



Kones (suing as the administrator of the Estate of Kipkalya Kiprono Kones (Deceased) v Kones (Environment and Land Miscellaneous Application E011 of 2022) [2023] KEELC 16813 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16813 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2022
MC OUNDO, J
APRIL 13, 2023

BETWEEN

KIPNGETICH KALYA KONES (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIPKALYA KIPRONO KONES (DECEASED) APPLICANT

AND

WILSON KIPLANGAT KONES RESPONDENT

RULING

1. Before me for determination is an Application dated 20th June 2022 by way of Chamber Summons pursuant to the provisions of Sections 3A, 89 and 94 of the *Civil Procedure Act*, Rules 11(1) (2) (4) of the Advocates Remuneration(Amendment Order [2014] in which the Applicant herein seeks the following orders:
 - i. That the decision of the Taxing Officer to award Kshs 15,000,000/= as instructions fees under item 1(a) of the Amended Party to Party Bill of Costs dated 23rd of February 2022 be set aside.
 - ii. That the decision of the Taxing Officer to award an amount of Kshs 5,000,000/= as Getting Up fees under item 1(b) of the Amended Party to Party Bill of Costs dated 23rd of February 2022 be set aside.
 - iii. That the decision of the Taxing Officer to award an amount of Kshs 6,000/= and Kshs 10,000/= as telephone expenses and miscellaneous expenses under item 59 and 60 respectively, of the Amended Party to Party Bill of Costs dated 23rd of February 2022 be set aside.
 - iv. That the Taxing Master's Ruling and Reasons for taxation delivered on the 13th of May 2022 ("Taxation ruling") be reviewed with respect to the sums allowed on the item numbers 1(a), 1(b), 59 and 60 of the Amended Party to Party Bill of Costs dated 23rd of February 2022.



- v. That in the alternative, the Taxing Master's Ruling and Reasons for taxation delivered on the 13th of May 2022 ("Taxation ruling") be set aside and the Amended Party to Party Bill of Costs dated 23rd of February 2022 be remitted for taxation afresh,
 - vi. That costs of the application be provided for.
2. The Applicant's application was supported by the grounds therein, the affidavit of Kipngetich Kalya Kones and the supplementary affidavit of Julius Kiprotich Mutai, Advocate sworn on the 16th June 2022 and 15th February 2021(sic) respectively to the effect that the honorable Taxing Master delivered a ruling dated the 13th May, 2022 which had no reasons as to how the figure of Kshs 15,000,000/= on item 1(1) had been arrived at keeping in mind that the subject matter of the suit could not be discerned from the pleadings on the ruling of the honorable judge dated 16th December 2021.
 3. The Application was opposed by the Respondent's Replying Affidavit and Preliminary Objection dated 8th July 2022 to the effect that Deputy Registrar had used his discretion judiciously by awarding Kshs, 15,000,000/= as instruction fees and secondly that the court lacked jurisdiction to entertain the Reference as the same was brought after the lapse of statutory period of fourteen (14) days hence it had contravened Rule 11(1) of the Advocates Remuneration Order, 2014, there had been no leave to enlarge time. That the application was therefore bad in law, an abuse of court process, frivolous and vexatious and should therefore be struck out with costs.
 4. By consent adopted by the court on 9th November 2022, the application as well as the preliminary objection were canvassed by way of written submissions to which I shall proceed to summarize as follows;

Applicant's submissions.

