Mombasa Cement Limited v Paddy (K) Limited; Equity Bank Limited (Garnishee) (Commercial Case 017 of 2020) [2025] KEHC 808 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 017 OF 2020

JWW MONG'ARE, J

JANUARY 27, 2025

BETWEEN

MOMBASA CEMENT LIMITED ..... PLAINTIFF

AND

PADDY(K) LIMITED ..... DEFENDANT

AND

EQUITY BANK LIMITED ..... GARNISHEE

RULING

1. It is common ground that on 23rd November 2023 judgment was entered in favour of the Plaintiff against the Defendant in the sum of Kshs.370,053,796.45/= together with interest and costs. By a ruling dated 25th July 2024, the court's Deputy Registrar taxed the Plaintiff's party and Party Bill of Costs dated 16th April 2024 at Kshs.8,245,390.29/=. As a result of the judgment and the ruling, the Plaintiff has filed two applications; the Notice of Motion dated 7th June 2024 that seeks a Garnishee Order Nisi against the Garnishee ("the Bank") for the sum of Kshs.692,644,208.26/= and; the Chamber Summons dated 12th August 2024 that seeks to set aside the Deputy Registrar's ruling and have the Bill of Costs taxed afresh.

2. The application for the Garnishee Order Nisi has been responded to by the Bank through the replying affidavit of its Operations Manager, Community Supreme Branch, Irene Gatukui sworn on 1st July 2024. The Defendant has opposed the application for setting aside the taxation ruling through the replying affidavit of its director, Patrick Nthiga Mvungu sworn on 2nd September 2024. The Plaintiff has also supplemented its arguments through written submissions.

Analysis and Determination:-

3. From the pleadings and submissions, the court is to determine whether a Garnishee Order Nisi should be issued against the Bank for the decretal sum and whether the ruling on the Plaintiff's Bill of Costs should be set aside and the Bill of Costs taxed afresh. On the Garnishee Order Nisi, it should not be lost that the object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. Crucial thereof is that the Garnishee is indebted to the Judgement Debtor. Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the Garnishee is indebted to the Judgment-debtor. Ordinarily, the Judgment-creditor only makes allegations of the Garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable(See *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] KEHC 8931 (KLR)]

4. Whereas the Bank has not disputed that the Defendant holds an account with it under number 018XXXX49, it has deponed that the said account has a NIL balance and that there is no balance available for attachment in the said account which can be termed as a debt, owing from the Bank to the Defendant that can go to satisfy either in whole or part of the decretal sum sought to be attached. To support this deposition, the Bank has annexed the Defendant's account statement which indicates that indeed, the same has a NIL balance. Section 176 of the *Evidence Act*(Chapter 80 of the Laws of Kenya) creates a presumption in favour of the Bank as follows:-

> A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

5. Since the account statement has not been validly objected to and there is no other statement of accounts to dislodge this position by the Bank, I am satisfied that the Bank has shown sufficient cause that it is unable to satisfy any part of the decretal sum. The application against the Bank for the Garnishee Order Nisi cannot therefore be allowed and the same is therefore dismissed.

6. Turning on the application seeking to set aside the taxed costs, the Plaintiff faults the Deputy Registrar for her award on instruction fees by only considering the sum of Kshs. 370,053,796.45/= and not considering the amount of time and labor input into the instant matter and the complexity of the matter, its nature and importance to the public, whether a novel point of law is raised and the responsibility and skill of counsel. It further states that the Deputy Registrar misdirected herself on the amounts due and payable as of the date of the judgment of the suit. That the amount due and payable as of the date of the judgment was the sum of Kshs. 646,041,758.53/= and that having misdirected herself on the instruction fees, she also automatically misdirected herself on the getting up fee due and payable. The Plaintiff also faults the Deputy Registrar's taxation of items no 5, 18, 21, 24,27,33 and 40 on service by stating that the firm of Samba & Company is duly located in Kitale and has been undertaking service from Kitale to Nairobi to the offices of the Defendant physically and the same is 386.6 kilometres apart.

7. In response, the Defendant states that the Deputy Registrar rightly considered the sum of Kshs. 370,053,796.45/= as the basis of computing instruction fees as this is what the Plaintiff sought in its plaint and not that the principal amount had interest on it. As such, the Defendant states that the Deputy Registrar did not make any error or law or fact in the award of instruction fees. On the

items under service, the Defendant depones that the same was done online and as such, there is no justification to interfere with the awards under those items in the Bill of Costs.

8. It is trite law that the Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] KECA 325 (KLR) the Court of Appeal affirmed that taxation is a matter wholly within the discretion of the taxing officer and the judge on reference will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. The same principle was reiterated in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006] KEHC 3504 (KLR) where Ojwang' J.,(as he was then) 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.

