after the Ruling has been delivered may as well be superfluous especially where a reasoned Ruling has been made and subsequently, the absence of reasons does not render a Reference futile.

20. In *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board*, [2005]eKLR, the Court of Appeal stated thus;

> " It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the *Order*, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a Reference and the absence of such reasons would not in itself preclude the objector from filing a competent Reference."

21. In *Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited* [2012] eKLR, Odunga J (as he then was) stated;

> " It is therefore clear that the interpretation by the Court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.
>
> However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference."

22. In *Mwangi Njenga t/a Mwangi Njenga & Company Advocates vs County Government of Mombasa* [2020] eKLR, the Court found that in the absence of reasons from the Taxing Master, the same having been sought, the Reference was properly before the Court.

23. A copy of the Taxing Masters ruling has not been attached to the Reference. However, the Court has been able to peruse the said ruling which is on record. The Taxing Master indicates that he perused the items in the bill, considered the submissions and found that the bill was drawn to scale in accordance with the 2014 Advocates Remuneration Bill. The Court considers that these are indeed reasons, the adequacy thereof will be discussed under the following head.

24. Regarding the failure to attach the Taxation Ruling, as aforesaid, the same forms part of the record which the Court is privy to. In the circumstances, the Court does not consider that the failure to attach the same renders the Reference fatal.

25. A contrary finding in the circumstances would be akin to upholding technicalities at the expense of justice. The Court of Appeal in *Charles Karanja Kiiru vs Charles Githinji Muigwa* [2017] eKLR made the following observation in this regard:

> " Be that as it may, this Court in Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others [2015] eKLR articulated that-
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> "It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this *Constitution*." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

26. The legal parameters within which the Court can interfere with a Taxing Master's decision are well settled. The Court of Appeal in *Joreth Ltd vs Kigano & Associates* Civil Appeal No. 66 of 1999 [2002] eKLR was categorical that a Judge sitting on a Reference against the Taxing Officer ought not to interfere with the assessment of costs unless the Taxing Officer had misdirected himself on a matter of principle.

27. In the South African case of *Visser vs Gubb* 1981(3) SA 753 (C) 754H – 755 C cited with approval in *KTK Advocates vs Baringo County Government* [2017] eKLR, the Court stated as follows;

> " The Court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the

point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

28. Similarly, the Ugandan Supreme Court in Bank of *Uganda vs Banco Arabe Espanol* SC Civil Application No. 23 of 1999 (Mulenga JSC) stated as follows:

> " 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.
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> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and 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 from an award of an amount which is manifestly excessive or manifestly low.
>
> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

29. It cannot be gainsaid that the only way to demonstrate that discretion has been exercised judiciously is by giving plausible reasons for reaching the decision and demonstrating that those principles have been applied.

30. The Court looks no further in this regard than the exposition by the Court in *Republic vs Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W'njuguna & 6 others* [2006] eKLR which held thus;

> " Item 1 (advocate's instruction fees) in the bill of costs is one of the very few which were not based on consent. The figure of Kshs.20,000,000/= which is now contested was the taxing officer's own decision. It is necessary to ascertain how she arrived at that figure; for although the judicial review applicants' firm position is that it was an exercise of lawful discretion which, therefore, this Court should uphold, the correct perception of a discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs.20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it

must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs."

31. By way of brief background, the Plaintiffs instituted this suit on 24th December, 2014 seeking, inter-alia, to have the grant pursuant to which the 1st, 3rd and 4th Defendants lay claim to the suit property declared void, injunctive orders restraining interference with the suit property and general damages for unlawful execution, attachment and trespass.

32. The matter proceeded for hearing and this Court rendered Judgement on the 27th July, 2023, finding in favour of the Plaintiffs. The Plaintiffs subsequently filed a Party-Party Bill of Costs on 3rd October, 2023, which was taxed on 16th January, 2024. The taxation precipitated the present proceedings.

