



**Limakou & 12 others v Krop & 3 others (Environment and Land Miscellaneous.
(Reference) Application 21 of 2022) [2023] KEELC 16668 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS.(REFERENCE) APPLICATION 21 OF 2022
FO NYAGAKA, J
MARCH 21, 2023**

BETWEEN

MARTIN SEMERO LIMAKOU 1ST APPLICANT
KAPCHONGE SHARTI 2ND APPLICANT
SAMUEL ALUKURENG 3RD APPLICANT
RIONGOSIA SAMAKITUK 4TH APPLICANT
JACKSON KANAWAI 5TH APPLICANT
STEPHEN KAKUKO CHEPLOPEI 6TH APPLICANT
KARITOR PSIKEN LOSIANGOLE 7TH APPLICANT
CHEPARKONG R. ROMONYANG 8TH APPLICANT
CHEPTANGAT LEKERN 9TH APPLICANT
JOSEPH P. LOPOTIO 10TH APPLICANT
POWON LONYN 11TH APPLICANT
CHEPOCHENDO LIMAN 12TH APPLICANT
JOACHIM ALEMUSIN 13TH APPLICANT

AND

VINCENT NARISA KROP 1ST RESPONDENT
COX PATRICK NARISA 2ND RESPONDENT
CHEMUTUKEN PALEE LOUKOTUM 3RD RESPONDENT
JANE NARISA CHEPOTUM EDHIO 4TH RESPONDENT



RULING

1. The instant Reference dated November 29, 2022 and filed on November 30, 2022 seeks the following reliefs:
 1. That this Honorable Court be pleased to review and set aside the taxation ruling of May 4, 2021.
 2. That upon allowing the Reference, the Honorable Judge to either peruse the court record (ELC at Kitale Land Case No 118 of 2013) and exercise his discretion and tax the Respondents' Bill dated August 18, 2020 or alternatively refer the Bill for re-taxation by a different taxing master.
 3. That costs of this Reference be in the cause.
2. The Reference was supported by the grounds on the face of it, coupled with a supporting Affidavit sworn by the Applicants' learned counsel. The gravamen of the Summons in Chambers was that the Applicants were the Defendants in Kitale ELC No 118 of 2013 as consolidated with Kitale ELC No 93 of 2018, that costs were taxed in the matters and they were excessive.
3. Their contention was that pursuant to the Court's judgment delivered on May 29, 2020, the Respondents filed their Bill of Costs dated August 18, 2020 marked PKN1. To the bills the Applicants' also annexed their submissions dated February 17, 2021 marked PKN2. In her ruling of May 4, 2021 marked PKN3, the taxing master assessed the Bill at Kshs 2,121,471.00.
4. The Applicants were aggrieved by the ruling on the taxation hence the present Reference. They filed a Notice of Objection dated May 5, 2021 marked as PKN4, prompting the taxing master to furnish the reasons for her decision dated October 26, 2022 marked as PKN5. The Applicants were aggrieved by the taxing master's findings on items 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 25, 27, 30, 32, 42, 43, 44, 45, 55, 56, 57, 58, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 113, 114, 115, 123, 124, 125 and 126.
5. The Applicants contended that the Bill of Costs was not taxed to scale. On items 1-5, they opined that the taxing master ought to have consolidated the items to avoid duplicity. They added that the tally was done in blatant violation of Paragraph 62A (3) of the Advocates Remuneration Order since the taxing master relied on a valuation report which valuation was conducted four (4) years after institution of the suit. As such, the findings on getting up fees would be extrapolated from the review on instruction fees.
6. The Applicants proposed that since the Application dated July 18, 2017 was dismissed on July 30, 2017 with each party bearing their own costs, items 3, 16, 18, 42 - 45, 76 - 81 and 114 - 115 ought to be taxed off. On items 27, 56 - 58 and 126 pegged on the Application dated October 8, 2018 that was overtaken by events, no orders as to costs was made. Thus, those items ought to be taxed off. On items 25, 55 and 61, the number of folios was disputed. They suggested further that items 84- 89, 97, 98, 101 and 102 ought to be taxed at Kshs 1,400.00 and not Kshs 3,000.00. On items 123 - 125, they proposed that they be consolidated to a sum of Kshs 1,400.00 since service was effected together. Finally, all the other items not particularly addressed were objected to.
7. The Applicants urged that costs should not be allowed to a level that confines access to the wealthy. Additionally, there ought to be consistency in awards on taxation so that a court will only interfere when the award of the taxing master is so high or low as to amount to an injustice to one party. For these reasons, they prayed that the Reference be allowed as prayed.



The Response

8. The Respondents opposed the Reference. They filed a Replying Affidavit on January 16, 2023 sworn by the 1st Respondent on January 12, 2023. They adopted the reasoning of the taxing master, arguing that it was well explained. They found that the Reference was filed inordinately as it was instituted two (2) years after the impugned ruling was rendered. They contended that the Applicants ought to have elucidated the scale they relied on. As such, to them, the present Application was baseless. They attached their written submissions to the Bill of Costs dated March 30, 2021 marked VNK1 demonstrating that the taxing master considered both parties' submissions in arriving at her conclusions.
9. Going to the merits of the Reference, the Respondents urged that the instructions fees were properly pegged on the uncontested valuation report. Since they did not countermand that, the assessment on instruction fees stood based on the value of the subject matter as discerned from the valuation report. Furthermore, they argued that the instruction fees was rightfully charged separately since instructions were obtained on different dates. The taxing master's outcome was thus in conformity with Section 62A (3) of the Advocates Remuneration Order. Deductively also, getting up fees ought to remain undisturbed.
10. On the Applications, the Respondents stated that costs followed the event. Consequently, items 27, 56, 57, 58 and 126 were drawn to scale. On the number of folios in items 25, 55 and 61, it was deposed they were not backed up by a stipulation on the number of folios. They observed that contrary to the Applicants' allegations, items 84 - 89, 97, 98, 101 and 102 were taxed at Kshs 1,900.00. Regarding the items objected to without justifiable cause, according to them, the Respondents urged this court to disregard and dismiss them.
11. The Respondent continued that the taxing master's decision was elaborately based on the principles set out in paragraph eight (8) of the Applicants' supporting Affidavit and is thus bereft of error. They lamented that the Application continues to condemn injustice upon them since mesne profits were never awarded to them yet the Applicants were in occupation of the suit land for over forty (40) years. In light of the above dispositions, the Respondents prayed that the Reference be dismissed with costs.

Submissions

12. At the close of the pleadings, parties disposed of the Reference by way of written submissions. The Applicants' submissions dated February 7, 2023 and filed on February 9, 2023 firstly synopsized the dispute the subject of taxation proceedings. Based on that abridgment, the Applicants argued that since the valuation report was only presented as a document in court and neither not pleaded in the Respondents' Plaint nor produced as evidence in court, there was improper basis by the taxing master for setting the instruction fees. Additionally, since there was a change of Advocates, it was incumbent upon the Respondents to file a certificate by dint of Section 62A (3) of the Advocates Remuneration Order. As such, instruction fees were not drawn to scale.
13. The Applicants then rehashed the contents of their Reference adding that items 25, 27, 30, 32, 55 and 61 were annexures and authorities that could not be charged as drawings. They propositioned that item 82 ought to have been taxed at Kshs 500.00 and not Kshs 1,000.00; Items 83 and 90 ought to have been taxed off or in the alternatively taxed at Kshs 1,100.00 as the hearing did not proceed and costs were not awarded; Item 95 be taxed off since the Respondents' Counsel was absent; Item 96 be taxed off as the court was not sitting. They relied on their submissions before the taxing officer to dispute items 99, 100, 113, 123, 124 and 125.