9. The Plaintiff has challenged the Deputy Registrar's ascertainment of the value of the subject matter in her computation of the instruction fees. It should not be lost that failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside (See *Kamunyori & Company Advocates v Development Bank Of Kenya Limited* [2015] KECA595 (KLR)]

10. As rightly observed by the Deputy Registrar, it is now firmly established in a long line of authorities of this Court, beginning with the case of *Joreth Limited v Kigano & Associates* [2002] KECA 153 (KLR), that the value of the subject matter can be discerned or determined from the pleadings, the judgment or the settlement, as the case may be. From the ruling, it appears that the Deputy Registrar used the sum of Kshs. 370,052,765.45/= which is what was indicated in the Plaint and was awarded in the judgment. However, it is not disputed that the Plaintiff sought and was also awarded interest on this sum. On whether the value of the subject matter ought to have been ascertained by considering both the principal amount and interest, the late Majanja J., had this to say:

    7. In my view the value of the subject matter determined from the judgment comprises the principle sum and the interest claimed and awarded in the judgment. In this case, interest is an integral part of the claim and was ascertainable following judgment entered as prayed in the plaint. In *Desai Sarvia & Another v Giro Commercial Bank*, Nairobi HCCC No.1847 of 2002 (UR), Ibrahim J., observed that:

        > It is the plaintiff to decide how it pleads or makes its claim. The important thing is that the interest is part of the plaintiff's claim as instructed to its advocates and the value of the interest is determinable. It is a factor to be taken into account in the assessment of the instruction fees. I therefore hold that the decision by the Taxing

Master to the effect that no instruction fees is allowed on interest accruing is not sound in law is not sustainable in principle.

This decision was cited with approval by Kimaru J.,in *Bank of India v Surgilabs Limited and 3 Others* Milimani HCCC No. 740 of 2003[2008]eKLR who stated that, "I agree with the submission made by the defendants that where interest is awarded by the court, such element of interest shall be taken into account when assessing the instruction fees payable to the successful party."

8. I also note that in *Biomedical Laboratories Limited v Attorney General* (Supra), Havelock J., remarked that,

I have noted that the Plaintiff failed to put any authorities before this Court and I have carefully perused the authorities put forward by the Defendant. None of those authorities and none that I have ever come across, back the Plaintiff's proposition that the Judgement sum be enhanced by the amount of accumulated interest for the calculation of party/party costs.

Apart from the fact that the inclusion of interest claimed and ascertained in the judgment is supported by principle, that interpretation of the law is supported by various decisions I have cited that were not shown to Havelock J. On the whole therefore, I find and hold that the Deputy Registrar was correct in assessing the value of the subject matter.

11. From the above, I am persuaded that interest forms an integral part of the judgment and that it is capable of being determined as at the time of the judgment and that it ought to be considered by a taxing master in their ascertainment of the value of the subject matter. I have also gone through the decision relied upon by the Defendant, that is, *Kenya Power & Lighting Co. Ltd v Msellem* [2022] KEELC 2764 (KLR) and I find that it supports the position aforementioned that the fact that a party was awarded a specific sum, does not mean that the instruction fee should be based on that amount alone. The taxing master ought to consider the judgment as a whole and since interest is part of the judgment and the same was determinable, then it ought to be considered.

12. In this case, I find that the Deputy Registrar only considered the sum of Kshs.370,052,769.45/= awarded and not the interest which was also awarded in the judgment and yet the same was determinable and could have informed a different value of the subject matter were it considered. I find this to be an error of principle by the Deputy Registrar that warrants the court's intervention. The taxation in respect of instruction fees and consequently getting up fees is hereby set aside.

13. On the items in respect of service, the Deputy Registrar stated that the service was "Kshs. 1400 within 3km of the High Court or district". The Defendant has stated that this was because of conducting hearings and serving the pleadings online and that physical service was not done. This position was not rebutted by the Plaintiff and therefore, I find no reason to interfere with the awards under these items in the Bill of Costs.

Conclusion and Disposition:-

14. In the foregoing, I find that the Plaintiff' application dated 7th June 2024 fails in its entirety. The application dated 12th August 2024 succeeds to the extent that the taxation in respect of the items on instruction fees and getting up fees in the Bill of Costs dated 16th April 2024 are hereby set aside and remitted for re-taxation before another Deputy Registrar other than Hon. Chembeni L. Adisa. The Plaintiff is awarded costs for both applications assessed at Kshs. 40,000.00/=.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Omwanza Nyamweya for the Plaintiff/Decree Holder.

2. N/A for the Defendant/Judgment-Debtor.

3. N/A for the Garnishee.

4. Amos - Court Assistant