REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC NO. 580 OF 2010

PYRAMID MOTORS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

LANGATA GARDENS LIMITED.....DEFENDANT/APPLICANT

RULING

Introduction

1. This is an application by the Defendant dated 29th April, 2014 seeking to set aside the decision of the Taxing Master ('the Master') made on 4th April, 2014 in the course of an assessment of party and party Bill of costs filed by the Plaintiff on 17th December, 2013. A similar bill of costs had also been filed in ELC Case No. 581 of 2010 and duly taxed by the Master and a decision rendered on 4th April, 2014 as well. The applicant also sought to set aside the same decision vide a similar application dated 29th April, 2014. In, ELC Case No. 581 of 2010, the Plaintiffs were Mbaabu Mbui & Fridah Muchina while the Defendant was the same.

2. To avoid disproportionate expenditure, I directed on 20th November, 2014 that the two applications be handled simultaneously and a singular ruling be delivered. The parties had themselves also so requested on 28th October, 2014. As the issues raised by the Defendant on the Master's decision were the same, it was also deemed appropriate to have a singular ruling. For purposes of clarity I have however separated the two cases in this ruling. The pilot file though is ELC 580 of 2010.

Facts and Litigation History

3. The events leading up to the two decisions of the Master may be synthesized as follows:

- The Plaintiff sued the Defendant vide a plaint filed on 30th November, 2010 and sought in 580 of 2010 an order of specific performance compelling the Defendant to complete the sale of the suit property Apartment Number A5 Block 6 situate on LR No. 18591/9. The Plaintiff also sought an order for the execution and registration of a lease of the suit property by the Defendant. In addition, the Plaintiff also prayed for damages as well as a permanent injunction and costs of the suit.
- The Plaintiff also filed on the same day an application for an interlocutory injunction.

- The Defendant opposed the application for interlocutory injunction and the same was prosecuted inter parties through the parties respective written submissions.
- The application was allowed on 17th March, 2013 but no costs were provided for even though the same had been asked for.
- On 20th June, 2011 the Defendant filed an application for the Plaintiff to deposit the amount of Kshs. 3,850,000/= in court.
- The Plaintiff filed a Replying affidavit opposing the application by the Defendant.
- The Defendant's application was later to be addressed by way of written submissions.
- The Plaintiff as did the Defendant in the meantime prepared the case for trial. The Plaintiff filed a List and bundle of documents on 29th November, 2011 alongside a statement of issues.
- The Defendant also filed a list of bundle of documents on 15th February, 2012 and later on a Supplementary list/bundle of documents on 7th June, 2012.
- Hearing of the case commenced on 21st February, 2012 (one day) and was wrapped up on 20th September, 2012 (one day).
- Final written submission were filed simultaneously on 7th November, 2012.
- The final judgment was delivered on 27th November, 2013 though dated 22nd November, 2013.
- The Plaintiff's prayers for specific performance and permanent injunction were granted. The Plaintiff was also awarded the costs of the suit.
- On 17th December, 2013 the Plaintiff filed the Party and party Bill of costs and the Deputy Registrar issued a Notice of Taxation on 18th December, 2013 scheduling the costs for assessment on 13th February, 2014.
- A day earlier on 16th December, 2013 the Defendant had filed an application for stay of execution. The same was fixed for hearing on 27th March, 2014.
- On 13th February, 2014 the parties appeared before the Master for taxation of the Plaintiffs Bill of costs. The master directed that the parties file written submissions on the Bill.
- On 18th March, 2014, counsel for the Plaintiff indicated to the Master that the Plaintiff would rely on the Bill of costs as drawn. The Defendant on the other hand had already filed written submission on the Bill on 17th March, 2014.
- On 4th April, 2014 the Master taxed the Bill of costs. On the same day the Master also rendered herself by way of a ruling on the taxation.
- On 4th April, 2014 only the Defendant was represented as the ruling on the taxation was read by the Master.
- On 9th April, 2014 the Defendant objected to the taxation of various items on the Bill and wrote to the Master seeking reasons for the decisions on the various assessments.
- The letter dated 9th April, 2014 was filed in court on the same day and served upon the Plaintiff's counsel some two days later.
- On the 24th April, 2014 the Defendant wrote again by way of reminder seeking reasons for the Masters decision on assessment of the various items of the Bill to which the Defendant had objected.
- The Master did not formally give a riposte but stated by way of endorsement on the Defendant's letter of 24th April, 2014 that the reasons were contained in the ruling delivered on 4th April, 2014. The endorsement was made on 9th May, 2014.
- Then on 15th May, 2014 the defendant filed the instant application.
- The Plaintiff filed a replying affidavit in opposition on 23rd October, 2014.

