



Ndegwa v Ol'kalou Water & Sanitation Company Limited & another (Environment & Land Case 107 of 2023) [2024] KEELC 3859 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 107 OF 2023**

YM ANGIMA, J

MAY 16, 2024

BETWEEN

NJOROGE NDEGWA PLAINTIFF

AND

OL'KALOU WATER & SANITATION COMPANY LIMITED ... 1ST DEFENDANT

RIFT VALLEY WATER SERVICES BOARD 2ND DEFENDANT

RULING

A. Introduction

1. This is a ruling arising from a reference against the decision of the taxing officer Hon. V. Kiplagat dated 31.05.2023. By the said decision, he taxed and allowed the Plaintiff's party and party bill of costs dated 02.02.2023 as drawn for a sum of Kshs.9,825,962.00/= only.
2. Vide a ruling dated 07.12.2023 the Defendants were granted an extension of time within which to file a reference against the decision of the taxing officer dated 31.05.2023. The court also allowed the Defendants to file the reference without the usual reasons for the taxation from the taxing officer because it is a matter of public knowledge that the said taxing officer has since been transferred to a different station.

B. Defendant's Reference

3. The Defendants filed a reference dated 19.12.2023 under paragraph 11 of the Advocates Remuneration Order (the Order). The Defendants sought to have the taxation set aside on the basis that the taxing officer committed an error of principle during the taxation and that the taxed amount of Kshs.9,825,962/= was so high and excessive as to be a wholly erroneous estimate of costs. The Defendants contended that even though the Plaintiff's bill of costs was taxed in their absence the amount allowed as per the certificate of taxation was excessive and erroneous.



C. Directions on Submissions

4. When the reference was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendants filed written submissions dated 14.02.2024 whereas the Plaintiff's submissions were dated 13.03.2024.

D. Issues for Determination

5. The court is of the view that there are only two key issues for determination in this reference namely:
 - a. Whether there is merit in the Defendants' reference against the taxing officer's taxation.
 - b. Who shall bear costs of the reference.

E. Analysis and Determination

a. Whether there is merit in the Defendants' reference against the taxing officer's taxation

6. The material on record shows that vide a plaint dated 12.07.2010 and amended on 02.09.2010 the Plaintiff sued the Defendants seeking the following reliefs:
 - a. A declaration that Title No. I.R. 42314 and LR No.3777/279/66 belongs exclusively to the Plaintiff pursuant to the certificate of lease dated 12/6/1987 and issued to him on the 16/6/1987.
 - b. An order of permanent injunction do issue restraining the Defendants either by themselves, their agents, servants, employees, contractors or anybody else whether claiming in or under their names from in anyway whatsoever trespassing into, developing, interfering or in any other manner dealing with Title I.R. No. 42314 and LR No. 3777/279/66 within Ol'Kalou Township in Nyandarua Central District.
 - c. General damages for trespass and for the illegal dealings on the suit plot.
 - d. Costs of this suit and interest.
 - e. Any other relief or further relief that this Honorable Court may deem fit and just to grant.
7. The Plaintiff pleaded that he was the registered proprietor of LR 3777/279/66 (I.R.No.42314) the suit property located in Ol'Kalou Township in Nyandarua County which was a leasehold interest from the Government of Kenya for a period of 99 years with effect from 01.10.1986. The Plaintiff further pleaded that the Defendants had without any lawful justification or excuse entered the suit property and caused permanent developments thereon without his consent in violation of his property rights hence the suit
8. It is evident from the material on record that the value of the subject matter of litigation was not disclosed in the pleadings. The value could not also be ascertained from any settlement since there was no settlement in this matter. The value of the subject matter could not be ascertained from the judgment as well save for the award of general damages of Kshs.1,000,000/= for trespass awarded to the Plaintiff. In fact, the Plaintiff and the Defendants have conceded in their respective submissions that the value of the subject matter could not be ascertained through any of the modes stipulated in the Order.



9. Whereas the Defendants impugned the decision of the taxing officer as erroneous, the Plaintiff supported the decision of the taxing officer and only conceded an error to the extent of Kshs.3,000/= only. As a result, the Plaintiff submitted that his bill of costs dated 02.02.2023 should be allowed in the sum of Kshs.9,822,962/= only. On their part, the Defendants urged the court to set aside the taxation in its entirety.
10. The principles to be considered by a Judge seized of a reference against a taxing officer's decision were superbly summarized by Hon. G.V.O. Odunga J (as he then was) in the case of *Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarkets Ltd & 2 Others* [2018] eKLR as follows:
- “ 18. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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 inference that it was based on an error of principle; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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; (3) if the Court considers that the decision of the Taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64.”
11. It was the Defendants' submission that if the Plaintiff's supposed value of Kshs.5,000,000/= were to be the basis of taxation then under Schedule 6A Paragraph 1(b) of the Order, the instruction fee should have been Kshs.137,000/= and not Kshs.3,000,000/= as allowed by the taxing officer. The Plaintiff justified the instruction fee of Kshs.3,000,000/= on the basis that the suit raised complex issues and that the Defendants were profiting from their utilization of the suit property. The court has, however, noted that there was no certification by the trial Judge that the suit involved any form of difficult, complex, or novel issues.
12. The court is of the opinion that since the value of the subject matter could not be ascertained from the pleadings, settlement or judgment, then paragraph 1 (b) of Schedule VI of the Order was not applicable in the circumstances. Consequently, the Defendant's' advocates were plainly wrong in submitting that



the instruction fee should have been taxed at Kshs.137,000/= on the assumption that the value of the subject matter of litigation was Kshs.5 million. The court is of the opinion that the taxing officer was obligated to apply the scale under “other matters” at the end of paragraph (b) which provides as follows:

“Other matters

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than:-

- i. If undefended 45,000/=
- ii. If defended 75,000/=

13. It is not in dispute that the instant suit was defended hence the minimum applicable fee should be Kshs.75,000/=. The taxing officer, of course, has the discretion to adjust the amount upwards after taking into consideration other factors such as the nature of the case and its importance to the parties, the time and responsibility involved and the volume of documents involved among other factors. The court has already found that there was no difficulty, complexity, or novelty of issues involved in the matter. The Plaintiff’s suit was just an ordinary claim by a land owner seeking to vindicate his property rights.
14. It is the finding of the court that the taxing officer gravely erred in principle by taxing and allowing instruction fee on the plaint in the sum of Kshs.3,000,000/= whereas the minimum fee allowable was Kshs.75,000/=. The increment of the instruction fee by 40 times could not be justified in the circumstances. In the alternative, the court finds that the instruction fee allowed was so high and excessive as to be a wholly erroneous estimate of costs. As a result, the court is inclined to interfere with the decision of the taxing officer dated 31.05.2023.
15. It is evident from the material on record that the said error of principle on the part of the taxing officer also affected the instruction fee on the counterclaim (item No.15) which was also taxed and allowed in the sum of Kshs.3,000,000/=. The same error also affected the instruction fee allowed for getting-up which was erroneously allowed in the sum of Kshs.1,000,000/= as one third of the instruction fee. It is also evident that there was an error of principle on taxation of items which were dependent on the number of folios involved. As submitted by the Defendants, the folios on items such as drawing of pleadings, drawing of applications and perusal of pleadings and documents were not specified in the bill of costs. The number of documents copied were not specified to enable the taxing officer compute and allow the correct amount. The court agrees with the Defendants’ contention that in the absence of the number of folios involved the taxing officer had no basis for allowing the items as drawn.
16. The court has further noted that the Plaintiff’s item No.29 on “instruction fee” for amending his plaint was allowed in the sum of Kshs.30,000/=. The court agrees with the Defendants’ submission that the item was not anchored in Schedule VI of the Order and that the Plaintiff could only charge a fee for drawing the amended plaint. The taxing officer clearly committed another error of principle in allowing a strange form of instruction fee in civil proceedings. The court is thus inclined to set aside the additional instruction fee of Kshs.30,000/=.
17. For the said reasons, the court is satisfied that the Defendants’ reference against the decision of the taxing officer has merit. The court is persuaded that the taxing officer committed various errors of principle in taxing and allowing the Plaintiff’s bill of costs dated 02.02.2023 as drawn. The court is further satisfied that the amount awarded of Kshs.9,825,902/= was so excessive as to be a wholly erroneous estimate of costs in the matter. As a result, the court shall set aside the entire taxation of the



taxing officer and the certificate of taxation dated 31.05.2023. The court shall further direct that the Plaintiff's bill of costs shall be referred to a different taxing officer for taxation de novo.

b. Who shall bear costs of the reference

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Defendants shall be awarded costs of the reference.

F. Conclusion and Disposal Orders

19. The upshot of the foregoing is that the court finds merit in the Defendants' reference against the taxing officer's decision. As a consequence, the court makes the following orders for disposal thereof:

- a. The Defendants' reference dated 19.12.2023 be and is hereby allowed in the following terms:
 - i. The certificate of taxation dated 31.05.2023 is hereby set aside.
 - ii. The Plaintiff's bill of costs dated 02.02.2023 shall be remitted to a different taxing officer for fresh taxation in accordance with the applicable provisions of Schedule VI of the Advocates Remuneration Order.
- b. The Defendants are hereby awarded costs of the reference.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 16TH DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Ojare for the Plaintiff

Mr. Okumu for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

