



Sichuan Huashi Enterprises Corporation v Thiongo (Environment & Land Case 1593 of 2016) [2024] KEELC 13282 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1593 OF 2016**

JA MOGENI, J

NOVEMBER 19, 2024

BETWEEN

SICHUAN HUASHI ENTERPRISES CORPORATION APPLICANT

AND

GEOFFREY MUNGAI THIONGO RESPONDENT

RULING

1. This Ruling is in respect of a Chamber Summons application dated 7/05/2024 by the applicant brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Rule 11 of Advocates (Remuneration) Order, seeking the following orders
 - a. The taxation ruling dated 24th April 2024 be set aside.
 - b. Items No.1 and 2 of the of the Respondent's Bill of Costs dated 9th June 2023 on instructions fees be assessed based on sum of Kshs. 624,756,855.15 being the contractual value of the residential apartments on LR No. 15005/12 and LR No. 15005/13 that the Plaintiff sought to demolish through the restoration order.
 - c. In the alternative, the Respondents Bill of Costs dated 23rd June 2023 be remitted for re-taxation before any other taxing officer with directions that the costs be taxed on the sum of Kshs.624,756,855.15 being the contractual value of the residential apartments on LR No. 15005/12 and LR No. 15005/13 that the Plaintiff sought to demolish through the restoration order.
 - d. The court be at liberty to issue any further order and directions.
 - e. Costs of this application be provided for.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.



3. The application is supported by the grounds on the face of the application and the affidavit by Allen Waiyaki Gichuhi sworn on 7/05/2024 together with the annexures thereto.
4. The objection against the impugned taxation of costs is based on the grounds that the taxing master erred by finding that the suit was determined summarily yet it had been fixed for hearing on diverse occasions warranting a granting of getting up fees. Further that the taxing master failed to subscribe the correct instruction fees based on construction of the apartments on the suit property. Yet the plaintiff had sought for demolition orders wanting the land to be restored to its original state.
5. Counsel therefore urged the court to allow the application as prayed.
6. The respondent in the replying affidavit sworn by Geoffrey Mungai Thiong'o on 3/07/2024 deponed that the application filed is seeking to have the Court compel the taxing master to base the instructions costs on the sum of Kshs. 624,756,855.145. That in so doing the applicant seeks to take away the discretion of the Taxing master, which is not allowed in law.
7. He contends that the Plaintiff that he filed as well as the amended Plaintiff that he filed majorly declarations seeking to ensure the developers of the suit property should comply with the permits as granted and not violate zoning laws. He also sought compensation for violation of his constitutional rights.
8. He contends that the Applicant was NOT the developer of the suit property but a construction company engaged by the developers to erect a multi- storeyed apartment adjacent to his residential property in spring valley.
9. Further that, it is important for the court to note that, the construction of the challenged Apartments was completed back in 2019 as a result of a consent entered into by himself and ALL the Defendants. The consent essentially allowed construction to proceed and be concluded. Currently, an 8 storeyed apartment building stands on the property.
10. He avers that since the contract price awarded to the Applicant's to build the subject apartments was not in question and neither has the same ever been an issue of consideration. Thus the mention of the contract price in the suit has no bearing on the value of the subject matter in light of the declaratory and compensatory prayers sought in my Plaints.
11. He deponed that the value of the contract for building the apartments cannot be used as the value of the suit. Further the respondent avers that the taxing master subscribed the correct instruction fee which was based on the prayers sought and not the value of the contract price payable to the Applicant which was not at all an issue in contention between the parties.
12. The respondent thus averred that there is no prejudice that was suffered by the 1st and 2nd defendants during the subsistence of the suit that would warrant the use of the construct sum of the construction project as the subject matter value of the suit. Further that the taxing master's decision through the ruling of 24/05/2024 is well reasoned and does not warrant a review on quantum and/or principle adopted on taxation.
13. It is the respondent's contention that following his perusal of the ruling of the court, he is of the view that each and every question raised by the Reference has been soundly addressed by the taxing master; the reason behind failure to use the applicant's proposed value, the reason to adopt the value he used, the issue of summary dismissal based on the Applicant's preliminary objection.
14. This being the case, then the respondent submitted that there is no prejudice that was suffered by the 1st and 2nd defendants during the subsistence of the suit that would warrant the use of the construct sum of the construction project as the subject matter value of the suit.



15. It is the respondent's averment that the applicant does not deserve the orders sought.

Analysis and Determination

16. The issue for determination is whether the taxing master exercised his discretion judiciously whether they he applied the right principles in arriving his decision.

17. The general principles governing interference with the exercise of the taxing master's discretion are well settled as was held in the South African Case of *Visser vs Gubb* 1981 (3) SA 753 (C) 754H – 755C. 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 his 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 master 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.”

18. At the same time, the court in the case of *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court observed that;

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

19. The taxing master must be guided by the principles governing taxation as was held in the leading case of *Premchand Raichand Ltd Another -vs- Quarry services of East Africa Ltd and Another.* [1972] E.A 162. The principles laid out are:

- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
- ii. The taxing master was expected to tax each bill on its merits;
- iii. The value of the subject matter had to be taken into account;
- iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;
- v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
- vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.”



20. This case sums up the principles what a taxing master must take into account when considering a bill for taxation. The applicant faulted the taxing master for not considering the value of development on the suit property hence came up with a figure that does not reflect the value of the suit property.
21. A taxing master is under a duty to consider the instruction fee which should cover the advocates work including taking instructions and preparing the case for trial or appeal, the value of the subject matter and that the taxing master's discretion must be exercised judicially and not whimsically or capriciously.
22. From the record and the submission by counsel, I notice that the taxing master applied the principles governing taxation by considering the instruction fees, the decision of the court and the contractual value of the construction. This was a physical planning matter which focused on violation of the Physical Planning Act and the Applicant/Respondent filed a Preliminary Objection raising the issue of the doctrine of exhaustion.
23. The applicant claims that the Taxing Officer should have awarded getting up fees and also he should have considered the contractual value of the suit being Kshs 624,756,855.15. To which the respondent has responded to and stated that the value that the applicant has provided is neither substantiated nor enumerated in the pleading filed in court.
24. The Respondent further avers that the matter did not proceed to trial having had a preliminary objection filed by the applicant and which was ruled in the applicant's favour dealing a death-knell on the suit. A decision to which the respondent has filed appeal on.
25. It is the respondent's contention that where the suit is determined in a summary manner without proceeding to full trial then the fee to be charged should be 75% of the sum under the schedule. This being the case he avers that the sum awarded by the taxing master should be subjected to a 75% reduction because the case was dismissed.
26. The court in the case of Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR held as follows:

“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 is somewhat too high or too low; it will only interfere if it thinks the award is 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 inference 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.”
27. There is no evidence that the taxing master exercised his discretion capriciously or whimsically. I find that it would be unjust to interfere with the discretion of the taxing master and therefore dismiss the application with costs to the respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2024.

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MOGENI J



JUDGE

In the virtual presence of:-

Mr. Otieno holding brief for Mr. Gichuhi for applicant

Ms. Njunge for Respondent

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

