



REPUBLIC OF KENYA



KENYA LAW
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**Cherutich & 3 others v Surveys & 4 others (Environment & Land Case
93 of 2012) [2023] KEELC 18450 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 93 OF 2012**

JM ONYANGO, J

JUNE 27, 2023

BETWEEN

**ROTICH CHERUTICH 1ST PLAINTIFF
JOHN KIPLAGAT & JACKSON KIPLAGAT (SUING ON BEHALF OF THE
ESTATE OF KIPLAGAT CHERUTICH) 2ND PLAINTIFF
HENRY NGETICH (SUING ON BEHALF OF THE ESTATE OF KIPRONO
KIMETO) 3RD PLAINTIFF
DAUDI EGO 4TH PLAINTIFF**

AND

**THE DIRECTOR OF SURVEYS 1ST DEFENDANT
THE CHAIRMAN NYARU FARMS 2ND DEFENDANT
TITUS KIPROP KIGEN 3RD DEFENDANT
YUSUF KIPKOSGEI KIGEN 4TH DEFENDANT
CHRISTOPHER KEMBOI KIGEN 5TH DEFENDANT**

RULING

1. This ruling is in respect of the Plaintiffs' Notice of Motion dated October 31, 2022 seeking the following orders:
 - i. Spent.
 - ii. This Honourable court be pleased to grant leave to the Applicants to file and serve an objection and reference application against the ruling of the taxing master dated February 25, 2022.



- iii. There be a stay of execution of the ruling delivered on February 25, 2022 and the resultant Certificate of costs pending the hearing and determination of this application and the reference made to this Honourable court.
 - iv. This Honourable court be pleased to set aside in entirety (sic) the ruling dated February 25, 2022 and the resultant Certificate of costs issued on March 3, 2022 and order a fresh taxation to be done in respect of the 3rd, 4th and 5th Defendants Party and Party Bill of Costs dated July 13, 2020.
 - v. In the alternative to prayer no 4 above, the decision by the learned taxing master delivered on February 25, 2022 in respect of item No 1 on instruction fees be set aside and taxed afresh by the Honourable court or be remitted to a different taxing officer for re-taxation.
 - vi. In further alternative to prayer (4) above, the decision of the taxing master on taxation of items number 3-28 be set aside entirely.
 - vii. The costs of this application be provided for.
2. The application is anchored on the grounds set out in the Notice of Motion and the Supporting Affidavit of Henry Ngetich, the 3rd Plaintiff herein. In essence the Applicants took issue with the fact that the taxing master had in his ruling stated the he taxed the bill of costs ex-parte without considering the Respondents submissions which were on record. They faulted the taxing master of applying the wrong principles of taxation and awarding instruction fees of Kshs 200,000/= which they considered excessive. They were of the view that the ruling of the taxing master did not have the backing of the law and principles of taxation and that the same was prejudicial to the Applicants who were condemned unheard.
 3. The application is opposed by the 2nd – 5th Respondents through the Replying Affidavit of Titus Kiprof Kigen sworn on December 5, 2022. He avers that the application is incompetent, frivolous and vexatious and the same is devoid of merit. He further avers that the application is merely intended to delay the payment of costs. The respondent point
 4. The court directed that the application be disposed of by way of written submissions and both parties filed their submissions.

Applicant's Submissions

5. In his submissions learned counsel for the Applicants challenged the manner in which the taxation was conducted and submitted that the taxation ought to be set aside and the 3rd, 4th and 5th Defendants' Party and Party Bill of Costs re-taxed by a different taxing master. He relied on the case of *Joreth Limited v Kigano & Associates* [2002] eKLR which sets out the how instruction fees where the value of the subject matter is not specified. The court held as follows:

“We would at this stage point out that the value of the subject matter of a suit for 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account among other matters, the nature and 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”



6. He submitted that the taxing officer had not given any reasons for the amount assessed as instruction fees and she had therefore not exercised her discretion correctly. He gave reasons why the amounts charged for the various items ought to be reduced. He concluded that the taxing officer erred in principle in considering factors she should not have considered and failed to consider factors which would have guided her to arrive at a just decision.

