



REPUBLIC OF KENYA



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**Mumo v Sairowua (Environment and Land Miscellaneous Application
E009 of 2022) [2023] KEELC 17015 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2022**

CG MBOGO, J

APRIL 25, 2023

BETWEEN

DAVID MUTUTO MUMO APPLICANT

AND

REPES SAIROWUA RESPONDENT

RULING

1. Before me for determination is a Chamber Summons Application dated 16th of September 2021, brought under the *Advocates Remuneration Order*, Section 51 of the *Advocates Act*, and Rule 11(2) of the *Advocates (Remuneration Order)* where the applicant sought for orders that;
 - i. The certificate of costs dated September 3, 2021 be varied, reviewed and or set aside;
 - ii. The costs of this application be provided for.
2. The Application is premised on the grounds set out on the face of the application and on the supporting affidavit of even date sworn by David Mututo Mumo, the applicant herein. The applicant objected to the Certificate of Taxation of the bill of costs by the taxing master dated September 3, 2021.
3. The background of the application is that the respondent herein initiated a suit in Narok CM ELC suit No 23 of 2021; *Repes Sairowua v Nareiyon Ologeso & David Mumo* with respect to parcel of land known as Cismara/ Olkinyei/ 790 which the applicant deposed that upon service with summons to enter appearance, the applicant herein filed an application dated April 8, 2021 to have the entire suit struck out for want of jurisdiction on the ground that the value of the suit land was above the pecuniary jurisdiction of a magistrate's court presided over by a chief magistrate.
4. The applicant further deposed that due to the conflict in values presented before court, the magistrate directed that the valuation be done by the government valuer in the presence of all parties then a report be filed in court.



5. That the government valuer filed a valuation showing that the property was worth Kshs 20,000,000/- which value the applicant objected to.
6. Further, that the county valuer visited the land a second time in the presence of both parties and or their representatives and filed a report indicating that the value of the land was Kshs 22,100,000/-.
7. That on the strength of the said valuation report, the applicant deposed, that the respondent moved to withdraw the suit in its entirety before the applicant's application to strike out the suit was heard and determined. The court proceeded to award costs to the applicant.
8. The applicant further deposed that the respondent then moved to file a similar suit before this court and thereafter, he applied for costs to be assessed by the subordinate court. The honourable court assessed the applicant's costs at Kshs 110,000/- and issued a certificate of costs thus prompting this reference. The basis of the amount was that the pleadings did not indicate the value of the land from the onset.
9. The respondent filed a replying affidavit dated November 1, 2022 in opposition to the application.
10. The respondent deposed that he instituted a suit in Narok CMC ELC No 23 of 021 Repes Sairowua versus Nareyioen Ologese and David Mututo Mumo in which he claimed that the applicant conspired with one Nareyioen Ologeso to fraudulently deprive him of his rights over land known as Cis Mara/ Olkinyei/790.
11. The respondent further deposed that before the suit was heard and determined, the applicant applied that the suit be struck out with costs on the basis that the magistrates' court lacked the requisite pecuniary jurisdiction. Further, that the application to strike out the suit was accompanied by a valuer's report dated February 18, 2021 which valued the suit property at Kshs35,000,000/-.
12. The respondent further deposed that he also engaged the same firm of valuers Adomag Valuers & Associates to undertake another valuation exercise of the suit property and which vide a report dated April 27, 2021 revised the earlier valuation to Kshs 16,000,000/-. That upon seeing conflicting valuation reports, the subordinate court directed a government valuer to value the suit property and by a report dated May 19, 2021, the suit property was valued at Kshs 20,000,000/-.
13. The respondent deposed that it would be fair for the court to appraise itself on the contradicting valuation reports including the report dated August 9, 2021 which again valued the suit property at Kshs 22,100,000/- and make a determination that there is conclusion regarding the value of the suit property.
14. The respondent deposed that the truth of the matter is that the value of the suit property could not be ascertained from the pleadings and in this sense, in assessing the instructions fees that is due to the applicant, the taxing officer ought to be guided by the dicta in *Joreth Limited versus Kigano & Associates* [2002] eKLR.
15. The respondent deposed that the taxing officer cannot be faulted for using his discretion in assessing the instruction fees as he did and that this court is enjoined from interfering with the exercise of discretion by the taxing officer unless it is shown that it was based on an error of principle and law which has not been shown in the reference.
16. Further, that there were several items in the applicant's bill of costs that were overly exaggerated being items nos. 4,8,9,10,11,15,16,18,19,20,21,22,23,24,25 and 26 and which the taxing officer was right to tax off. Also, that there were items that were sought for irregularly as they are not items allowed and



provided for as costs under Schedule 7 of the [Advocates \(Remuneration\) \(Amendment\) Order, 2014](#) which are items nos. 2,3,5,6 and 7.

