



**Sehmi v Sehmi & 4 others (Environment & Land Case
659 of 2017) [2024] KEELC 4707 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 659 OF 2017**

J OMANGE, J

MAY 23, 2024

BETWEEN

HARJEET SINGH SEHMI PLAINTIFF

AND

JOGINDER KAUR SEHMI 1ST DEFENDANT

GURPAL SINGH SEHMI 2ND DEFENDANT

AND

TEJPARKASH SINGH SEHMI RESPONDENT

AND

**OTIENO OMUGA T/A OTIENO OMUGA & OUMA
ADVOCATES 1ST DEFENDANT**

**ERIC BENGI T/A BENGI, MBITI & ASSOCIATES
ADVOCATES 2ND DEFENDANT**

RULING

1. The applicant herein has filed a chamber summons application dated 19th May 2023 seeking to review/set aside the ruling on the bill of costs delivered on the 2nd September 2021.
2. The application is premised on the grounds on the face of the application and on the applicant's supporting affidavit sworn by Frank Habakkuk Nabutete dated 19th May 2023.

He avers that the applicant is aggrieved by the ruling of the Taxing Officer on the following grounds;

- a. The taxing officer erred in law by adopting a value of Ksh. 30,000,000 /=as the value of subject matter and used this figure to award instruction fees on all the 5 bills of costs.



- b. The taxing officer failed to consider other legal principles that were brought to her attention.
 - c. That the bill of costs failed to specify the schedule and paragraph of Advocates Remuneration Order under which they were brought and hence was defective.
 - d. That the taxing officer failed to appreciate that the dispute was a family inheritance matter and costs arising should have been treated as costs under the Succession Act.
3. The 1st, 2nd, 3rd and 4th Defendants opposed the application vide their respective grounds of objection dated 14th August 2023 and 10th August 2023. The 5th Respondent filed a replying affidavit sworn by Eric Gitonga dated 25th August 2023 in which it was deposed that the applicant had failed to demonstrate that the taxing officer committed an error of principle to warrant setting aside of the ruling. It was argued that the submission that the bill of costs should have been taxed as a Succession matter is baseless. That the Taxing Master correctly taxed the bill as a matter in the Environment and Land Court.
 4. The applicant in response to the objections by the 1st -3rd defendants filed a replying affidavit indicating that delay on his part in filing the application was excusable as it was not intentional rather occasioned by the court system and asked the court to excuse the delay which was not inordinate.
 5. Parties filed submissions pursuant to the court's direction issued on 17th October 2023.
 6. The Plaintiff/Applicant filed submissions dated 10th April 2024 in which he responded to grounds of opposition by the 4th defendant. He averred that in the supplementary affidavit dated 20th February 2024 he had rectified the mistake in the supporting affidavit and attached properly marked documents. On the issue of filing out of time, he submitted that the ruling was delivered to them on 8th May 2023 hence the filing date of 22nd May, 2023 was within the time lines issued by the court. Lastly, he submitted that the court should consider the merits of the application which was brought on grounds that the Taxing Master had failed to consider the pleadings, Judgement and settlement in reaching a determination on the value of the subject matter. That the Taxing Master ought to have considered that the 4th and 5th Defendant had failed to give accounts of the escrow account.
 7. He further submitted that the Taxing Master erred in principle when she failed to apply the formulae for assessing instructions fee as in Schedule 6 (1) of the Advocates Remuneration Order resulting in a manifestly excessive instruction fee of Kshs. 485,000/= for all of the 5 Defendants in this suit notwithstanding the fact that the nature and importance of the cause of action varied from the 1st -3rd defendants to the 4th and 5th defendants and the fees given should have varied based on the pleadings of each of the defendants.
 8. That the Honourable Taxing Master failed to notice that the 5th Defendant had not filed any statement of defence hence not entitled to instruction fees as was determined in *Joreth Ltd v Kikano & Associates* [2002] 1 EA92 and *Mayers v Hamilton* [1975] E.A. 13
 9. The 1st -3rd Defendants did not file any submissions. The 4th Defendant relied on the grounds of opposition dated 10th August 2023.

The 4th Defendant took issue with the reference which had been filed outside the 14-day period granted by the court.