5. The Applicant framed his issue for determination as follows;
 - i. Whether the Reference was filed out of time and whether the leave was necessary before filing the Reference?
 - ii. Whether or not the prayers in the Reference are merited.
 - iii. Who bears the costs for the Application?
6. On the first issue for determination, it was the Applicant's submissions while placing reliance on the provisions of Rule 11(1) and (2) of the Advocates (Remuneration) Order, that the crux of this issue was the statutory stipulations and computation of time within which to file Reference. That the Deputy Registrar had failed to comply with the above provisions of the law in that from the reading of his ruling dated 13th May 2022, he had not disclosed the basis of the reasoning of the award of the exorbitant and financially crippling amount of Kshs. 15,000,000/= as instructions fees under item 1 (a) and the Getting up fees of Kshs 5,000,000/= under item 1(b) of the bill of costs and the endorsement of the terms "Wakili if you are not satisfied with the ruling kindly approach the High Court for an appeal" as a response therefore did not satisfy the legal requirements as he was required to give reasons for the awards objected to.
7. That the primary reason why reasons must be given under the provisions of rule 11(2) of the Advocates Remuneration Order is to ensure that the Objector knows the basis of such an award, and also to enable the Judge in case of a Reference, to scrutinize the basis of the award and ascertain if the exercise of discretion is within the set parameters of the law. Reliance was placed on the case in Muriu Mungai & Co. Advocates v New Kenya Co-Operative Creameries [2012] eKLR where the Honorable G. Odunga



J (as he then was) analyzed the requirement as cited in Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua (K) Construction Co. Ltd Eldoret HCMCA No. 124 of 2007.

8. That the situation was further compounded by the failure by the Deputy Registrar and the Registry to notify the Applicant of the endorsement as the same allegedly constituted a “response” to the notice of objection. That after Counsel had been informed that the file was still held up in chambers, his follow-up letter dated 6th June 2022, did not prompt any response. That the strict attributes of the provisions of Rule 11(2) of the Advocates Remuneration Order, should therefore not be enforced against the Applicant as these were failures by the Deputy Registrar and the Registry. Reliance was placed on the decision by the court of appeal in the case of Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board [2005] eKLR.
9. That the Deputy Registrar and the Registry had failed to inform the Applicant’s advocates of the “endorsement” on the letter requesting for reasons and the Applicant proceeded under the impression that no communication or response had been given by the time of filing the Reference herein. The filing of a Reference in the absence of the reasons therefore did not render the Reference incompetent as was held in Kipkorir Titoo (supra).
10. That in the present case, it could not be argued that since the Reference was filed on 20th June 2022, while the Deputy Registrar’s endorsement of the terms “Wakili if you are not satisfied with the ruling kindly approach the High Court for an appeal” was on the 19th May 2022 which had been on the same day that the filing of the Notice of objection and request for reasons had been made, was within the period required of the Deputy Registrar to give reasons under rule 11(2) of the Remuneration Order. The Applicant submitted this argument resulted in an injustice because firstly, the endorsement was not equivalent to giving reasons to the Objector, was not an indication that the ruling contained sufficient reasons for the taxation of the items challenged and neither was the said endorsement communicated to the Advocates for the Objector despite the several follow ups. That time computation on when the period of 14 days, within which to file a Reference could therefore not be determined in the present circumstance.
11. On the second issue for determination as to whether or not the prayers in the Reference were merited, the Applicant submitted that the starting point of taxation of bills of costs was the three-tier mandatory step:
 - i. value of the subject matter is to be determined from the pleadings, which factors were set out in the case of Joreth Limited v Kigano & Asroctates [2002] eKLR
 - ii. Judgment (if matter is heard and determined) and
 - iii. Settlement in that that order.
12. That although the Deputy Registrar cited the principles governing the assessment of costs as was held in Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] EA 162, which was cited in the case of Anthony Thuo Kanai T/A A. Thuo Kanai Advocates v John Ngigi Ng’ang’a [2014] eKLR, yet he did not follow or derive guidance from them.
13. The Applicant sought for the court to interfere with the decision of the Taxing Master dated 13th May 2022 and the award of Ksh. 20,079,769/= as costs, based on the grounds as enumerated in their supporting affidavit dated 15th June 2022.
14. That in laying basis for the figure of Kshs 15,000,000/= the Learned Taxing Master had cited the ruling of the Honorable Judge stating that the Judge had referred to the whole land and not only 125 acres and further that the land was fully developed. The Applicant submitted that nowhere in the said ruling



had the Honorable Judge referred to the whole subject suit as developed and this was therefore the error that had resulted in the humongous and unreachable award of Kshs 15,000,000/= made under item 1(a) of the amended Bill of costs more so when the valuation report filed without leave of court had been dismissed and rightly so. The Applicant relied on this court's decision in the case of Andrew Kipkoech Bon & 2 others v Elizabeth Korir [2022] eKLR.

