



Case Number:	Civil Suit 131 of 2003
Date Delivered:	31 Jul 2014
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Jonathan Bowen Havelock
Citation:	Meir Mizrahi & another v Nairobi City Council & 2 othes [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaintiff application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 131 OF 2003

1. **MEIR MIZRAHI**
2. **STANLEY KINYANJUI (Treasurer and**

Secretary respectively, of the Outdoor

Advertising Association of Kenya)

Suing on behalf of

OUTDOOR KENYA ASSOCIATION OF KENYA PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL 1ST DEFENDANT

ADOPT A LIGHT LTD 2ND DEFENDANT

ALLIANCE MEDIA KENYA LTD 3RD DEFENDANT

RULING

1. The application for determination by the Court is brought by the Plaintiffs dated 20th July 2006 pursuant to the provisions of **Rules 11(1) and (2)** of the *Advocates Remuneration Order, Section 3, 3A, 63(e) and 89* of the *Civil Procedure Act* and **Order L Rule 1 & 2** of the *Civil Procedure Rules, 2010*. The applicant seeks for orders for the stay of execution of the Certificate of Taxation dated 14th July, 2006 issued in favour of the 2nd Defendant and further for the setting aside of the Ruling of the Taxing Officer dated 7th July, 2006 relating to the taxation of the 2nd Defendant's Bill of Costs dated 6th April, 2006.

2. The application is predicated upon the grounds that the Taxing Officer erred in principle in assessing the instruction fees on the sum of Kshs. 314,475,000/- as mentioned in the Defence and awarded the 2nd Defendant instruction fees of Kshs. 48,000,000/- on the basis of *paragraph 1(b) of Schedule VI* of the *Advocates (Remuneration) Order* instead of a reasonable amount under *Schedule VI A 1(i)* of the *Advocates (Remuneration) Order*. It is the Plaintiffs' contention that the amount awarded is manifestly excessive and that the Taxing Officer applied the wrong principles and disregarded the normal practice in awarding the same.

3. The application is supported by the Affidavit of **Stanley Kinyanjui**, sworn on even date. In reiterating the contention adduced in the Grounds of the application, the deponent further avers that the

subject matter of the suit was for injunctive orders, declaratory orders and the nullification of the Contract dated 28th March, 2002 as between the 1st and 2nd Defendants. He further deponed that the Taxing Officer erred in adopting the provisions of *Schedule VI A(1)(b)* and ought to have followed *Schedule VI A (i)* of the *Advocates (Remuneration) Order*, instead.

4. The application is opposed. In the Replying Affidavit of Esther Passaris, the Director of the 2nd Defendant Company, sworn on 30th April, 2010 she contends that the taxing master did not err in principle in the assessment of instruction fees in this matter as such were in accordance with *Schedule VI A(1)(b)*. The Taxing Officer had considered the pleadings and not just the prayers, in her Ruling dated 7th July 2006. The Plaintiffs' contention that the assessment should have been based on *Schedule VI (1)(i)* was incorrect and a misapprehension of the applicable law. It was also the 2nd Defendant's contention that the application has been overtaken by events in that the 2nd Defendant has already commenced execution proceedings and that, in any event, the application is inordinately delayed.

5. In contrast, it is the Plaintiffs' case that the taxing master erred in the determination of the instruction fees. Further, the decision rendered by the Taxing Officer be set aside and be substituted with a reasonable award on the instruction fees or that the Bill of Costs be remitted for taxation before a different taxing officer. In its submissions dated 2nd June, 2010, the Plaintiffs maintained that the Orders prayed for in the Plaint were injunctive, declaratory and a nullification of the contract entered between the parties on 28th March, 2002. They emphasised that at no point was there a monetary claim pleaded in the Plaint. On this basis, they submitted that the base figure awarded by the Taxing Officer was excessive, having included issues that were not the subject matter of the suit. It is the contention of the Plaintiff that the Taxing Officer in including the sum of Kshs. 314,475,000/- as the value of the subject matter was erroneous as the same was only an estimate of the value of the agreement. The Plaintiffs relied on the authorities of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004** on the issue of error in principle by the taxing officer, **Attorney General v Kenya Commercial Bank Ltd H.C.C.C No. 329 of 2001** on the issue of the nature of prayers to which a taxing officer based his decision and **Vijay Kumar Mandal v Rajinder Kumar Mandal H.C.C.C No. 337 of 2002** and **Danson Mutuku Mwema v Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991 (Machakos)** on reasonable awards for instruction fees. They also relied on **Republic v Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W'Njuguna & 6 Others Misc. Civil App.No. 621 of 2000 (2006) eKLR** on the exercise of discretion by a taxing officer to increase basic fees.

6. In the 2nd Defendant's submissions filed on 19th November, 2010 it was contended that the Plaintiff took an inordinately long delay in prosecuting the reference, having filed the same on 21st July, 2006 and only having it listed for hearing in March, 2010. On the issue of delay, she relied upon the case of **Downhill Ltd v Harith Ali El-Busaidy & City Finance Bank Ltd Nairobi Civil Appeal No. 254 of 1999**. It was also the 2nd Defendant's submission that there are no grounds for interfering with the discretion of the taxing master in his/her determination on a taxation matter and counsel relied upon the authority of **Joreth Ltd v Kigano & Associates [2002] 1 EA 92**. It is the 2nd Defendant's contention that the value of the contract that was nullified was Kshs. 314,475,000/- and such formed the subject matter of the case, and which the Taxing Officer had considered in her determination.

7. In considering the Application, the affidavits on record by both the Plaintiff and 2nd Defendant, the submissions and authorities relied upon, two issues are, in my opinion, for the determination of the Court:

a. whether the taxing master exercised her discretion and took into consideration all matters as appertaining to the matter at hand in her ruling and

b. whether the application by the Plaintiff has merit.

