



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, AZANGALALA, KANTAI JJ. A)

CIVIL APPEAL NO. 262 OF 2012

BETWEEN

MORONGE & COMPANY ADVOCATES APPELLANT

AND

KENYA AIRPORTS AUTHORITYRESPONDENT

(Appeal from a Ruling of the High Court of Kenya at

Kisumu (H. K. Chemitei, J) dated 26th July, 2012

in

KSM HCMISC No. 138 OF 2011

JUDGMENT OF THE COURT

This appeal is from the ruling of **Chemitei J**, dated 26th July, 2012 allowing the application of **Kenya Airports Authority** (hereinafter the client”) dated 29th November, 2011. By that application the client sought two main orders of the court expressed as follows:-

“ (a) That the decision of the Deputy Registrar dated 31st May, 2011 together with the Certificate of Taxation issued on 7th June, 2011 be set aside and the Respondent's Advocates/ client Bill of costs dated 5th May, 2011 be taxed afresh.

(b) That this Honourable Court be pleased to order that the execution of the Certificate of Costs issued on 7th June, 2011 be stayed pending the hearing and determination of this application.”

The learned Judge set aside the Certificate of Taxation which had been issued in favour of **Moronge & Company Advocates**, the respondents (hereinafter “the **Advocates**”). The learned Judge also held that the sum of Kshs. 278,466,690/=, which was the amount at which the Advocate / client's bill of costs had been taxed, was “**manifestly excessive in the circumstances.**”

The dispute arose this way. The client was sued by some **99** individuals in Kisumu High Court Civil Suit No. 179 of 2009. By their plaint amended on 9th December, 2009 the 99 individuals (hereinafter “**the plaintiffs**”) claimed a sum of Kshs. 25,542,000,000/= being compensation for “**loss of land, development, inconveniences current and future loss of profits to be earned.**” The client instructed the advocates to defend the suit. Upon receipt of those instructions, the advocates, among other things, entered appearance and delivered a defence. They also lodged an application in that suit seeking an order striking out the suit. The application was allowed in a ruling delivered by **Ali-Aroni J**, on 29th October, 2010. The learned Judge held that the plaintiffs' suit was incompetent for the following reasons:-

“ **(a) No notice was issued to the authority as required by Section 34 of Chapter 395.**

(b) any reference to the High Court would be by way of appeal against the decision of the Commissioner of Lands.”

The advocates then demanded their fees which they stated amounted to Kshs. 638,779,000.00. The client protested in its correspondence with the advocates that the fees were exorbitant and offered to pay Kshs. 480,000/= in settlement thereof. On their part, the advocates offered “ a 30% rebate” on their instructions to fees.” The client apparently declined the offer.

The advocates subsequently lodged their advocate / client bill of costs before the Deputy Registrar of the High Court. They claimed a total sum of Kshs. 416,884,592.87 of which Kshs. 239, 542,212.50 constituted instructions fees.

The bill of costs was placed before **Ezra Awino**, then a Senior Principal Magistrate, who taxed the same at Kshs. 278,416,690/=. The proceedings relating to the taxation show that the taxation proceeded ex-parte as neither the client nor its counsel attended the taxation despite having been served. Following the taxation, a Certificate of Costs was duly issued on 7th June, 2011. The client did not formerly object to the taxation.

The advocates then sought to recover the taxed costs in **Misc. Application No. 138 of 2011**. Some of the proceedings relating to that application are not included in this record. It would appear however, that those recovery proceedings triggered **High Court Civil Suit No. 124 of 2011** in which the client substantially challenged the said taxation. Pending the hearing of that suit, the client lodged an application in which it sought the following main reliefs from the Court:-

“ **(1) That this honourable court be pleased to order that the hearing of High Court Misc App. No. 138 of 2011 be stayed pending the hearing of this application inter partes.**

- 2. That this Honourable court be pleased to order that the hearing of High Court Misc Civil Suit number 138 of 2011 be stayed pending the hearing and determination of this suit.**
- 3. That this Honourable court be pleased to set aside the taxation in High Court Misc Civil suit number 138 of 2011 and the consequential certificate of costs.”**

The clients' said application was heard by Chemitei J, who, on 21st November, 2011, made the following orders:-

“**(i) The applicant's application dated 28th July, 2011 is hereby dismissed with costs.**

- ii. The applicant shall within the next fourteen (14) days from the date herein file and serve the reference in case number Misc Application 138 of 2011.**
- iii. In default of the compliance with (ii) above the respondent shall be at liberty to execute the certificate of costs as issued in his favour by the taxing master.**
- iv. The filed reference if any shall be mentioned on 5th December, 2011.**

v. There shall be a stay of execution for the next fourteen (14) days in any event.”