Counsel further submitted that the documents annexed to the application were improperly annexed as they had not been referred to in the supporting affidavit and marked with serial letters of identification or sealed with by the commissioners of oaths hence not in compliance with rule 9 of oaths and statutory



declaration rules (subsidiary legislation) and should be struck out. He relied on the case of *Francis Mbalanya v Cecilia N.Waema [2017]* eKLR

10. Further the 4th Defendant stated that applicant had not attached the subject ruling under contention and should be struck out as it offended Section 11 of the Advocates Remuneration Order that requires the reasons for taxation or the ruling to be part of the reference. Lastly, it was submitted that the applicant had not demonstrated how the Taxing Master committed an error of principle as she exercised her discretion in awarding instruction fees and gave the reasons for the award of the same in the ruling as illustrated in *Joreth Limited Vs Kiganjo Associates (2002) 1E.A 92*
11. The 5th Defendant in his submissions argue that the Taxing Master correctly relied on the settlement agreement to determine the instruction fees. The 5th Defendant states that the settlement agreement which included proceeds of LR NO 209/2360/1 was the basis upon which the declaratory orders were sought. As such there was no error of principle that warrants interference by this court.
12. Having considered the application, the responses and the submissions by the parties who filed submissions the court identifies the following issues for determination; Whether the annexures in the supporting affidavit are grossly defective Whether the application should be struck out for being filed out of time. Whether the Ruling of the Taxing Officer delivered on 2nd September, 2021 should be set aside.

On the first issue, it was argued that the annexures are defective. in *Machakos ELC Case No. 21 of 2016 Francis A. Mbelanga v Cecilia W. Waema [2017]* eKLR, where it was held that;

- “ 15. It is trite in law that an Affidavit and the annexures attached on it constitute evidence. Indeed, where a person seeks to prove a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit.
16. However, before such a document can be received in evidence by the court, the law requires that such a document must be sealed by the Commissioner for Oaths.
17. The law that requires the sealing and marking of annexures with serial letters is in mandatory terms, and must be complied with.
18. Although the Plaintiff’s advocate submitted that the failure to seal and mark the annexures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annexures must be sealed and numbered. That is the only way they can be allowed on record.
19. It is therefore not true, as submitted by the Plaintiff’s counsel, that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*.”

In the case of *Mwahima Mwalimu Masudi v Independent Electoral and Boundaries Commission & 3 others [2017]* Eklr;

“55. The relevance of Article 159(2) (d) of *the Constitution* was also discussed in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013]* eKLR where Kiage JA stated:

“...I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both commend courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of



rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines...”

13. In the instant case the applicant has included several documents in a bundle that contains the reference. I ascribe to the principles in the above authorities. A party attaching documents to an affidavit must have them witnessed and attested to. However, I note that most of the documents in the bundle are court pleadings which are already part of the court record in any event. For instance, the amended plaint; the settlement agreement etc.

There would be no reason to expunge documents which in any event are in courts custody in the very file the court is making its determination on.

This is the spirit of the East African Court of Justice in the case of *The Secretary General of the East African Community v Margaret N Zziwa*, Taxation Reference no 1 of 2019 in which the court held ...;

“these documents being part of the Courts own record, were we to consider them necessary for the purposes of determining the instant application we would be able to suo moto call for them.”

Guided by this decision, I find that the objection is only upheld in respect of documents which were not already part of the court record.

14. On the question of extension of time, the applicant was granted 14 days to file the notice of objection and the reference. The time was to run from the date the Ruling dated 20th April, 2023 was emailed to the parties. The applicants uncontroverted averment is that the said Ruling was emailed to the applicant on 8th May, 2023 hence there was one-day delay in filing the Reference. This, the applicant depones was caused by technical issues which the applicant took up with the Deputy Registrar. This deposition is uncontroverted as none of the Respondents filed an affidavit to challenge this averment. After the issue was raised the applicant in the affidavit asked the court to exercise its discretion to extend time. Article 259 of *the Constitution* gives the court wide discretion to extend time. In the circumstances of this case, considering the technical issues faced by the applicant in filing, the delay of one day, I will extend time and consider the application to have been duly filed within time.