The issues in contention are in relation to Item No. 2 of the Bill of Costs dated 6th April, 2006. The Taxing Master, Mrs. Wamae, D.R delivered her ruling on the same on 7th July, 2006 and gave reasons for her Ruling therein. With regard to Item No. 2, she made a determination as follows:

“The Plaintiff’s claim in the Plaintiff was for injunctive and declaratory orders. Paragraph 17 of the second defendant’s defense shows that what was at stake was the agreement dated 28.3.02 whose value was estimated at 89,100,000/- and a further estimated benefit of 125,475,000/- and 100,000,000/- to the 1st and 2nd defendants respectively and I find that 314,475,000/- which is the aggregate of these sums to be the value of the subject matter for purposes of item 2. Item 2 is therefore calculated under paragraph 1(b) as follows:

<i>For the first 1 million</i>	<i>35,000.00</i>
<i>313,475,000 x 1.5%</i>	<i><u>4,702,125.00</u></i>
	<i><u>4,737,125.00</u></i>

The sum of 4,800,000/- at item 2 is reasonable considering the volume and complexity of this matter and item 2 is therefore taxed as drawn.”

8. It is the 2nd Defendant’s submissions that the amount of Kshs. 4,800,000/- as per the Taxing Officer’s calculation was proper and in accordance with *Schedule VI A(1)(b) of the Advocates (Remuneration) Order, 1997* which reads:

“To sue in any proceedings described in paragraph (a) where defence or other denial of liability filed; or to have an issue determined arising out of the interpleader or other proceedings before or after the suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties.”

The 2nd Defendant further contends that the instruction fee was derived from the subject matter of the case, being that there was a contract between the parties dated 28th March, 2002. In the case of **Joreth Ltd v Kigano & Associates** (supra) which the 2nd Defendant relies upon, the learned Judges of Appeal, on the issue of ascertaining the value of the subject matter, held *inter alia*:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of Costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters the nature and importance of the cause or matter, the interest of the parties, the general

conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

To this, the Plaintiffs object, intimating that the Taxing Officer based her determination of instruction fees on estimations, which were not part of the claim in any event. They contended that the amount of Kshs. 4,800,000/- was manifestly excessive and the Taxing Officer erred in principle in her determination. The finding in the case of **Kipkorir, Titoo & Kiara Advocates** (supra) was helpful in that the Court of Appeal’s decision detailed:

“She (taxing officer) found as a fact that the claim was not a monetary claim but a claim for declaratory orders. Notwithstanding these findings, the taxing officer seems to have applied the same figure in determining instruction fees payable. This determination affected the computation of the final figure of Kshs. 6,081,312.97/-. On the face of the record therefore, the taxing officer does not seem to have exercised any discretion at all.”

9. The determination by the Taxing Officer herein was based on the two aspects:

a. that the subject matter of the suit was as enunciated in the statement of defence:

b. that all circumstances were considered in the final determination, including the volume and complexity of the matter.

What is the subject matter of this suit" According to **Blacks’ Law Dictionary, 9th Edition** at pg. 1562, the definition of subject matter is detailed as:

“The issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute.”

In my view, what was in dispute between the parties was firstly, the annulment of the contract between the parties, and secondly for injunctive and declaratory orders. It is the Plaintiffs’ contention that no monetary claim was pleaded or claimed by the Plaintiffs in the claim. It would seem logical therefore that, since no such monetary prayers were sought, then the Taxing Officer ought to have followed *Schedule VI A (1)(i)* instead of *VI A (1)(b)*. It was interesting to note that the Taxing Officer in her said Ruling rightly admitted that the Plaintiff’s claim was for *“injunctive and declaratory orders.”* In my view, the Taxing Officer having taken into consideration the value of the subject matter as per the Defence, she considered matters outside the issues as between the parties in her said Ruling.

10. The upshot of the matter is that in her assessment of the instruction fees, the Taxing Officer did not ensure that she adopted the proper provisions of the law which details that the discretionary power given to the taxing officer’s should be exercised judiciously. These powers should not be callously or capriciously used to defeat the ends of justice. To this end I would adopt the finding of Mwera, J (as he then was) in **Danson Mutuku Muema v Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991** in which he held:

“Then the taxing officers while applying the schedules should know and seriously apply their minds, within the discretion allowed, with due seriousness to their exercise. They should ensure that only proper, lawful and justified bills roll off their desks.”

As a result, I find that the subject matter of the claim by the Plaintiff was for declaratory and injunctive orders and for the nullification of the contract entered on 28th March, 2002. Nowhere in the Plaint was a claim made for any monetary award. The Taxing Officer having (rightfully) detailed that the claim was for such orders, should have assessed the instruction fees at that point. The issue of value of the subject matter at Kshs. 314,475,000/- having been neither pleaded nor sought by the Plaintiff was beyond the scope of the Taxing Officer's discretion as to the determination of assessment of costs herein. The Ruling in **Premchand Raichand & Another v Quarry Services E.A Ltd & Others (1972) E.A** provided that a Court will not normally interfere with a taxing officer's decision on taxation matters, the exception to the same are decisions based on error of principle and manifestly excessive fees awarded to justify an inference that it was based on an error. The Court is granted unfettered power to determine what orders it deems fit and suitable to be made in the circumstances of the determination of a taxing officer's ruling as per **Section 51(2)** of the *Advocates Act*. In exercise of the aforementioned provisions of the law, and considering all circumstances and issues raised, the application by the Plaintiff dated 20th July, 2006 is allowed and the Bill of Costs dated 6th April 2006 remitted for taxation afresh before a different taxing officer.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE



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