So, despite the dismissal of its application, the client was granted leave to file a reference to the High Court against the taxation of the advocate / client bill of costs. The learned Judge, in reality, treated the client's application in HCCC No. 124 of 2011 as its application for leave to enlarge the time within which to file a reference from the said taxation. The advocates have challenged that procedure in this appeal but unfortunately did not challenge the said order of the learned Judge in those proceedings. In our view it is now not open to the advocates to complain against the order in this appeal which arose from the reference which was made by the client pursuant to the order of the learned Judge.

The client lodged its reference by way of a Notice of Motion dated 29th November, 2011. Only two orders were sought, apart from costs, which orders we have cited at the beginning of this judgment. In allowing the client's application, the learned Judge rendered himself as follows:-

“There was no basis for the sum of Kshs. 25 billion demanded by the plaintiffs therein. There is no valuation or any other document in support of their claim at all.

.....

.....

Having found that there was no basis for the award by the taxing master what is the recourse for the advocate(s). They are entitled to their costs. This is his livelihood. He has worked. He has given a sound and credible opinion and as result he succeeded in having the suit against the claimant struck out. He won the case.

The advocates pay however must be commensurate to his work otherwise shall be what is termed as “unjust enrichment”. The same must be a reasonable compensation for professional work done.

The court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances. Having carefully perused through the rival affidavits and submissions and taking into consideration the issues I have observed above I am inclined to set aside the taxing master's certificate issued herein. The sum of Kshs. 278,466.690/= was manifest of excessive (sic) in the circumstances.

Having set aside the said Certificate, the learned Judge retaxed the bill at Kshs. 1.2 million and condemned the client in costs. That is the order which provoked this appeal which is premised upon seven grounds expressed as follows:-

“ (1) Having found that the plaintiffs in HCCC No. 179/2009 sought a sum of Kshs. 25,524,000,000.00 the learned Judge erred in law by holding that there was no basis for use of the said sum in calculating the basic instructions fees.

- 2. The Learned Judge erred in law by basing his determination on the amount of legal fees on an opinion regarding the chances of success of a suit given to a client rather than the pleadings in the suit he was instructed to defend.**
- 3. The Learned Judge misapprehended the law on taxation by using improper considerations in determining the value of the subject matter and thereby failed to determine basic instructions fees on a claim whose value was disclosed by the pleadings.**
- 4. Having found that the Respondent had not filed a reference as required by Section 11 (b) of the Advocates Remuneration Order, the learned Judge erred in law by exercising his discretion to interfere with the decision of the taxing master.**
- 5. The learned Judge erred in law by declining to refer the matter back to the taxing master and instead substituting it with his own.**
- 6. In all circumstances the decision of the learned Judge is unlawful, premised on**

- discretion that has not been exercised judiciously, and manifestly unfair**
7. **Such other and or further grounds as may be canvassed, adduced, proved and or emerge at the hearing of this appeal.”**

In arguing the appeal before us, **Mr. Bwomote**, learned counsel for the advocates, raised the following issues:-

- i. **Improper determination by the learned Judge of the value of the subject matter of the suit.**
- ii. **Retaxing the bill of costs without jurisdiction.**
- iii. **Considering the client's reference when the same was incompetent having been filed contrary to the provisions of the Advocates Remuneration Order.**

Mr. Bwomote invoked several decisions of this Court and those of the High Court in support of his arguments and urged us to set aside the decision of the High Court and remit the bill of costs back to the taxing officer for taxation afresh.

In response, **Mr. Munyu**, learned counsel for the client, submitted that determination of the value of the subject matter is not limited to the figure mentioned in the pleadings. In his view, such a restricted determination of the value of the subject matter would encourage filing of frivolous suits with the sole purpose of unjust enrichment. On the challenge raised regarding the jurisdiction to tax the bill by the learned Judge, **Mr. Munyu** contended that the Judge indeed had jurisdiction to tax the bill rather than refer it back to the taxing officer. On the argument that the reference was incompetent, learned counsel submitted that, that could not be as the reference was filed pursuant to an order of the court in proceedings against which no appeal had been preferred. He too invoked several decisions of this court, the High Court and even decisions from other jurisdictions.

We have considered the grounds of appeal, the record of the High Court, the proceedings of the taxing officer and the rival submissions of counsel. We have further duly considered the authorities cited to us by counsel. Having done so, we propose to first consider the complaint against the competence of the reference before the High Court. The short answer to this complaint is that it is without merit. We have already dealt with this complaint in this judgment and need not repeat what we have already stated. Suffice to say that the client was granted extension to file its reference against the taxation in a ruling in separate proceedings against which ruling the appellant preferred no appeal. We do not think it is necessary to comment on whether or not an appeal against the said ruling would have succeeded.

The second issue upon which counsel made arguments and which we think we should consider in some detail is whether the learned Judge of the High Court had jurisdiction to tax the contentions bill himself rather than remit it to the High Court for taxation. In our view, the issue of the jurisdiction of High Court Judge to tax a contested taxation on a reference is settled. Indeed all the authorities cited to us by counsel for the appellant are unanimous that a judge of the High Court has jurisdiction to tax the bill himself.

In **D'sonza v Ferrao [1960] 602**, it was stated at page 605 as follows: -

“Though the general practice is as indicated in the foregoing passages the reviewing judge can and sometimes does deal with the matter (taxation) himself.”

In **James v Nyeri Electricity [1961] 492**, it was stated at pages 492 – 293 as follows:-

“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim

(4) 1956, 23 E.A.C.A. 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles,”

And in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [Civil Appeal No. 220 of 2004] (UR)**, this Court, differently constituted, said:-

“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And 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 (see – D’Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243.” (Underlining ours).

In view of the decisions in the above cases, we must reject the argument that the learned Judge of the High Court had no jurisdiction to tax the contentious bill himself. Related to this finding is the issue as to whether, in the circumstances of this case, the High Court Judge was entitled to interfere with the taxing officer's determination of

instructions fees due to the appellant. The learned Judge stated as follows:-

“ The advocate's pay however must be commensurate to his work otherwise it shall be what is termed as “unjust enrichment.”

The same must be a reasonable compensation for professional work done.

This court shall interfere with the decision of the taxing master if the same was unreasonable and excessive in the circumstances. Having carefully perused through the rival affidavits and submissions and taking into consideration the issues I have observed above I am inclined to set aside the taxing master's certificate issued herein. The sum of Kshs. 278,466,690/= was manifestly excessive in the circumstances.”

Prior to the above passage the learned Judge had said:-

“Having found that there was no basis for the award by the taxing masters (sic) what is the course for the advocate. They are entitled to their fees. This is his livelihood.”

From the above findings it is clear to us that the learned Judge was not merely concerned with the quantum of fees awarded by the taxing officer but also considered that the figure awarded of Kshs. 278,466,690/= had no basis.

The record of the taxing officer shows that he determined instructions fees under schedule VI (1) (b) of the Advocates (Remuneration) Order which gives a guide on how the value of the subject matter of a suit may be determined. The value may be found from the pleadings, judgment or settlement between the parties. In the matter before us the taxing officer took the figure which was given in paragraph 12 of the amended plaint aforesaid which reads as follows:-

“12. The Plaintiff avers (sic) that the acts of the Defendant has (sic) deprived them livelihood of themselves, their children, grandchildren, great grandchildren, and great great grand children and their future personal representatives. The plaintiffs also claim mesne profits and loss of income from their parcels of land.

Particulars of loss and damage suffered by the plaintiff (sic)

- (i) Loss of respective parcels of land belonging to the plaintiffs.
- (ii) Non-compensation of Land compulsorily acquired.
- (iii) Inadequate, compensation for land illegally acquired.
- (iv) Non-compensation and inadequate compensation for loss and damages suffered by the plaintiffs.
- (v) Fraudulent representation for adequate compensation and or compensation at all.
- (vi) Loss of profits for the development on the respective parcels of land.
- (vii) Disturbances and in concurrencies (sic) suffered as a result of loss and damage and illegal acquisition.
- (viii) Mesne profits

PARTICULARS OF SPECIAL DAMAGES

(i) Each Plaintiff claims an average of Kshs. 258 Million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respective parcels of land which aggregates to Kshs. 25,542,000,000.00 which also represents loss for their children, personal representative (sic) future grandchildren and great grandchildren.

Each Plaintiff will tender evidence for loss of land, loss of profits, damage and inconveniences suffered at the hearing hereof.”

A plain reading of the above paragraph shows, without doubt, that it was not possible to determine the value of the subject matter of the suit from the pleading. We say so, because the subject parcels of land were not identified. Their respective valuations were not given. The alleged developments were not particularized. The figure of Kshs. 25,542,000,000/= given in the paragraph was also said to represent loss to the plaintiffs, their children, their representatives, future grandchildren and great grandchildren without disclosing how the figure was arrived at.

In our view, there is no way the value of the subject matter of the suit could be determined from the pleading in paragraph 12. The figure given therein was, in our view, plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis. It could not therefore be the value of the subject matter of the suit. The suit was dismissed on a preliminary objection. The value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none. As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the taxing officer should have used his discretion to determine such instructions fees as he considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances (**See Joreth Limited =vs= Kigano & Associates [Court of Appeal, Civil Appeal No. 66 of 1999 Nairobi] (UR)**). The taxing officer in our case did not do so but the learned Judge of the High Court did. In our view, he was entitled to interfere with the decision of the taxing officer as he did. We do not detect any error of principle or improper exercise of discretion.

We have said enough, we think, to show that this appeal is without merit. It is ordered dismissed with costs to the respondent.

Dated and Delivered at Kisumu this 21st day of February, 2014.

W. KARANJA

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR