



REPUBLIC OF KENYA



**Sinja v Willstone Homes Limited (Miscellaneous Reference Application E336 of 2023)
[2024] KEHC 304 (KLR) (Commercial and Tax) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS REFERENCE APPLICATION E336 OF 2023**

PM MULWA, J

JANUARY 25, 2024

BETWEEN

ALPHAS SINJA APPLICANT

AND

WILLSTONE HOMES LIMITED RESPONDENT

RULING

1. Before the Court is the applicant's Chamber Summons dated 2nd May, 2023, brought under Paragraph 11 of the *Advocates (Remuneration) Order*, seeking the following orders:-
 1. That the Honourable Court be pleased to set aside/vary the decision of the Taxing Officer Hon. B.M Cheloti (PM) dated 17 April 2023.
 2. That the Applicant's Party and Party Bill of Costs dated 29 July 2022 be remitted back to the Taxing Officer for fresh taxation.
 3. That the fresh taxation be undertaken by a different Taxing Officer other than Hon. B.M Cheloti (PM).
 4. That the costs of this application be borne by the Respondent.
2. The application is supported by the grounds on its face, the supporting affidavit sworn by Advocate Jasper Lubeto on even date and written submissions dated 2nd October 2023. The applicant contends that in dismissing the applicant's Bill of Costs dated 29th July 2022, the Learned Taxing Officer erred by going beyond the scope of taxation and rendering a decision on the merits of the suit as opposed to limiting herself to taxation of costs; by taking into account irrelevant factors and failing to exercise her discretion correctly and judiciously and by holding that she could not tax the said bill of costs since there was no specific timeframe within which the said property was to be sold.



3. The background to this application is that the applicant executed an offer letter dated 16th October 2020 for the purchase of a residential house and paid a deposit of Kenya Shillings Two Million only (Kshs. 2,000,000/-). However, he thereafter opted not to proceed with the purchase, issuing the respondent with a demand for refund of the amount deposited on 10th March 2021.
4. The applicant then filed a suit for breach of contract against the respondent before the Nairobi Chief Magistrates' Court, being Commercial Suit No. E483 of 2021, seeking special damages of Kenya Shillings Two Million only (Kshs. 2,000,000/-). The respondent filed all necessary pleadings and the matter was certified ready for hearing on 13th July 2022. On the hearing date, the proceedings were rendered moot as the respondent had deposited the entire amount claimed as special damages. The applicant sought for costs and the Trial Court then asked parties to agree on costs for the suit, failure to which the plaintiff to file its party to party bill of costs.
5. The parties failed to agree on the costs leading to the filing of the applicant's party to party bill of costs dated 18th August 2023. Through a ruling dated 17th April 2023, the trial court struck out the applicant's party to party bill of costs with no orders as to costs for want of merit. The reasons for the decision were that the applicant had agreed to be refunded the deposit once the house had been resold; that there was no specific timeframe within which the said property was to be sold and that the applicant had been refunded.
6. In opposing the application, the respondent filed a grounds of opposition on the grounds:-
 1. That, the applicant was not at all a successful litigant as the matter did not proceed to full hearing since the subject matter of this case being the refund had already been fully paid by the respondent.
 2. That, the applicant prematurely litigated this matter without having explored and or exhausted all other forms of dispute resolution between the parties.
 3. That, the applicant seeks to unjustly enrich itself on the expense of the respondent as he was paid his entire deposit without the deduction of the 2% that forms part of administrative costs as is protocol.
 4. That, parties are bound by their terms of agreement and refund could only be made once the property is resold as the project was an off-plan project.
 5. That, in any case, if any party is entitled to costs would be the respondent.
 6. That, the said bill of costs arose from the merits of this suit and the taxing officer as of right had to satisfy itself that the costs are justifiable in law.
 7. That, this application is frivolous, made in bad faith and seeks to waste the courts precious time and thus should be dismissed with costs to the respondent.
7. The applicant contended that the respondent ought to bear the costs of the suit in the trial court because it silently deposited piecemeal sum of monies in his bank account without informing him. On the other hand, the respondent contended that the applicant filed the suit prematurely as it had, in response to his demand letter, informed the applicant of its intention to refund the claimed sum as soon as the house he had intended to purchase had been resold as per the offer letter. Moreover, as a show of good will, the respondent would refund the entire deposit without the deduction of 2% thereof meant to cover the administration fees.



8. The applicant argued that it was entitled to the costs since it was the successful party. It focused on the proviso to section 27 of the Act which states that costs shall follow the event unless the court for good reason otherwise directs. He relied on *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* (Judicial Review Application No. 6 of 2004) to the effect that the principle is not meant to penalize the losing party but to compensate the successful party for trouble taken in prosecuting the case.
9. The applicant highlighted that though the matter did not proceed to full hearing, it went through all pre-trial motions and was certified ready for hearing during the pre-trial conference. The applicant argued that the fact that the matter did not go to full trial cannot be a basis upon which the Taxing Master would deny it the costs of the suit. He relied on *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR where it was held that it is imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed.
10. The respondent also filed written submissions dated 11th October 2023. It cited the Supreme Court decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012 [2014] eKLR for the proposition that costs follow the event and that the Court has the discretion in awarding such costs. In the respondent's view, the court came to the right decision after considering that in the circumstances, the applicant had signed the letter of offer and was bound. The respondent castigated the applicant for failure to disclose the terms of the offer letter, arguing that he had sought equity with unclean hands, seeking unjust enrichment.

Analysis and Determination

11. I have considered the application, the grounds in support and opposition as well as the respective submissions. The issue for determination is whether the Learned Taxing Officer erred in law by dismissing the bill of costs application filed by both parties.
12. In a taxation reference, the guiding principle is that the Court will not interfere with a Taxing Officer's decision on taxation unless it is shown that the decision was based on an error of principle. In *Peter Muthoka & Anor v Ochieng & 3 Others* [2019] eKLR, the Court of Appeal, stated thus:-

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with”
13. Determination of costs is a matter of court's discretion and though wide and unfettered, discretion must be exercised with good reason with due regard to the circumstances of the case. Section 27 of the *Civil Procedure Act*, which is instructive, reads:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to



what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

14. The elements for consideration were properly laid out in *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR cited with approval in *David Kiptum Korir v Kenya Commercial Bank & another* [2021] eKLR as follows:

- “ a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated
- g. the relationship between the parties and
- h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.”

15. The circumstances of this case are clear. Although the applicant intimated that the respondent silently deposited the amount claimed in instalments into his bank account without informing him, I find this to be a cavalier approach. I am persuaded that the respondent acted in good will to refund him the entire amount deposited. The applicant did not challenge the terms of the offer letter neither did he challenge the fact that the respondent had responded positively to his demand letter dated 10th March 2021.

16. In coming to his decision, the taxing officer took into account the fact that the applicant had accepted the terms of the offer letter which had not specified any timeline for the refund after the sale of the house. Hence, I find that the applicant has not demonstrated that the taxing officer took into account irrelevant factors in coming to his decision, to warrant this Court’s interference.

17. In conclusion, therefore, the application dated 2nd May 2023 is dismissed with costs to the respondent.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

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P. MULWA
JUDGE

In the presence of:

Carlos - Court Assistant

Mr. Maina h/b for Mr. Oduor – for Applicant

Ms. Wambui h/b for Mr. Odenga - for Respondent

