Jilk Construction Company Ltd v Kenya Breweries Ltd (Miscellaneous Application E782 of 2021) [2025] KEHC 71 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 71 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E782 OF 2021

A MABEYA, J

JANUARY 16, 2025

BETWEEN

JILK CONSTRUCTION COMPANY LTD ..... APPLICANT

AND

KENYA BREWERIES LTD ..... RESPONDENT

RULING

1. This ruling determines two applications; the reference dated 15/9/2023 and the application dated 2/8/2023 for entry of judgment. I propose to start with the 1st application whose outcome will be impact the 2nd application.

Application dated 15/9/2023

2. The respondent filed a reference brought under rules 3(1) and (2) of the *High Court (Practice and Procedure) Rules* and Rules 16 and 17(1) of the *High Court (Organization and Administration) General Rules 2016*. The application sought for the setting aside of the decision by the taxing officer Hon Mary Osoro delivered on 28/7/2023 on the applicants bill of costs dated 6/10/2022.

3. In support of the summons, the applicant relied on the grounds on the face of the Summons and the supporting affidavit dated 15/9/2023 sworn by KAREN MATE GITONGA. It was contended that there was a dispute before a tribunal with respect to scope of work under the JBC Contracts and conditions of contracts for building works.

4. The applicant stated that in the course of the arbitral hearing, a question on the impartiality of the arbitrator and his jurisdiction was raised before the tribunal and the tribunal delivered a ruling dismissing the application. This necessitated the applicant to challenge the arbitrator's ruling in this Court and a ruling was delivered on 17/12/2021 dismissing that application with costs.

5. Pursuant thereto, the applicant filed party and party bill of costs dated 6/10/2022 seeking a sum of Kshs. 120,236,960/=. The same was taxed at Kshs 88,139,724/=. It was contended that the taxing officer misdirected herself by assuming that the proceedings before the Court were for setting aside an arbitral award of Kshs 2,499,889,853/=. That she did not recognize that the respondent had only sought to set aside the interim award on a challenge on jurisdiction as well as the recusal application.

6. The applicant challenged the reference *vide* grounds of opposition dated 13/10/2023. It was stated that the taxing officer did not err in finding that the value of the subject matter was Kshs 2,449,889,853.81 in the calculation of the instruction fees. That the taxing officer noted and considered the volume of the documents and the importance of the matter to the applicants thereby finding it eligible to grant getting up fees. That the instruction fees was reasonable and justified. That the respondent had not demonstrated that the decision was an error of principle.

7. The application was canvassed by way of written submissions which I have considered.

8. The respondent submitted that the proceedings before this Court were not in respect to setting aside the arbitral award rather it concerned the interlocutory applications as no final award had been published. That the taxing officer made an error in principle in allowing the instruction fees on the basis of the arbitral award.

9. It was the respondent's submission that getting up fees being a third of the instruction fees were erroneous since Schedule 6 Paragraph 2 of the Remuneration Order did not provide for getting up fees. That the arbitration was continuing and therefore allowing the instruction fees as it stood would amount to unjust enrichment to the detriment of the respondent. That the applicable fees for defending High Court applications was expressly provided for under Schedule 6 paragraph(j)(iii) of the *Advocates Remuneration Order 2014*. It was additionally submitted that the bill of costs sought to recover additional disbursements which were not supported by documentation.

10. On the part of the applicant, it was submitted that the respondent did not dispute that the value of the subject matter could be ascertained in the pleadings which is Kshs 2,449,889,853.81. That the taxing officer gave a reasonable and justified decision upon taking into consideration the nature and importance of the cause, the amount or value of the subject matter involved. With respect to getting up fees, Counsel submitted that the same flows from the instruction fees upon conclusion of the matter.

11. I have considered the reference, the affidavit in opposition and the submissions on record. The main issue for determination is whether the decision of the taxing master delivered on 28/7/2023 should be set aside.

12. Paragraph 11 of the *Advocates Remuneration Order* makes provision for the procedure an aggrieved party must adopt. It provides:

> "(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt 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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

13. In *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus: -

> " I am also of the same school of thought as the learned judges' as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference."

14. The reference before Court is on the ground that here was an error in principle on the part of the taxing officer master in the taxation of the subject bill of costs. That the taxing officer had taxed the bill of costs as if the final award had been granted. That what was before the court for determination was on the interim awards in respect of the jurisdiction of the arbitrator and his competency. The applicant on the other hand maintained that the subject matter of the arbitration could be ascertained from the pleadings which fact was not disputed. That the decision of the taxing officer was reasonable.

15. In *First American Bank of Kenya v Shah & other*s [2002]1 E.A 64 p.69, it was held: -

> " I find that on authorities this court cannot interfere with the taxing officers decision on taxation unless it is shown that either the decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle."

16. Similarly, in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal held 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."

17. From the foregoing, it is clear that the Court can only interfere with the decision of the taxing officer where it is demonstrated that, firstly there is an error of principle and secondly, that the fee awarded was manifestly excessive or high as to amount to an injustice.

18. In the present case, it is not in dispute that the parties are subject to arbitral proceedings and the same have not been concluded. The costs that are subject to this taxation are with respect to the application

that the respondent made before this Court challenging the jurisdiction of the arbitrator and seeking his recusal that were dismissed in the applicant's favour.

19. I have considered the ruling of the taxing officer. She held that the matter had proceeded before a superior court where the arbitral award of Kshs 2,499,889,853/= was being sought to be set aside. The Court finds that the taxing officer on this account misdirected herself since the applications before Court were not for setting aside the arbitral award but interim awards wherein the tribunal refused to recuse itself.

20. In awarding the instruction fees, the taxing officer stated that the amount in dispute was admitted by the respondent to be Kshs 2,499,899,853/=. She then proceeded to tax the bill at Kshs 65,234,118/=.

21. The Court is alive to the holding in *Joreth Ltd vs Kigano & Associates* (2002)1 EA 92, where the Court of Appeal held that: -

> " The value of the subject matter for 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 fees as he considers just taking in account, amongst other matters, the nature and the 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."

22. From the foregoing, this Court finds that in the determination of instruction fees on the applications that were before Court, the value of the subject matter could not be ascertained from the pleadings. Had the matter been concluded and a final award made in the arbitration, the taxing officer would have had the necessary basis to use the final award as the subject matter for determining the fees. However, the circumstances in the present case are different, as the Court was only dealing with an interlocutory application.

23. The interlocutory application did not attract any direct monetary value. Therefore, using the disputed amount in the arbitration to calculate the instruction fees would result in unjust enrichment. Allowing the bill as taxed by the taxing officer would mean that if the arbitration is finally determined against the respondent, the respondent would have to be subjected to pay the costs of the arbitration twice. To this Court's mind, that would amount to double jeopardy.

24. The court finds that the determination of the instruction fees amounted to an error of principle on the part of the taxing officer. The getting up fees are calculated as a third of the instruction fees. Having found that there was an error of principle in calculating the instruction fees, it follows that the getting up fees was also incorrect.

25. Accordingly, I find the application meritorious. The bill of costs ought to be re-taxed and recalculated based on the proper principles. I hereby remit the bill of costs back to the taxing officer for re-taxation on account of the issues raised herein above.

26. Having set aside the ruling of the taxing officer, the application for adoption of the costs as a judgment of the Court cannot be sustained. It is hereby dismissed. Parties to bear own costs.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE