Seventh -Day Adventist Church E.A Ltd (Nairobi East SDA Church) v Strathmore Edu. Centre & 2 others (Environment and Land Miscellaneous Application 303 of 2011) [2024] KEELC 4642 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4642 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 303 OF 2011

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

SEVENTH -DAY ADVENTIST CHURCH E.A LTD (NAIROBI EAST SDA CHURCH) ..... APPLICANT

AND

STRATHMORE EDU. CENTRE ..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

STELLA MABAI T/A ST MARY'S SCHOOL ..... 3RD RESPONDENT

RULING

1. The Applicant filed a reference on taxation of Items 1 & 2 of the 2nd Defendant's Bill of Costs dated 16th August 2021 and the 3rd Defendant's Bill of Costs dated 18th February 2022 as per the learned Taxing Master's decision dated 2nd February 2023 vide chamber summons dated 29th May 2023 seeking to have the two items set aside.

2. The grounds for the reference were that the Taxing Master erred in principle and misdirected herself in assessing the said two items in the 2nd and 3rd Defendant's Bills of costs which are excessive, unreasonable and arbitrary, contrary to the rules and principles of taxation. That the Taxing Master failed to appreciate that the matter before the court was not complex as it involved basic matters of law on trespass hence the same was simple and straight forward. That the time taken to conclude a matter in court does not imply that the matter is complex.

3. The Applicant contended that the Taxing Master erred in principle by failing to set out the basic instructions fees before venturing to increase it on the factors listed and not identifying the elements of complexity in the issue before the Court or describe with accuracy the nature of the responsibility which had fallen upon counsels to justify the amounts awarded in the impugned Items No 1 & 2.

4. In opposition, the 2nd Respondent filed a replying affidavit sworn on 10th November 2023 by Stanley Gitari and the 3rd Respondent filed grounds of opposition dated 8th August 2023. The 2nd Respondent stated that the only ground advanced by the applicant to support its claim is that the two items as taxed are excessive and arbitrary without presenting any documentary or empirical evidence to sustain the same.

5. Mr Gitari vehemently refuted the assertion by the Applicant that the matter before the Court was simple and straight-forward as from the Court record the same presented an array of issues for determination; trespass, subdivision and the transfer of land. He avers that where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement by the Parties as in the present matter, the Taxing Officer has the discretion in ascertaining the instruction fees as s/he deems just. Further, that the Taxing Officer in assessing the instruction fees will consider, amongst other matters: the nature and the importance of the matter, the interest of the parties, general conduct of the proceedings and other relevant circumstances thus was in adherence to the *Advocates (Renumeration) Order* that sets the getting up fees at least a third of the Instruction fees.

6. The grounds of opposition stated inter alia that the application is bad in law and incurably defective as it offends the mandatory provisions of Paragraph II of The Advocates Remuneration Order. That the Applicant did not issue a Notice of objection indicating the items of the Bill of Costs it objected within the statutory timelines. The 3rd Defendant also pleaded that the application is statute barred as it is filed out of time allowed by law without any leave of this Court. That it is ambiguous for not seek any specific prayer from this Court.

7. The 3rd Defendant averred that the Applicant has not demonstrated any sufficient grounds to demonstrate that the Taxing Officer failed to apply the correct principles of taxation of instruction fees and getting up fees under schedule 6 of the *Advocates Remuneration Order,2014* to warrant the Honorable Court's interference. That in any event, the Applicant did not challenge any item contained in the Bill of Cost despite being served with the same and therefore the instant application is wrong in law, untenable and an abuse of the Court process.

8. In response to the 2nd and 3rd Respondents' affidavit and grounds of opposition, the Applicant filed an affidavit sworn by Manyara Mainye Michael on 27th November 2023 stating that the Plaintiff did issue a notice of objection one day after the ruling as contemplated under Rule 11 (1) of the Advocates Remuneration Order through a letter to the Deputy Registrar, dated 3rd February 2023 which was copied to Counsels for the 2nd and 3rd Defendants. That the Deputy Registrar never responded to the letter forcing them to do a reminder on 17th May 2023 which equally was copied to all the advocates on record and similarly there was no response, making them write another letter on 24th May 2023 and a personal email to the Deputy Registrar.

9. That the Deputy Registrar responded to the email sent and indicated that a letter dated 3rd February 2023 was forwarded to the Applicant's postal address which had not been received and finally received the ruling of the taxing officer on the 26th May 2023 as can be deduced from the trail of the annexed emails of 24th - 26th May 2023. He deposed that a reference was filed on the 29th May 2023 which was 3 days after receipt of ruling on taxation that contained the reasons of the taxing master thus in compliance with Rule 11 (2) of the *Advocates (Remuneration) Order*.

Submissions

10. The Plaintiff/Applicant and the 2nd Respondent filed submissions dated 27th November 2023 and 14th December 2023 respectively. The Applicant submitted that the taxing officer, delivered her ruling on

2nd February 2023 where she taxed instructions fee at Kshs 1,200,000/- and Item 2 Kshs 400,000/- each for the 2nd and 3rd Defendants.

11. That what was taxed as instructions fees and consequently getting up fees by the taxing master through the said ruling was grossly excessive and not based on sound principles of taxation. In support of this argument, they cited the case of *First American Bank of Kenya v Shah & others* [2002] 1 EA 64 which was quoted with approval in *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR which summarized the principles to be considered when a Judge determining a reference from a taxing master's decision may interfere with the taxing officer's discretion.

12. The Applicant submitted that the value of the subject matter could not be ascertained from the pleadings and judgement but what was in issue was the ownership of the suit properties where the Plaintiff sought for a permanent injunction, restraining the Defendants from trespassing on the suit property measuring 4 acres, special damages, general damages for inconvenience and loss of user, declarations, transfer general damages and costs. That in the judgment the Plaintiff was granted an injunction, costs and interest.

13. Placing reliance on the decision of Ojwang J (as he then was) in *Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna & 6 others* (2006) eKLR, the Plaintiff contended that the amount charged as instruction fees was inconsistent with the known principles of taxation and the taxing officer not only did fail to set out the basic fees before venturing to consider whether to increase or reduce it, but also failed to outline the formulae used in reaching the said figure especially where she clearly found as a matter of fact that the value of the subject matter was unascertainable.

14. They added that the taxing master ignored her duty to refuse usurious claims and ensure and avoid the possibility of unjust enrichment for any party as the figure given for instruction fees is exorbitant considering the matter was not complex and cited the case of *Belgo Holdings Limited v Robert Kotch Otachi & another* [2019] and *Opa Pharmacy Ltd v Howse & Mcgeorge Ltd* Kampala HCMA No 13 of 1970 (HCU) [1972 EA 233.

15. The Applicant submitted that it is in the public interest that costs are kept to a reasonable level so that justice is not put beyond the reach of the poor which makes this court obliged to set aside the amount taxed. In support of the argument cited the case of *Republic v Ministry of Agriculture & 2 others* (*supra*) as quoted by Odunga J in *Nyangito & Company Case* (*supra*).

16. In its submissions, the 2nd Defendant gave a factual background of the suit, outlining the pleadings filed, orders sought and dismissal of the Plaintiff's case with the 1st and 3rd Defendant's counterclaims being allowed with cost. They submitted that the discretion of a taxing master can only be interfered with in limited and justified circumstances as was echoed in *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR.

17. That, since the value of the subject matter could not be ascertained, the taxing master had the leeway to use her discretion to assess the instruction and the getting up fees as she deemed fair and reasonable. They submitted that the Taxing Master taxed the instruction fees at Kshs 1,200,000 and gave her reasons for arriving at the said figure to be the general conduct of the proceedings, the care and labour employed by counsel in the prosecution of the suit, the nature in terms of complexity and amount of time taken to conclude the suit.