4. The above litigation chronology is similar to what happened in ELC Case No. 581 of 2010 even though the subject property in ELC Case No. 581 of 2010 was Apartment No. B4 on Block5. . I will not repeat the same.

5. The Defendants current application is majorly to the point that the Master erred in law and in

principle in assessing and taxing some 28 items of the Bill in ELC Case No. 580 of 2010 and 40 items in ELC Case No. 581 of 2010. The Defendant further contends that the Master erred in awarding interest as well as VAT to the Plaintiff in a Party and Party Bill of costs.

Reply by the Respondent

6. Stripped to detail, the Replying Affidavit by Plaintiff's director Gitobu N'Mbui is to the effect that the Application by way of reference is fatally defective for having been filed out of time. The Plaintiff secondly contended that the Master proceeded on the basis of correct legal principles in taxing and assessing the Plaintiff's Bill of costs.

Submissions and issues for determination

7. The parties filed written submissions and decided to wholly adopt the same without any additional oral submission by way of highlighting.

8. From the submissions, the affidavits in support of the application and the application itself the following four issues arise for determination. Firstly, was the reference by the Defendant to the court filed within the prescribed time. Secondly is whether the Master erred in principle in his taxation of any of the items identified and challenged by the defendant. Thirdly, if the reference was filed in time did the Master err in awarding the Plaintiff interest on costs. Fourthly, if the reference was filed in time, did the Master err in awarding the Plaintiff Value Additional Tax (VAT)

Analysis and Determination

9. The first issue raised by the Plaintiff could be deemed as a preliminary issue. If affirmed by myself then the entire application must be immediately struck out.

10. The point raised is that the application which is by way of reference was filed outside the stipulated time. Reliance has been placed on Paragraph 11 of the Advocates Remuneration Order. The paragraph reads inter alia s follows:

11(1). Should any party object to the decision of the taxing officer, he may within fourteen days after the decisions give notice in writing to the taxing officer of the items of taxation to which the objects.

11(2). The taxing officer shall then forthwith record and forward to the objector the reasons for his decisions on those items and the objector may within fourteen days from the receipts 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.

11. The intention behind Paragraph 11 of the Advocates Remuneration Order can be gathered from the paragraph itself. The paragraph enables a party dissatisfied with a Taxing Master's decision to decide whether or not to challenge the decision made by the taxing master on any item of the Bill. The taxing master is obligated to reflect on his decision and advance reasons for such decision. The taxing master has fourteen (14) days from the date of request by either party to state his reasons. It may very well be that the reasons are already stated in the ruling but in my view it is not for the parties to second guess the Taxing Master. The Taxing Master upon receipt of a request from either party under paragraph 11(1) must state explicitly his reasons for the decision on each item of taxation sought to be challenged. If the ruling already contains all

reasons then it is for the Taxing Master to state so. That is what paragraph 11 of the Advocates Remuneration Order anticipated. If the ruling contains only some of the reasons then the Taxing Master is obliged to state the other missing reasons.

12. In my view, it is not for the Applicant to second guess the Taxing Master and assume that all the reasons are contained in a ruling. The Applicant, like any party intending to challenge a decision of a Taxing Master is entitled to await communication from the Taxing Master stating the reasons for the decision in full or confirming to the party that the reasons are contained in the ruling already read. I would in the circumstances not ascribe to the views of Ochieng J in the Case of **Ahmednasir Abdikadir & Co. Advocates –v- National Bank of Kenya Ltd No. 2 [2006]1 EA 5** where the learned judge seemed to suggest that where there exists a considered ruling then the Taxing Masters reasons for the decision as anticipated by paragraph 11 of the Advocates Remuneration Order must be deemed to be contained in the ruling. I part ways with such reasoning as the reference is intended to question whether discretion in assessing costs was exercised properly and on the basis of correct principles. In such cases, second guessing the judicial officer and making assumptions as to the reasons for his action would be faulty.

13. In the circumstances of this case, I find that the Applicant/Defendant only became aware of the reasons for the decision of the Taxing Master on 9th May, 2014 when the Taxing Master endorsed on the Applicants letter that the reason were contained in the ruling. The reference had then to be filed pursuant to paragraph 11 (2) on or before 23rd May, 2014 being the fourteenth day following receipt of the reasons. The reference herein was filed on 15th May, 2014. That was well within the prescribed period. There was no need for the Applicant to seek additional time from the court to file the reference. The application is consequently not incompetent. I would exercise my discretion and allow the reference to proceed.

14. The second issue is whether the Taxing Maser erred in principle in his taxation of the items in the Bill which have been identified as the ones being contested.

15. The items are number 1, 2, 7, 8, 17, 21, 22, 23, 24, 26, 27, 28, 32, 35, 36, 37, 38, 40, 42, 43, 44, 45, 46, 47, 48, 51, 52 and 53 of both Party and Party Bills of costs filed in ELC Case No. 580 of 2010. The reference on taxation of the Bill in ELC Case o. 581 of 2010 had the following additional items of the Bill subjected to challenge: 5, 11, 12, 13, 16, 18, 19, 20, 25, 31, 74, 83, 84, 87, 91, 92, 94, 95, 96, 97, 98, 99, 102, 104, 108, 118, 126, 128, 129 & 130 but exclude items 32, 35, 36, 37, 38, 40, 42, 43, 44, 45, 46, 47, 48, 51, 52 and 53. It is the decision on each of these items to be juxtaposed with the relevant reason, if any, advanced by the Taxing Master and related to the applicable principle.

16. Both the Applicant and the Respondent in their respective written submissions have cited several cases which explicate the principles governing and directing the assessment of costs in the application of the Schedules under the Advocates (Remuneration) Order. In the case of **Kipkorir, Titoo & Kiara Advocates –v- Deposit Protection Fund Board [2005]1 KLR 528**, the Court of Appeal held as follows:

“In exercising its discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of Schedule VIA, i.e. the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause of matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a discretion by the trial judge and all other relevant circumstances”.

Similar holding could be found in the case of **Joreth Limited –v- Kigano & another [2002] EA 92**.

17. The much earlier case of **Premchand Raichand Ltd –v- Quarry Services of East Africa Ltd (No. 3) [1972] E.A. 162** was even more specific. The court outlined the principles as follows, without liming itself to instructions fees:

    a. Costs should not be allowed to rise to a level as to confine access to justice to the wealthy.
    b. That a successful litigant ought to be fairly reimbursed for the costs he has had to incur
    c. That the general level of remuneration of advocates must be such as to attract recruits to the profession and
    d. So far as possible there should be consistency in the award made.

The court then stated that a court may interfere with the award of costs when the award is so high or so law as to amount to an injustice to one party.

18. The principles set out in **Premchand Raichand Ltd's** (supra) case are still good law and constitute excellent guidance as the court exercises discretion to vet and review an award of costs on specific items by the Taxing Master.

19. With the aforestated in mind, I would start from the premise that the applicable Remuneration Order is the Advocates Remuneration Order of 2009 which came to force through Legal Notice No. 50 of 2009. The Taxing Master did not allude to this fact and it is left to the court to identify the figures and formulae applied by the Taxing Master to confirm that the correct Remuneration Order was invoked. It is an error of principle to apply the wrong Remuneration Order. Indeed, it is one of the reasons which a Taxing Master should always give upon request by the parties: an identification of the Remuneration Order applied as well as the applicable Schedules under the Order.

20. Failure to cite the Remuneration Order applied should however not be fatal as from a formula applied by the Taxing Master the court can always easily discern the Order applied.

21. I have looked at the formula applied by the Master in assessing the instructions fees and it can easily be discerned that the master was using the Remuneration Order 2009 as his reference and starting point. The formula can be found at paragraph 8 of the ruling by the master dated 4th April, 2014. A quick glance at Schedule VI of the said Remuneration Order would reveal the formula applied by the master.

22. With regard to the specific items challenged I find as follows.

23. On items 1 and 2, the submission by the Applicant is that the Master erred in applying Schedule VI (1) (b). I do not think so. The orders sought and finally decreed by the court was not limited to an injunction. There was an order for specific performance. In such cases the Taxing Master is perfectly entitled to ascertain if any value can be ascribed to the subject matter itself. No better indicator can be found for this than the same Remuneration Order which at proviso (IV) to Schedule VI A 1(b) states that:

"Where specific performance is sought for the performance of a lease then the value of the subject matter shall be taken to be the arrears of rent or mesne profits, if any that may be found due, increased by the sum equivalent to the annual rental value of the premises or to one tenth of the capital value of the premises whichever is higher"

24. That is perfect indicator that in suits for specific performance as contrasted with injunctions the value of the subject matter must and can actually be established by the Master from the pleadings judgment or settlement by the parties. The Master was consequently in order and adopted the correct principle in ascertaining and applying the value of the suit premises in arriving at the correct instructions fees awardable. The Master was spot on in taking the value of Kshs. 5.5 Million which was the value of the property when the transaction commenced. That is the value the parties could have been litigating about. In my view, it is the appropriate value of the subject matter and in suits for specific performance Taxing Masters should always take into account the value being the consideration of the sale agreed between the parties rather than any subsequent increased or decreased values which may be simply speculative.

25. I would consequently not disturb the Master's assessment of items No. 1 and 2 of both Bills of costs filed in ELC 581 of 2010 and ELC 580 of 2010.

26. I now turn to item Nos. 7, 8, 17, 21, 22, 23, 24, 26, 27, 28, 32, 35, 36, 37, 38, 40, 42, 43, 44, 45, 46, 47, 48, 51, 52 and 53 of the Bill of Costs filed herein. I note that the Master in assessing the costs applied the provisions of Schedule VI (4) – (9) of the Advocates Remuneration Order of 2009. These items constituted mainly routine drafting, attendances, copying and perusals charges. The Master had discretion where appropriate to increase the amounts pegged by the schedule, for example in the case of attendances before the Judge where the judge had specifically awarded or assessed an amount for the attendance or where amount has been undercharged, but the master did not invoke the discretion allowed under paragraph 16 of the Order. In applying the Schedule only, the Master acted on the correct principle which is to seek consistency in assessing such items. I would not consequently disturb the amounts awarded by the Master.

27. The same finding would apply to item Nos. 5, 7, 11, 12, 13, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, 74, 83, 84, 87, 91, 92, 94, 95, 96, 97, 98, 99, 102, 104, 108, 118, 126, 127, 128, 129 and 130 in the Bill of costs filed in ELC 581 of 2010. The Master acted correctly in applying Schedule VI (4) – (9) of the Advocates Remuneration Order.

28. Perhaps, I may add that besides the fact that Taxing Officers should always endeavor to ascertain and expressly state which Remuneration Orders have been invoked and applied, during the actual assessment of the Bill the 5th column of the Bill of costs drawn in accordance with paragraph 69 of the Advocates Remuneration Order is intended for the Taxing Officer to indicate the amount taxed off or deducted. It is not intended that the amount awarded is thereat indicated. In the instant suits the Master indicated the amounts awarded on the 5th column of the Bills. That was wrong. However in my view that mistake could not amount to an error in principle. It could have led to some confusion but not such as to go to the root of the taxation. Taxing officers though should take note.

29. On the issue of interest, I would agree with the Applicant. The Taxing Officers under the Advocates Remuneration Order, from where they obtain their jurisdiction, have no powers to award interest. The ruling of 4th April, 2014 indicates a sum of Kshs. 42,470/= as interest awarded on amount taxed. The Respondent concedes that the taxing master had no powers to award interest and states that their was an error or slip in the typing. A similar amount is reflected on the Bill as VAT. I would take the view that no interest was indeed awarded. The amount of Kshs. 42,470/= was meant to be VAT at the statutory rate of 16%. The same applies in the case of the ruling in ELC 581 of 2010 where the amount of Kshs. 43,400/= is reflected as interest. That too was intended to be the VAT. The slip in both cases could have been avoided. I am ready to

accept that the slip ought to be corrected. They are so corrected.

30. On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the Value Added Tax Act, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a vatable person. I would vacate the award on VAT as the Master erred.

31. In the result, I would not return the Bills to the master for re-assessment but would direct that the item of VAT be completely and wholly taxed off. The Bills will consequently be taxed at Kshs. 265,440/= for ELC 580 of 2010 and Kshs. 271,249/= of ELC 581 of 2010. I have exercised the discretion to tax the Bills in view of the delay in rendering this ruling.

32. Both parties have partially succeeded and I thereof direct each to bear his own costs.

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Respondent

..... for the Defendants/Applicant