



**Biegon v Langat (Miscellaneous Reference Application  
E025 of 2024) [2024] KEHC 9596 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9596 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS REFERENCE APPLICATION E025 OF 2024**

**JK SERGON, J**

**JULY 31, 2024**

**BETWEEN**

**DAVID BIEGON ..... APPLICANT**

**AND**

**ESTHER CHEPKORIR LANGAT ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a chamber summons dated 12th June, 2024 seeking the following ex parte and inter parte orders;
  - (i) Spent
  - (ii) That pending the hearing and determination of this application inter partes, there be a stay of execution of the entire decision of the Learned Principal Magistrate, F.M Nyakundi dated 5.6.2024 in the Kericho Chief Magistrate Court Succession Cause No. 45 of 2020, In the Estate of the late Reuben Kiptanui Langat alias Kiptanui Sinei (Deceased).
  - (iii) That pending the hearing and determination of this reference, there be a stay of execution of the entire decision of the Learned Principal Magistrate, F.M Nyakundi dated 5.6.2024 in the Kericho Chief Magistrate Court Succession Cause No. 45 of 2020, In the Estate of the late Reuben Kiptanui Langat alias Kiptanui Sinei (Deceased).
  - (iv) That costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of David Biegon the applicant herein.
3. The applicant avers that he was the objector in Kericho Chief Magistrate Court Succession Cause No. 45 of 2020, In the Estate of the late Reuben Kiptanui Langat alias Kiptanui Sinei (Deceased) which matter was heard and determined and his objection dismissed with costs to the respondent herein.



4. The applicant further avers that Kshs. 702, 202/= costs was awarded to the respondent upon her assessment of her party to party bill of costs dated 6.3.2024 and that having been aggrieved with the taxation by the Learned Principal Magistrate, he instructed his advocate to file the instant reference.
5. The applicant avers that before the reference was heard and determined, the respondent has since taken out a notice to show cause why he should not be committed to civil jail in execution of the certificate of costs subject of the reference herein.
6. The applicant avers that the costs awarded to the respondent in an objection application filed in the instant probate and administration cause in the subordinate court is excessive and high in the circumstances.
7. The applicant avers that the Learned Magistrate failed to use the correct scale of fees prescribed being schedule 10 of the Advocates (Remuneration) Order, 2014 as opposed to schedule 6 thereof which is meant for assessment of costs in the High Court.
8. The applicant faulted the Learned Magistrate for disregarding his submissions and comparative authorities demonstrating fair and reasonable costs in view of the circumstances of the particular case before him
9. The applicant avers that the Learned Magistrate erred in law and principle in assessing Kshs. 400,000/= as the instruction fees to defend an application for revocation of grant dated 10.11.2023 and awarding an additional Kshs. 200, 000/= as instruction fees to defend an application dated 23.11.2023. The applicant contended Kshs. 83, 062/= awarded as VAT in the party to party bill of costs.
10. The applicant reiterated that the costs awarded were excessive and that the Learned Magistrate made serious errors in principle in assessing the respondent's impugned party to party bill of costs dated 6.3.2024 thereby arriving at the wrong decision.
11. The applicant avers that the reference has high chances of success and that the same was brought without undue delay and that it is therefore in the interests of justice that the orders sought be granted and the respondent would not suffer any prejudice if the orders sought are granted.
12. The respondent filed a preliminary objection in response to the chamber summons on the following grounds;
  - (i) That this Honourable Court had no jurisdiction under the Advocates Remuneration Order to direct that the Bill of Costs be taxed afresh in a matter emanating from the subordinate court.
  - (ii) That the said application is bad in law and incurably defective as it offends the mandatory provisions of Paragraph 11 of The Advocates Remuneration Order which states:- "Should any party object to the decision of the taxing officer he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects"
  - (iii) That no request has been made to the assessor (taxing officer) to give reasons regarding the taxed items to enable the appellant invoke the jurisdiction of this court to consider any decision on any objected item (s).
  - (iv) That the taxing officer has rendered no communication containing reasons for the impugned taxation as by Law required to enable to reconsider the same.
  - (v) That the application is misconceived and is otherwise an abuse of the process of the court.
  - (vi) That there can be no stay of execution on costs.