18. They submitted that the Plaintiff has not adduced any documentary nor empirical evidence to show that the taxing master might have erred in principle by relying on irrelevant factors in computing the final figures and as such, it is the 2nd Defendant's submission that the Plaintiff has not met the test warranting an interference of a Taxing master's decision and in support cited the case of *African*

Merchant Assurance Co. Ltd v Kenya Power & Lighting Co. Ltd [2020] eKLR where it was remarked that at this stage the burden of proof is on the applicant to demonstrate an error of principle or failure to take into account relevant matter on the part of the taxing master.

19. They further submit that with regard to getting up fees, it was a matter of simple arithmetic and as evident in the Taxing master's decision, the sum of Kshs 400,000/ that was charged as getting up fees amounts to one-third of the Instruction fees charged.

Determination:

20. The Applicant has urged the taxing master erred in principle in taxing the Instruction fees and getting up fees at Kshs 1,200,000 and Kshs 400,000 respectively. They contend that the amounts are excessive and no reason was issued to show how the figures were arrived at. In opposition, the 2nd and 3rd Respondents stated that the Applicant's reference was out of time and the Taxing Master exercised her discretion judiciously in taxing of the two impugned items after noting that the value of the subject matter could not be ascertained from the pleadings and the judgement.

21. It is not in dispute that the instruction fees are based on the value of the subject matter and where the value cannot be ascertained from the pleadings as in this case, the same has to be arrived at by exercise of discretion of the Taxing Master. I frame the following issues in determination of the reference;

    a. Whether the references is incompetent for being filed contrary to paragraph 11 of the *ARO*?

    b. Whether the Taxing Officer erred in principle while taxing the Advocate-client bill of costs herein

a. Whether the references is incompetent for being filed contrary to paragraph 11 of the ARO?

22. The 2nd and 3rd Respondents contend that the Applicant filed the instant reference out of time contrary to paragraph 11 of *Advocates Remuneration Order*. They submitted that the Taxing Officer delivered her ruling on 2nd February 2023 and the Reference was filed on 29th May 2023 exceeding 14 days provided for.

23. Paragraph 11 of *ARO* provides:

> "(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 his objection."

24. The Applicant has vividly explained to this court that although the Taxing Master rendered her ruling on 2/2/2023, they received the actual ruling which outlined the reasons thereof on 26th May 2023. In proof of the reason why they had filed the reference out of time, they annexed correspondence with the court which was always copied to the Respondents. The Chamber summons dated 29th May 2023 was thus filed within the time provided under paragraph 11(2) of the *ARO*. Consequently, the Applicant did not require to seek leave of this court to allow them file the reference out of time.

b. Whether the Taxing Officer erred in principle while taxing the Advocate-client bill of costs

25. The Principles of taxation are aptly stated in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others No 3* (1972 EA 162) where the court noted as follows on the principles on taxation:

> " (a) successful litigant ought to be fairly reimbursed for costs he has had to incur
>
> (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy.
>
> (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and
>
> (d) that as far as practicable there should be consistency in the awards made.
>
> (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances
>
> (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically
>
> (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

26. As earlier said, there is no contention that the value of the subject matter is not indicated in the pleadings thus there is no mathematical formulae that could be used to arrive at the figure awarded. I have perused the prayers sought in the amended Plaint and the Counter-claim filed thereof and note that the taxing master took these into consideration. She stated thus;

> " ...the Plaintiff sought nullification of the subdivision of the suit property and the allocation of 4 acres for its use."

27. In my opinion and I so hold that the nature of the orders sought were not complex to require a lot of labour to be employed by counsels on record for the parties. The number of witness who testified were not very many (the record shows a total of seven witnesses) and the land in dispute was not vast (4 acres on Jogoo road). The taxing master does not disclose her estimate value of the property that would warrant the award of Kshs 1,200,000 as instructions fee. I am persuaded to find that she did not apply her discretion judiciously on the award of impugned sum of Kshs 1,200,000 and the consequent getting up fee.

28. It is on this account that I find merit in the reference under review and allow it. The matter shall be referred back for taxation before any of the current Deputy Registrars of the Environment and Land Court. Each party to bear their Costs of the Reference.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2024

A. OMOLLO

JUDGE