Respondents' Submissions

7. On his part learned counsel for the Respondents submitted that the issues raised by the Applicants could only be canvassed in a Reference in accordance with paragraph 11 of the Advocates Remuneration Order. He was of the view that the decision of the taxing officer could not be challenged in the present application. He relied on the case of *Odera Obar & Company Advocates v Aly Enterprises Limited & 3 Others* (2015) eKLR where the court made it clear that the proper way to challenge the decision of a taxing officer with regard to taxation of a Bill of costs is by way of a Reference.
8. He submitted that Applicants were aware that the court had directed that the Bill of Costs be canvassed by way of written submissions and in compliance with the said directions, both parties filed their submissions after which the court reserved its ruling for February 25, 2022. It was his submission that the Applicants could not feign that they were not aware of the ruling date and they deliberately ignored the same and came to court 7 months later to challenge the same. He therefore submitted that the Applicants were guilty of indolence as they ought to have challenged the decision of the taxing officer within 14 days after receipt of the reasons for the decision of the taxing officer. He relied on the case of *Abmed Nasir Abdikadir & Co Advocates v National Bank of Kenya Limited* (2006) E A

Analysis and Determination

9. The main issue for determination is therefore whether the court can set aside the ruling dated February 25, 2022 and the resultant Certificate of costs issued on March 3, 2022 and order a fresh taxation to be done in respect of the 3rd, 4th and 5th Defendants Party and Party Bill of Costs dated July 13, 2020.

Paragraph 11 of Section 11 of the *Advocates Act* which provides as follows:

11. Objection to decision on taxation and appeal to Court of Appeal.
 - 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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.



5 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.”

10. The courts have held time and again that the ruling of the taxing master can only be challenged by way of a reference pursuant to paragraph 11 of the *Advocates Remuneration Order* and not by way of an application to set aside the ruling. In the case of *Odera Obar & Co Advocates v Aly Enterprises Limited & 3 Others* [2015] eKLR the court relied on the decision by Ringera J (as he then was) in the case of *Machira & Co Advocates vs Magugu* [2002] 2 EA 428 that:-

“As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

11. Similarly, in the case of *Gacau Kariuki & Co Advocates v Allan Mbugua Ng'ang'a* Misc Application No 678 of 2011, where the Hon Mr Odunga declined to set aside the decision of the Taxing Officer on account of failure by the Applicant to file a Reference. The Learned Judge expressed himself more succinctly as follows:

“I must make it very clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on 29th day of September 2011 and 27th day of October 2011. The orders, which were made on 29th day of September 2011, were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision” In my view the only available recourse to a person aggrieved by a decision of a taxing officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11 (4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with. (Underlining added) Odunga J in the above case finally declared that:

“I am also of the same school of thought as the Learned Judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing officer has directed himself on a matter of principle. If the same is found to have been the case, the usual course is to remit the matter back to the taxing officer with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the judge may remit the matter back with directions that the bill be re-taxed in the presence of the parties. It is therefore my view and I so hold that the only recourse available to the client herein was to come by way of Reference. Accordingly, I decline to set aside the taxing master’s decision made on the 29th day of September 2009.”(Underlining added)



12. Ringera J (as he then was) in the case of *Pyaralal Mband Bheru Rajput v Barclays Bank and others* Civil Case No. 38 of 2004 observed that;

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff’s application incurably defective, and a candidate for striking out.”

13. In the instant case, the Applicant lumped up a number of prayers in the Notice of Motion as set out at the beginning of this ruling. On November 2, 22 the court granted prayers 1, 2 and 3 of the Notice of Motion. The Applicant having been granted leave to file a reference out of time was expected to file the said Reference but instead he chose to pursue the other prayers in the Notice of Motion as if what had initially been filed was a Reference.

14. The approach adopted in this application is inappropriate as the test applicable in deciding a Reference under paragraph 11 of the Advocates (Remuneration) Order is different from the one applicable in an application for the setting aside of a judgment. The said procedure cannot be wished away as mere technicality which can be cured by Article 159 2(d) of the *Constitution*. In saying so I am guided by the case of *Moses Mwicigi & 14 Other v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR where the Court stated thus:

“This Court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of case, that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

15. In view of the foregoing, it is my finding that the application is incompetent and it is dismissed with costs to the 2nd- 5th Respondents.

Dated, signed and delivered virtually this 27th day of June, 2023.

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J.M ONYANGO

JUDGE

In the presence of :

1. Mr. Ogongo for the 1st Defendant/Applicant

2. Mr. Kibii for the 2nd-- 5th Defendants/ Respondents

3. No appearance for the 1st Defendant

Court Assistant: A. Oniala