13. The parties were directed to canvas the matter via written submissions. The applicant complied and filed his respective submissions which I have duly considered.
14. The applicant in his submissions maintained that this Court is vested with the jurisdiction to hear and determine the reference in spite of the non-compliance with provisions of rule 11 of the Advocates and Remuneration Order. He cited case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR where the Court of Appeal observed as follows; “It is true that the taxing officer did not record the reasons for the decision on the items objected to after receipt of the respondent’s notice. It seems that the taxing officer decided to rely on the reasons in the ruling on taxation dated 23rd February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”
15. The applicant reiterated that the magistrate used the wrong scale of the Advocates (Remuneration) (Amendment) Order, 2014 in assessing the subject party to party bill of costs, the magistrate used schedule 6 which relates to assessment of costs in proceedings in the High Court. The applicant contended that the subject of the reference was not filed in the High Court and that it was a succession cause and therefore the right scale in assessing succession matters ought to be schedule 10 and the same constituted an error in principle.
16. The applicant contended that the magistrate erred in allowing an award of Kshs. 400, 000/= as instruction fees to defend an application for revocation of grant dated 10th November, 2023 under item 1 of the Bill whereas schedule 10 paragraph (1) (f) of the Advocates Remuneration Order provides a scale and the minimum fees described is Kshs. 10, 000/=. The applicant cited the Court of Appeal case of Joreth Ltd v Kigano & Associates (2002) E.A 92 where the court set out factors to be considered in determining the instruction fees as follows; “The importance of the matter, general conduct of the case, the nature of the case, time taken for the dispatch and the impact of the case on the parties.”
17. The applicant contended that the magistrate erred in allowing an award of Kshs. 200, 000/= as instruction fees to defend an application dated 23rd November, 2023 under item 7 of the Bill whereas instruction fees are only chargeable once in a suit.
18. The applicant found fault in the computation of the applicants claim on drawing, perusal and attendances and proposed a sum of Kshs. 11, 352/= on the same.
19. The applicant contested an award of Kshs. 83,062/= as VAT yet the bill of costs in question was a party to party bill of costs. The applicant cited the case of Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR where the court observed as follows; “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.”



20. Having considered the chamber summons, preliminary objection by the respondent and the submissions filed by the applicant, the issues for determination by this court is whether to stay of execution of the entire decision of the Learned Principal Magistrate, F.M Nyakundi dated 5.6.2024 in the Kericho Chief Magistrate Court Succession Cause No. 45 of 2020, In the Estate of the late Reuben Kiptanui Langat alias Kiptanui Sinei (Deceased) pending hearing and determination of the reference and set aside and tax or assess afresh the decision of the taxing master.
21. On the issue of stay of execution, section 89 of the *Civil Procedure Act* provides for the application of the Civil Procedure Rules in all cases of a civil nature such as the present application arising from taxation of costs, section 89 of the *Civil Procedure Act* provides as follows:
- “ 89. Miscellaneous proceedings
- The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”
22. This provision tilts the scales of justice, in favor of a party against whom substantial sums of money have been adjudged in the nature of taxed costs, the party should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. In the absence of the option for stay such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.
23. Therefore by analogy of the stay of execution pending appeal envisaged under Order 42 Rule 6 of the Civil Procedure Rules, courts are enjoined to grant stay of execution pending hearing and determination of a reference to a judge from taxation of costs, guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant.
24. The court, while asserting jurisdiction to order stay of execution of the certificate of taxation of costs pending the hearing and determination of the reference to a judge, will determine whether the applicant stands to suffer substantial loss if stay is not granted and whether the applicant has provided security. The applicant in this case stands to suffer substantial loss as he would be condemned unheard to pay the taxed costs as the respondent had taken out a notice to show cause why he should not be committed to civil jail in execution of the certificate of costs subject of the reference herein. The applicant has filed the instant application without unreasonable delay. The applicant has not offered any security, however, it is the discretion of this Court to prescribe the nature of security.
25. On the issue as to whether to allow the reference and set aside the decision of the taxing master and tax or assess afresh the Party to Party Bill of Costs. This Court having considered the material presented before it notes that the applicant has submitted extensively on the reference, however, the applicant is bound by his pleadings. In *Galaxy Paints Company Limited v. Falcon Guards Limited Court of Appeal Case Number 219 of 1998*, the Court of Appeal stated that “issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.” The applicant in his application dated 12th June, 2024 has only sought for stay of execution of the decision of the taxing master pending hearing and determination of the reference, there is no prayer seeking to set aside and tax or assess afresh the Party to Party Bill of Costs, therefore this Court cannot entertain the reference at without being appropriately moved by the aggrieved party.



26. Consequently, the chamber summons dated 12th June, is allowed. Consequently;

- i. An order for stay of execution of the Certificate of Costs dated the 10th June 2024 pending the hearing and determination of the reference is granted.
- ii. Costs of the application to abide the outcome of the reference.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 31ST DAY OF JULY, 2024.**

**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

No Appearance