14. The Applicants submitted that the taxing master ought to always exercise her discretion judiciously. They relied on several authorities to support this argument. Based on the above evaluation, they continued that the taxing master erroneously relied on the valuation report that was not a pleading, evidence or alluded to in the judgment. The taxing master, they continued, ought to have applied the Schedules properly and give reason for enhancing the award. In that regard, the award on instruction fees was too colossal and punitive to warrant an interference by this Honorable Court.
15. The Respondents filed their submissions dated February 20, 2023 on February 22, 2023. They wholly adopted the contents of their Replying Affidavit together with the annexures thereto sworn on January 12, 2023 and filed on January 16, 2023. They submitted that the fact of not filing a certificate disclosing Change of Advocates did not lay a justifiable basis for filing the present Reference. They clarified that the valuation report was produced at the hearing to determine the extent of trespass by the Applicants. They thus accused the Applicants of misleading this court.
16. Computing the timeliness as enshrined in Paragraph 11 (1) and (2) of the Advocates Remuneration Order, the Respondents found that the Applicants were in breach of those provisions having filed the present Reference outside that scope and without seeking extension of time. They relied on several authorities to fortify this contention urging that the Reference be dismissed.
17. Responding to certain parts of the Applicants' submissions, the Respondents relied on their Replying Affidavit and further submitted as follows: Items 3, 16, 18, 42, 45, 76 - 81 and 114 - 115 were properly incurred since costs followed the event; Item 7 awarded at Kshs 5,000.00 properly formulated the basis of the award in items 27, 56 - 58 and 126; Items 25, 27, 30, 32, 55 and 61 were pleadings and not annexures; there was no basis for the award of Kshs 500.00 at Item 82.

Analysis And Determination

18. I have considered the Reference and the opposing Affidavit together with the annexures thereto. I have also examined the parties' rival written submissions and evaluated the applicable law together with the itemization of charges to be levied as fees in bills of costs.
19. The taxing of a Bill of Costs is an exercise of discretion reserved for the taxing master. As such, a court is invited to be jealously slow to interfere with the exercise of such discretion unless it can be demonstrated that it was done injudiciously. I am guided by the pronouncements of the Court in the case of *First American Bank of Kenya vs Shab and Others [2002] 1 EA 64* at 69, where Ringera J (as he then was) stated as follows:

' First, I find that on the authorities, this court cannot interfere with the taxing officer's 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 inference that it was based on an error of principle'.
20. The Applicants challenged several items decided on from the itemized Bill of Costs dated August 18, 2020. I will determine them in several clusters where it is evident that the rationale for challenge is based on the same reasoning.
21. Before delving further, I wish to remind the Applicants that imperatively, since it is their Reference, they must obligatorily present the same painstakingly. The burden of proof rested on them to remain diligent and back up their allegations with supporting evidence without necessitating an invitation of this court to call for the original file, although this Court, in exercising due diligence and out of



abundance of caution called for and compared the taxed bills, the items complained about and the proposed decision that should have instead been arrived at.

22. In summary, it is undesirable for this court to appear to litigate on behalf of a party when it is supposed to remain unbiased and neutral. The burden rests upon the propounder to prove what he or she alleges and this court will never depart from that aphorism. These are the dictates of Section 107, 108 and 109 of the *Evidence Act* as well as Article 50 of the *Constitution*.
23. It is for the above reasons that the challenge on Items 8, 9, 10, 11, 12, 13, 14, 70, 71, 72, 73, 74, 75, 105, 106, 107, 108 and 109 must fail. The Applicants only informed that they challenged those items. They did not lay a basis for that opposition and I find none. Similarly so, it was for items 30 and 32 and they too must suffer the same fate. The items were argued, albeit in submissions by the Respondents, as pleadings and not annexures. However, they were not produced before me for my analysis.
24. Items 25 and 55 cannot also be considered because those pleadings were not attached to the Reference. Items 61 and 83 did not form part of the items challenged under the Applicants' Notice of Objection dated May 5, 2021 marked PKN4. They are dismissed as an afterthought.
25. The Applicants further challenged the awards on several Applications in particular dated July 18, 2017 and October 8, 2018. However, they failed to demonstrate their basis for challenge of the items given the pleadings relied on as well as the orders justifying their arguments. For these reasons, the challenge on items 7, 16, 18, 27, 42, 43, 44, 45, 56, 57, 58, 76, 77, 78, 79, 80, 81, 114, 115 and 126 are dismissed. I find items 123, 124 and 125 equally baseless and dismissed since the Applicants did not attach evidence to demonstrate that service was effected on the same day.
26. I note that Item 82 was taxed at Kshs 500.00. I thus fail to comprehend why the same was challenged. It is thus dismissed. Items 84, 85, 87, 88, 89, 97, 98, 101 and 102 were taxed at Kshs 1,100.00 which was less than the Applicants' proposed amounts for each item at Kshs 1,400.00 while item 86 was taxed at Kshs 1,000.00.
27. Similarly, Item 113 was taxed at Kshs 1,400.00 yet the Applicants proposed a sum of Kshs 4,000.00. Be that as it may, I find that being a disbursement, it was taxed based on the receipt furnished. Its challenge must thus fail.
28. At this point I must chastise the Applicants that they were certainly not diligent in preparation of their pleadings from this perspective. It is apparent that they impulsively challenged the items outlined in paragraph 24 and 25 of this ruling, just to lay a baseless basis for the present Reference, which I would call 'hot air', to borrow from the language of the apex Court in the 2022 Presidential Election petition.
29. On Item 90, the Applicant did not furnish evidence to demonstrate that the matter did not proceed for hearing. It is dismissed. Item 95 cannot be disallowed since the Bill of Costs is not an Advocate-Client Bill but that of a party and party costs one. Item 96 is disallowed because no evidence was furnished before me to evince that the court was not sitting.
30. About Items 99 and 100 which were taxed at Kshs 7,100.00 each on the higher scale, the Applicants have proposed a sum of Kshs 5,000.00 for each item on the ordinary scale. Under the relevant Advocates (Remuneration) (Amendment) Order 2014, a hearing that proceeded for half a day provides remuneration on two (2) scales; the ordinary scale computed Kshs 5,000.00 and the higher scale computed Kshs 7,100.00. I must now determine whether the taxing master justifiably applied the higher scale in arriving at the figures awarded.



31. I am guided by the wordings set out in Paragraph 50 of the Advocates Remuneration Order that provide as follows:

' Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and lower scale, the costs shall be taxed in accordance with the lower scale.'

32. At Paragraph 50A of the said Order:

' The court may make an order that costs are to be taxed on the higher scale in Schedule 6 on special grounds arising out of the nature or importance or the difficulty or urgency of the case. The higher scale may be allowed either generally in any cause or matter or in respect of any particular application or business done.'

33. The above provisions couched in mandatory terms generally necessitate that taxing of a Bill must be done in accordance with the ordinary scale and not the higher scale. In that regard, it is the responsibility of the taxing master to only tax on the ordinary scale. However, exceptions are contemplated where an order is issued by the court compelling the taxing master to apply the higher scale.

34. From the paucity of evidence before me, I cannot ascertain whether or not those provisions were complied with. I have no such evidence. I cannot thus determine whether the taxing master erred since she justified that the items were drawn to scale. Due to the scanty amount of evidence before me and further taking into account the counterproductive argument of the Applicants, I am not persuaded that the taxing master exercised her discretion erroneously. It was upon the applicants to prove that the taxation was done contrary to the provisions of the regulation I have referred to above. Thus, the challenge must thus fail.

35. Finally, the Applicants challenged the Items set out in 1, 2, 3, 4, and 5 of the Bill of Costs relating to instruction fees. It was their proposition that the taxing master erroneously relied on the valuation report as the basis for determination of the value of the subject matter. According to the Applicants, the valuation report was neither pleaded nor produced in evidence. In opposition thereto, the Respondents informed the court that contrary to the Applicants' assertions, the valuation report was produced in evidence.

36. It is trite law that the value of the subject matter can be determined from the pleading, judgment or settlement between the parties when ascertaining instruction fees. These parameters are set out in Schedule 6 (1) (b) of the Advocates Remuneration Order. Courts have, however, applied their minds to instances where the value of the subject matter cannot be determined as contemplated in the above citation. My brother Munyao J. succinctly addressed as follows and which view I wholly adopt in [Masore Nyang'au & Company Advocates vs. Kensalt Limited \[2019\] eKLR](#) thus:

20. Schedule 6 above, does prescribe how costs should be assessed 'where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties'. The said schedule does not, however, explicitly prescribe what should be done, where the value of the subject matter is not in the pleadings, judgment or settlement. You could indeed have litigation where the value of the subject matter is not given in the pleadings, judgment or settlement. A common example is in land cases, where say, the plaintiff files suit to cancel the defendant's title claiming that the defendant acquired the title through fraud but the title rightfully belongs to the plaintiff. In such a case, all that may be given in the pleadings is the



registration particulars of the said land and no more. Assuming the plaintiff in such a case succeeds, and the court orders the defendant's title to be cancelled, and in place, the plaintiff to be registered as proprietor, what would the plaintiff be entitled to as costs in respect of instruction fees since no actual value may be given in such a judgment?

