



REPUBLIC OF KENYA



KENYA LAW
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**Oloo v Maina (Miscellaneous Reference Application E182 of 2021)
[2023] KEHC 2517 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS REFERENCE APPLICATION E182 OF 2021
RN NYAKUNDI, J
MARCH 27, 2023**

BETWEEN

LEORNARD OLOO APPLICANT

AND

CALEB ATSANGO MAINA RESPONDENT

RULING

1. The applicant approached this court vide an application dated November 22, 2022 seeking the following orders;
 1. Spent
 2. Spent
 3. That the decision of the taxing officer as evidenced in the certificate of costs dated October 22, 2021 with respect to all the items in the bill of costs to be set aside and taxed afresh by this honourable court with input by both parties.
 4. That in the alternative, the honourable court be pleased to order that the respondent's bill of costs (if any) be taxed afresh by another taxing master with the input of both parties.
 5. That the court be pleased to order the respondent to effect service of the bill of costs upon the applicants and/or their counsels.
 6. That costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by Amihanda Anthony in support of the same.



Applicant's Case

3. The applicant's case is that no supporting documents, in the form of receipts and/or a breakdown were availed as at the time of effecting service of the Bill of Costs. This contravenes the provisions of Order 21 Rule 9A of the Civil Procedure (Amendment) Rules, 2020 (Legal Notice No. 22). The appellant contended that the laid down procedure to file the reference as per the provisions of Rule 11 of the Advocates Remuneration Order, 2014 was followed and further, that the applicant's counsel proceeded to do a correspondence to the Honourable court/ taxing officer on 5th November, 2021 requesting a copy of the ruling/ reasons giving rise to the certificate of costs. The same was done within the 14 days' timeline required by the Law and to this date the same has never been complied. The same therefore, was issued un-procedurally and deserves and intervention from this court. Counsel urged that no legal basis having been advanced and/or a ruling giving rise to the Certificate of costs, it is the Applicant's contention that the court intervenes, sets aside the certificate of costs and direct that the same be re-assessed afresh or the court herein proceeds to re-asses the said Bill of Costs fresh in line with Schedule 7 of the Advocates Remuneration Order.

Respondent's Case

4. The respondent opposed the application and stated that when the matter came up for assessment of the Party and Party bill of costs before the Civil Registry the Applicants had an opportunity to object to any of the items that they wished to oppose. He urged that the application is premature as it offends the provisions of rule 11 of the advocates remuneration order and that the court has no jurisdiction to hear the application as there is no provision of reference of assessment of party to party costs from the subordinate court to the high court. It was his case that the applicants are undeserving of the orders sought as he is in contempt of the order to pay half the costs as ordered on January 21, 2022.

Analysis & Determination

5. Upon perusing the application and the response to the same I have identified the following issues for determination;
 - 1) Whether the court has jurisdiction to determine the reference
 - 2) Whether the decision of the taxing officer should be set aside

Whether the court has jurisdiction to determine the reference

6. The Court of Appeal in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where the Court of Appeal (per Nyarangi JA held as follows: -

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

7. In *Donholm Rahisi Stores (firm) v EA Portland Cement Ltd* [2005] eKLR Waweru J held:

"Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration



Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.”

8. It follows that the court is therefore clothed with the jurisdiction to entertain the present reference.

Whether the decision of the taxing officer should be set aside

9. Order 21 Rule 9A of the *Civil Procedure (Amendment) Rules*, 2020 states as follows;

A party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought.

10. As regards the germane issue on review jurisdiction of a taxing masters decision a plethora of cases have articulated the guiding principles as noted in the Kenya *Kenya Ports Authority vs. Modern Holdings Limited* Lady Stella Arach-Amoko DPJ held as follows:

“The principles regarding review of taxation orders by the courts is well settled. According to a wealth of authorities some of which were cited by both counsel, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on error of principles, or the fee awarded was so manifestly excessive as to justify the interference that it was based on an error (EACJ The Taxation Reference No 4 /2010)

11. Fundamentally, the taxing master in exercising discretion has to bear in mind the following principles set out in *Kulona Richard Hints on Civil Procedure* 2nd Edition pp 118 119 as follows:-

- a. The cost be not allowed to rise to such level as to confine access to courts to the wealthy;
- b. A successful litigant ought to be fairly reimbursed for the costs the has to incur
- c. That the general level of remuneration of advocates must be such as to attract recruits to the profession.
- d. That as fa as practicable, there should be consistency in the awards made
- e. That there is no mathematical formula to be used by the taxing master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances.
- f. The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically.
- g. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party

12. As a matter of history, deducible from the record there is a prima facie evidence of a party likely to be affected adversely by the decision of the taxing master was never given an opportunity to participate in that forum of convenience on taxation. I note that the applicant alleges that the application was never set down for directions on assessment and that there were no notices issued on the same, thus occasioning an ex parte taxation. The respondent has not provided any evidence that there was a hearing notice issued or that the applicant was notified of the ruling date.



13. Article 50 of the Constitution provides;

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

14. It follows that allowing the decision of the taxing master to stand as it is would occasion a miscarriage of justice and therefore, I find that the application succeeds partly in the following terms;

1. The decision of the taxing master and the certificate of costs issued on October 22, 2021 is hereby set aside.
2. The respondent's bill of costs be served on the applicants and taxed afresh by another taxing master with the input of both parties.
3. Costs to the applicant

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27th DAY OF MARCH 2023

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R. NYAKUNDI

JUDGE

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