17. The respondent urged this court not to disturb the assessment of costs as done by the taxing officer and to dismiss the reference with costs.
18. This court on March 8, 2023 directed that the application be canvassed by way of written submissions. By the time of writing this ruling, it is only the applicant who had filed his submissions on the 8th of March, 2023 the same being dated December 14, 2022.
19. The applicant raised one issue for determination which is whether the certificate of costs should be set aside. The applicant submitted that the value of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement and if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees. The applicant relied on the case of [Joreth Limited versus Kigano Advocates](#) 2002 IEA 92.
20. The applicant further submitted that the value of the subject matter is not in question as it was settled by the subordinate court and the party and party costs in this case cannot be assessed as if the subject matter of the litigation is not ascertained yet the value was clearly ascertained. The applicant submitted that in line with Schedule 7 1 (b) of the [Advocates Remuneration Order](#), the value of instruction fees in this matter shall be 75 % of the fees chargeable since the suit was withdrawn without going to full trial. As such, the instruction fees ought to be taxed at Kshs 427,500/- .
21. Lastly, the applicant submitted that this court ought to take into perspective the number of hours that counsel spent while attending to the matter in Narok and the quantum of Kshs 110,000/- was excessively low.
22. The principles of setting aside the decision of a taxing master were well established in the cases of [Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another](#) [1972] E.A 162, [First American Bank of Kenya v Shah and Others](#) (2002) EA 64 and [Joreth Ltd v Kigano and Associates](#) (2002) 1 EA 92. These includes: -
 - a. That there was an error of principle
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 - d. That so far as practicable there should be consistency in the award.
23. Further, in [First American Bank of Kenya v Shah and Others](#) [2002] E.A.L.R 64 at 69, the court held 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”.
24. From the above principles, the duty of a taxing officer is to assess the fair and reasonable remuneration under the [Advocates Remuneration Order](#) that a party or an advocate is entitled to pay to the other party who is said to have won the legal contest. However, I am concerned with an issue as to whether the taxing officer decision in exercising discretion applied the settled principles on various cases in assessing counsels’ bill of cost.



25. As was said in the case of *Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri* 2006 eKLR, the jurisdiction by the High Court to interfere with the decision of a taxing officer must only be on the basis that there were mis-directions amounting to errors of law in the findings of the certificate of costs in respect of the material issues and evidence placed before the taxing officer. That the misdirection and error entitle the court to upset the finding of fact and law by the taxing officer. I adhere to these principles which have already been laid down.
26. The remuneration of advocates in connection with non-contentious and contentious matters is regulated by the *Advocates Remuneration Order* which prescribes and regulates various fees chargeable on any business, transaction in court or in their chambers.
27. The information in question must be furnished to the taxing officer in the event a bill of costs is filed for consideration by the court. If having regard to the evidence, nature of the claim and its complexity, its importance to the party or parties, the time and resources expended by the advocate in research, communication, attendances, a taxing officer decision must give reasons for the cost permitted in the taxation.
28. The law in Kenya provides for considerable guidance regarding instructions fees that should be charged in non-contentious matter. According to Schedule 7 1(b) of the *Advocates Remuneration Order* the underlying factors on instructions fees are clearly spelt out. To give meaning to the provisions the taxing officer is clothed with wide discretion to make an inquiry as to the suitability on instructions fees in order to enhance or reduce it altogether. The approach to be adopted in taxing instruction fees lies in the principles in the case of *Jorerb Ltd v Kigano Advocates* 2002 IEA 92 where the court held inter alia that:
- “The instructions fee is an independent and static item it is charged once only and it is not affected or determined by the stage the suit has reached.”
29. In this application I have come to the conclusion that the assessment and taxation carried out by the taxing officer cannot be left to stand. The taxation took place as provided for under the *Advocates Remuneration Order* when the taxing officer issued a certificate of costs. No reasons for the decision was given.
30. Rule 11 of the *Advocates Remuneration Order* 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) (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.”

31. As such this is one of the grounds which impugns the certificate of costs by the taxing officer. From the record the aggrieved party demanded to be provided reasons for the decisions by the taxing officer but at the time of filing the reference no such reasons had been provided for in compliance with the law.
32. In those circumstances and in view of the clear provisions of the Advocates Remuneration Order, it is for these reasons I would therefore allow this chamber summons by setting aside the certificate of costs dated September 3, 2021 and in its place order for a re-taxation to be carried out by a different taxing master other than the one who issued the impugned certificate of costs.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 25TH DAY OF APRIL, 2023.

MBOGO C.G.

JUDGE

25/4/2023

In the presence of:

CA:Chuma