15. That since there is abundant jurisprudence on the parameters upon which the judge would interfere with the Taxation Master's exercise of discretion, the prevailing scenario in this case was that the Honorable Deputy Registrar committed a manifest error of principle, and in the process made an award that was manifestly excessive as to justify an inference that it was based on an error of principle.
16. That since the pleadings did not disclose the value of the subject matter, the figure of Kshs 15,000,000/= awarded as instruction fees was unsupported and unreachable and unless the court intervened, the Applicant would not only be financially crippled, but it would also set a precedent of punitive awards of costs in litigation.
17. That in regard to an award of "Getting up fees", the correct legal position under Schedule 6 paragraph 2 (ii) and (iii) was that no fee was chargeable until the case had been confirmed ready for hearing, and in every case which was not heard the Taxing officer must be satisfied that the case had been prepared for trial. In the instant case, the matter had been dismissed at the pre-trial stage. Reliance was placed on the decision in Muri Mwaniki & Wamiti Advocates vs. African Banking Corporation Limited [2020] eKLR.
18. On items No. 59 and 60, the Applicant submitted that the legal requirement was that such costs could only be awarded if supported by documentary evidence. That in this case no such documentary evidence had been presented. The Applicant prayed for his application to be allowed with costs.

Respondent's submissions.

19. In opposition to the Applicants application and in support of their Preliminary Objection, the Respondent relied on the provisions of Section 11 of the Advocates Remuneration Order to submit that in this instance, the Taxing officer had given exhaustive reasons for his decision on items contested by the Applicant through a ruling which had been delivered on 13th May 2022, in the presence of both Counsel for the Applicant and Respondent herein, hence the Taxing officer had complied with paragraph 11(2) of the Advocates Remuneration Order.
20. That after thirty nine (39) days of the delivery of the decision aforesaid, and without seeking leave to extend time of filing a Reference to this court, the Applicant herein filed the present Reference by way of Chamber Summons which was after the elapse of fourteen (14) days as stipulated under the provisions of paragraph 11(4) of Advocates Remuneration Order. That in this regard, the application herein was fatally defective as it offended the provisions of paragraphs 11(2) and (4) of the Advocates remunerations Order and therefore it ought to be dismissed with costs.
21. The Respondent relied on the decision in the case of Odera Obar & Co. Advocates v Aquva Agencies Limited [2021] eKLR which quoted the decision in the case of Ahmednasir & Co. Advocates v National Bank of Kenya Ltd (2)[2006] IEAS to submit that the gist of the suit giving rise to the disputed Bill of Costs was a land dispute involving approximately five hundred (500) Acres of land namely L.R NO.9932/3 registered in the name of Sambut Tea Limited and which land had been estimated at a value of Kshs.1.5 billion as per the title deed and valuation report annexed to the Replying Affidavit. That the Taxing officer had thus based the Advocate's instruction fees on the estimated value of suit property which was extensively developed and therefore the fees for instruction was correctly tabulated at Kshs. 15,000,000/=.



22. That although the Respondent's Counsel had complied with the provisions of Order 11 of Civil Procedure Rules, the Applicant had dragged his feet by failing to comply wherein the matter had been referred to the registry. That to this effect there had been no doubt that the Respondent had got up for hearing of this suit and therefore the ward of Kshs.5,000,000/= for getting up was justified based on the reasons given by the taxing officer.
23. That the awards under paragraphs 59 and 60 of Kshs.6,000/= and Kshs. 10,000/= as expenses was justified and reasonable in the circumstance. That the reasons given of the disputed items in the amended Party and Party Bill of Costs was not concrete and could not tilt and/or alter taxed bill. That despite the Taxing officer rejecting the valuation of the suit property, his reasoning that the suit land was extensively developed and its value was colossal was reason enough for his arrival of Kshs. 15,000,000/= as Advocates instruction fees which was fair in balance of probabilities. The Respondent and thus submitted that the Applicant's chamber summons was not merited and the same ought to be dismissed with costs.

Determination

24. I have considered the Application, the Preliminary objection as well as the law, the Authorities herein cited by the parties' and their respective submissions. I find the issues arising for determination therein as follows:-
 - i. Whether the said Preliminary Objection should be upheld, and if not,
 - ii. Whether the Taxing Officer had committed any errors of principle while taxing items 1(a) (b), 59 and 60 of the Amended Party to Party Bill of Costs dated 23rd of February 2022.
25. On the first issue for determination, it is trite that a Preliminary Objection according to the decided case by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd-vs.- West End Distributors Limited (1969) EA. 696 was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
26. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
27. The Respondent herein has raised a preliminary objection to the application herein filed by way of Chamber Summons for reasons that it was filed after thirty nine (39) days of the delivery of the impugned decision which was after a elapse of the fourteen (14) days as is stipulated under paragraph 11(4) of Advocates Remuneration Order and therefore had been caught up by the effluention of time.



28. Paragraph 11 of Advocates Remuneration Order which deals with objections to decision on taxation and appeal to Court of Appeal 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.
- (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."

29. I have considered the fact that the ruling in the Amended Party to Party Bill of Costs was read and delivered in open court on the 13th day of May 2022 in the presence of Counsel for both parties wherein the Applicant wrote their Notice of Objection, dated the 17th May 2022, to the taxing officer of the items of taxation to which he had objected to and which Notice was filed on the 19th May 2022. This I hold was within the 14 days of the decision and in compliance with the provisions under Paragraph 11(1) of Advocates Remuneration Order.

30. Pursuant to the filing of the Notice of objection, I note that on the same day the 19th May 2022, the Taxing officer had scribbled on the face of it the following phrase; "Wakili if you are not satisfied with the ruling kindly approach the High Court for an appeal"

31. The provisions of Paragraph 11(2) of Advocates Remuneration Order are clear and in mandatory terms to the effect that;

"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."

32. To my understanding, the scribbling of the above captioned phrase on the Applicant Counsel's Notice of objection was averse to the laid down procedure and therefore cannot be deemed to be in compliance with the of Paragraph 11(2) of Advocates Remuneration Order. I find that the scribbling therein did not consist a "response" to the notice of objection on the reasons that had informed the Tax master's decisions in the impugned ruling, on the items objected to, so as to enable the objector to, within fourteen days from the receipt of the reasons, file the application/Reference to the court. No evidence was also adduced as to when the Applicant was informed and/or received the said "endorsement" and this conclusion is supported by the Applicant's follow up letter dated the 6th June 2022 annexed to their affidavit in support, and which letter went unanswered.



33. Indeed were the taxing master satisfied that his ruling was elaborate, he, as was held in the case of Muriu Mungai & Co. Advocates (*supra*), would have done either of the following:
- a. “if he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for the decision on each item, then he could state that the reasons are in the ruling; or
 - b. he could summarize specific reasons for decision on each item; or
 - c. if the ruling/decision given earlier is not detailed enough to enable the objector lodge an effective and proper Reference, then the taxing master would be obliged to give reasons for the decisions on each of the items complained.
- It would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis or the decision.”
34. I thus find in the present circumstance, that since the time computation upon which the period of 14 days, within which to file a Reference could therefore not be determined, the Reference, having been filed on the 21st June 2022, was therefore within the prescribed time in the circumstance. The Preliminary Objection dated 8th July 2022 is herein dismissed with costs.
35. On the second issue for determination as to whether the Taxing Officer had committed any errors of principle while taxing items 1(a) (b), 59 and 60 of the Amended Party to Party Bill of Costs dated 23rd of February 2022, the often cited case of *First American Bank of Kenya vs. Shah & Others* [2002] 1 EA 64 sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Master’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162 and *Arthur vs Nyeri Electricity Undertaking* [1961] E.A 492. The said principles were also re-affirmed by the Court of Appeal in *Joreth Limited vs Kigano and Associates* [2002] 1 E.A 92. These principles include
- i. that the Court cannot interfere with the Taxing Master’s discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;
 - ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
 - iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 - iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
36. From the above stated, it can be discerned that there is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see *Premchand’s case* (*supra*)



37. I have considered the impugned ruling herein and for the contents therein it is not to be lost that the matter herein had been struck out by this court for there being lack of locus standi. (See Kipngetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021]eKLR. On Item 1(a), the Taxing Master has held as follows:
- “I have perused the ruling of the learned judge who suggested in her ruling that the issue was about the whole land and not only 125 acres as submitted by Mutai for the plaintiff. The said piece of (sic) is fully developed from the ruling of the judge in this case, I take note also that this case did not proceed to full hearing and as indicated in the above quoted cases, I will use my judicial discretion to award a reasonable figure of ksh 15,000,000 as instruction fees.”
38. In the case of Joreth Limited (Supra) the Court of Appeal held that the value of the subject matter for the 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 so ascertainable the Taxing Officer is entitled to use his/her discretion to assess such instruction fee as (s)he considers just, taking into 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.
39. The Applicant did not annex the Plaint to his application, but from the Respondents’ annexure marked as WK1(a) the Plaint was to the effect that the Plaintiff had sought for an order of eviction against the Defendant, from the deceased person’s share of the land parcel No. LR No. 9932/3 land which was registered in the name of Sambut Tea Limited. The Plaintiff also sought for an injunction restraining the Defendant, his agents, privies, servants and others whosoever claiming through him, from entering, trespassing, tilling, wasting, harvesting trees and/or in any manner dealing with the deceased’s share of land parcel No. LR No. 9932/3 registered in the name of Sambut Tea Limited.
40. I have perused through the said ruling that struck out the suit herein and I have not found the above caption phrase, by the court, upon which the Taxing master had used as a yard stick while applying his discretion to come up with the impugned figure of Ksh. 15,000,000/= as instruction fee. I find that there was nothing to show that the matter was complex. Indeed, the responsibility entrusted to Counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. I find that the Taxing Master did not exercise his discretion judicially thereby following a wrong principle in reaching his decision. The taxed fee of Ksh. 15,000,000/= as instruction fee is herein set aside.
41. On item 1(b) which was in relation to the Fees for Getting Up, schedule 6 paragraph 2 of the Advocates Remuneration Order provides as follows:
- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
 - ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
 - iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.



42. In the instant case, no fee was chargeable as the suit was struck out before it could be heard and / or confirmed ready for hearing. Further the Taxing Master had not made any comment that he was satisfied that the case had been prepared for trial. Indeed the Taxing Master's decision on the taxable fee for getting up would have been based on the $\frac{1}{3}$ of the Instruction fee which fee the court has set aside and therefore the taxed fee of Ksh, 5,000,000/= as Fees for Getting Up is also set aside.
43. On items No. 59 and 60, which was in regard to Telephone and travelling expenses as well as miscellaneous expenses, I note that the Taxing Master taxed the bill at Ksh. 6,000/= and Ksh.10,000/= respectively. These factors are difficult to categorize and/or raise invoices/receipts. The form of communication would entail and include, driving to meet in the advocates office(s), telephone or mobile conversations, correspondence or emails etc, which is difficult to raise receipts on for example bundles/internet connections, telephone/mobile use or transport. The taxed sum of Ksh, 16,000/= in total was in my view reasonable in the circumstance as work was actually done.
44. In the end, save for the last issue, I find that the Application dated 20th June 2022 is merited, I allow the same with the following orders:-
- i. Save for items No. 59 and 60, the taxation of the Respondent's Amended Party and Party Bill of Costs amended on 23rd February 2022 and all the consequential orders are hereby set aside.
 - ii. The said Bill of Costs shall be and is hereby remitted back to another Deputy Registrar to be taxed afresh on the items objected to by the Applicant.
 - iii. Each party shall bear its own costs for this Application.

It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13TH DAY OF APRIL 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