21. At the end of the day, costs will need to be pegged on the value of the subject matter, and my own view of the matter, is that the court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purposes of taxing costs, or refer to other documents provided in the course of the case, and which may point at the value of the subject matter. Such documents may include the sale agreement, valuation report, or the consideration noted in the transfer instrument or title. Indeed, Rule 13 of the Advocates' Remuneration Order does allow the court to even call for evidence for purposes of determining a dispute before it. The said provision of the law is drawn as follows:-
 - 13 A. Powers of taxing officer For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.
37. It is apparent that the taxing master relied on the valuation report which, according to the Respondents, was produced in evidence to justify the allegations of trespass. Contrary to the Applicants' assertions, the taxing master was within her jurisdictional powers to evaluate the evidence before her. This included, but was not limited to, the valuation report relied upon. It is imperative to further note that from the parties' arguments, the valuation report was not challenged.
38. The Applicants have failed to conclusively establish that the valuation report was not evidence before the Court. Be that as it may, the taxing master was within her mandate under Paragraph 13 of the Advocates Remuneration Order to rely on any evidence it thought fit. I therefore find that the reliance of the valuation report to determine the value of the subject matter was not done per incuriam. Additionally, since instructions were received on different dates, I do agree with the Respondents to hold that they could not be determined as one (1) conglomerate item. I thus find that the instruction fees and consequential awards set out in items 1 - 5 were properly drawn.
39. Turning to the provisions of Paragraph 62A of the Advocates Remuneration Order, I find that they remain applicable to instances where Advocate-Client Bill of costs has been filed. As such, they were inapplicable to the present facts and circumstances. Its reliance cannot formulate the basis for a challenge to the Bill of Costs.
40. Before giving my final orders, I note that the Respondents in their Replying Affidavit and written submissions computed that the Reference herein was filed in violation of Paragraph 11 (1) and (2) of the Advocates Remuneration Order. The provision stipulates as follows:
 - (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.'



41. A purposive and holistic interpretation of the above provisions can only be determined by further reading Paragraph 11 (4) of the Order that provides:

' (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.'

42. The above provisions set out time limits geared towards invoking the discretion of this court. In order to file a Reference, aggrieved party must instigate the process by the filing a Notice of Objection within fourteen (14) days of the decision. Thereafter, upon receipt of the reasons from the taxing master, the aggrieved party must file the Reference within fourteen (14) days. Although the words 'may' are applied in Paragraph 1 and 2, the provisions are imperative and make it mandatory only subject to the exception the court may give. Paragraph 4 allows parties caught by limitation of time to seek enlargement upon lapse.

43. In the present case, the Applicants filed a Notice of Objection within the stipulated fourteen (14) day time period. The reasons were issued on October 26, 2022. They were then collected by the Applicants' Counsel on November 15, 2022 who then filed the instant Reference on November 30, 2022. Time started running from the time of receipt of the reasons, that is to say, on October 26, 2022. That notwithstanding, the Applicants fell on their slumber and only elected to file the present Reference more than fourteen (14) days after time lapsed. They did not seek extension of time.

44. Rules of procedure are not enacted and implemented in vain. It behooved the Applicants to firstly enlarge time since they were locked out and then invoke this court's jurisdiction. As such, the present Reference was filed incompetently for failing to adhere to the strict timelines.

45. The upshot of the above analysis is that the Reference dated November 29, 2022 and filed on November 30, 2022 is not only incurably defective but unmerited. The Court could have struck out the Reference on account of the last limb (of failure to extend time) but relied on Article 159(2)(d) of the Constitution to not determine on the same on a technicality. It accordingly fails and is hereby dismissed with costs to the Respondents.

46. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT THIS 21ST DAY OF MARCH, 2023

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