15. On the question of the taxation ruling, the applicant raised several issues which the court has considered.

These issues were; the Taxing Master should have considered that this was a succession matter and not taxed each bill of costs separately; the Taxing Master should have considered the conduct of the parties in this matter; that the Taxing Master should have used the amount in the escrow account to consider the instruction fees for the 4th and 5th Defendant; that the instruction fees were grossly exaggerated; that the Taxing Master did not indicate the schedule under which the bill was taxed.

16. Its trite law that Courts would not generally interfere with the decision of a Taxing Master. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W’Njuguna & 6 Others [2006] eKLR*; the Court stated:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on



an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.

Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge.”

17. The first concern that the applicant has with the Taxation Ruling is that the learned Taxing Master should have taxed the matter as a Succession Cause. This argument cannot hold water as this was a matter filed in the Environment and Land Court and hence could only be properly taxed as a civil matter.

18. The next argument is that the Taxing Master should have considered one instruction fees in respect of all Respondents.

On this Taxing Master considered the bill for the 1st, 2nd and 3rd Respondents together, 4th and 5th Respondent separately. In a case where there are several defendants it is my view that the Taxing Master should be guided by the representation and also the pleadings. As such parties who have filed one pleading and represented by one counsel should file one bill. I therefore find no error of principle by the Taxing Master in considering the bill by the 1st, 2nd and 3rd Respondents jointly and that of 4th and 5th Respondent separately. It is however my view that in deciding whether to increase the instruction fees in respect of each bill of costs, the Taxing Master should consider as a factor that the amounts in respect of each party will be paid by one party.

19. The applicant takes issue with the Ruling in that he states that the Learned Taxing Master did not indicate the applicable Remuneration Order.

The Taxing Master applied Schedule 6. As I have indicated above the matter was filed in the Environment and Land Court hence Schedule 6 is the correct schedule.

However, the Taxing Master in assessing the court fees should have considered that Schedule 1(a), (b) and (c) makes a distinction on the instruction fees payable if a matter is withdrawn before filing of defence or setting the matter for hearing. The learned Taxing Master should have considered this aspect in respect of each bill and stated the finding in respect of each.

20. The next bone of contention is whether the value of the subject matter could be determined. According to the Remuneration Order, the value should be ascertainable from the pleadings, Judgement or settlement. In this case Judgement was not delivered as the matter was withdrawn. Neither was a settlement reached. It is argued by the Respondents that the Settlement agreement indicates the value of the subject matter is Kshs 30,000,000. The settlement agreement which has been severally referred to had yet to be produced as evidence in court.

This court is of the humble view that the Remuneration Order does not envisage that extraneous documents which were not produced should be used to determine the value of the subject matter. This then leaves the pleadings.

21. Britannica defines a pleading as a written presentation by a litigant in a suit setting forth the facts upon which he claims legal relief or challenges the claims of his opponent. In the instant case this is the Plaintiff and Defence.

The figure that is discernible from the Plaintiff herein is the amount in the escrow account. This is what the learned Taxing Master should have relied on to determine the value of the subject matter.



22. In the case of First American Bank v Shah& Others [2020] 1EA 64 it was held that the Taxing Master must first set out the basic instruction fees before considering whether to increase or reduce it. And where it reduces or increases, reasons must be given.
23. In this case the Taxing Master in her ruling at paragraph 3 on page 3 indicates and I quote; “am persuaded that an instruction fee of Ksh. 485, 000/ would be fair and reasonable to the 1st, 2nd and 3rd defendant’s and a similar amount for the 4th defendant and 5th defendant.” This exercise of discretion does not first set out the basic instruction fees and does not indicate the factors the Taxing Master considered in awarding the fees. The elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified with conviction
24. In the end I find that the errors and omissions amount to an error of principle that warrant setting aside of the ruling dated 2nd September 2021, which I hereby set aside and return for taxation before a different taxing officer of this court, who should take into account the principles outlined in this Ruling.

Each Party will bear their own costs for that reference.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 23RD OF MAY, 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

-Esther Nabutete for Plaintiff

-Mr. Okiya holding brief for Omuga for 2nd and 3rd Respondents

-Court Assistant-Steve