33. The 1st Defendant is aggrieved by the entire process of the taxation. They contend that the Taxing Master did not consider their submissions. In particular, the 1st Defendant objects to items Numbers 1, 27, 35, 48, 73, 89, 142, 177, 185, 226, 235, 243, 303, 26, 121, 128, 135, 272, 29, 30, 31, 32, 50, 51, 52, 53, 54, 55, 60, 75, 76, 77, 78, 91, 92, 93, 114, 145, 146, 157, 179, 180, 181, 182, 219, 237, 238, 239, 240, 245, 28, 49, 74, 90, 143, 326, 244, 83, 84, 218, 263, 294, 250, 251, 253, 256, 256, 257, 264, 266, 270, 271, 274, 297, 309.

34. Beginning with the question of instruction fees, it is trite that the same is to be determined from the value of the subject matter of a suit. It is also trite that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement.

35. In the event the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement, the Taxing Officer has discretion to assess the instruction fees taking into account various factors. This position was affirmed by the Court of Appeal in *Peter Muthoka & Another vs Ochieng & 3 others* NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR which, expounding on the principles in *Joreth Ltd vs Kigano & Associates* (*supra*) set down the proper basis of taxing the instruction fees as follows;

> " It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.
>
> 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."

36. In this instance, the Taxing Master relied on the subject matter set out by the Plaintiffs in their Bill of Costs, and the submissions. The Plaintiffs relied on the value of the suit property, as set out in a letter from NEMA to the 1st Defendant dated 8th September, 2014 which according to them set out the value of the subject matter as being Kshs 126,000,000.

37. Considering the Plaintiffs submissions' in this regards, they set out the aforesaid sum as one that should guide the Taxing Master in assessing instructing fees stating as follows: "The Court may adopt that document as a guide in informing its ascertainment of what is reasonable instruction fees."

38. The Plaintiffs' counsel further submitted that there was need for a commensurate figure for instruction fees considering the award of damages which pointed to the gravity of the dispute, and the location of the property and the development thereon.

39. Guided by the Court of Appeal in *Peter Muthoka* (supra), judgement having been entered in the matter, the first port of call in determining the value of the subject matter was the Judgement. It is only where the Taxing Master was of the opinion that the value of the subject matter could not be discerned from the Judgement that he would be permitted to consider other grounds.

40. In the circumstances, it appears that the Taxing Master did not attempt to make any independent consideration of the matter at hand nor indeed consider the 1st Defendants objections as surmised in its submissions. There was no attempt by the Taxing Master to discern at the first instance what the value of the subject matter was, or whether it was discernible from the Judgement or otherwise.

41. The Taxing Maters relied on a sum suggested to him by the Plaintiffs which was not disclosed in the Judgment and was contested by the 1st Defendant. This, the Court opines, constituted a patent error in principle warranting the Court's interference.

42. The Court of Appeal in *Kamunyori & Co. Advocates vs Development Bank of Kenya Ltd* [2015] eKLR elaborated on the meaning of an error of principle as follows;

> " Failure to ascertain the correct subject matter in a suit is an error of principle. So too, failure to ascribe the correct value to the subject matter is 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 instruction fees is arrived at on the wrong principle, it will be set aside."

43. With regard to the other disputed items, it is noted that the Taxing Master simply stated that the items were drawn to scale and proceeded to tax them as drawn.

44. It is imperative to underscore that the role of the Taxing Master necessitates an independent and judicious evaluation of the bill and submissions presented. In this respect, by simply stating that the Bill of Costs has been considered and is found to be drawn to scale is insufficient. The taxing of a Bill must be conducted with meticulous care, ensuring that each determination is underpinned by well-reasoned and comprehensive analysis.

45. From the foregoing analysis, the Court is of the view that it is just and fair that this Court upsets the taxed Bill of Costs. The ruling of the Taxing Master dated 16th January, 2024 is therefore set aside.

46. Having set aside the ruling of the Taxing Officer, the next course of action is that illuminated by the Court of Appeal when it stated in *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR, thus:

> "if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer."

47. The Court finds the application merited and makes the following determination.

    i. The Ruling of the Taxing Master dated 16th January, 2024 is hereby set aside.

    ii. The Plaintiffs' Bill of Costs dated 3rd October, 2023 is remitted for taxation before any other Taxing Officer other than Hon Vincent Kiplagat.

    iii. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Awino for Mr. Otieno for 1st Defendant/Applicant

Ms Otoo for Mr. Havi for Plaintiff /Respondent

Ms Munene holding brief for Mureithi for 3rd and 4th Defendant

Court Assistant: Tracy