



Mutai & 5 others v Kipsigis Traders' Co-operative Society Limited (Environment & Land Case E008 of 2022) [2023] KEELC 18177 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E008 OF 2022**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

**STANLEY MUTAI 1ST APPLICANT
NEWTON MUTAI 2ND APPLICANT
STEPHEN KIPRONO KOECH 3RD APPLICANT
JOSEPH KIPKORIR TOO 4TH APPLICANT
CHARLES KIPRUTO SAINA (BEING SUED AS EXECUTIVE OFFICIALS OF
KERICHO DISTRICT CO-OPERATIVE UNION LIMITED) 5TH APPLICANT
PARMINDER SINGH HUNJAN 6TH APPLICANT**

AND

KIPSIGIS TRADERS' CO-OPERATIVE SOCIETY LIMITED RESPONDENT

RULING

1. Before me for determination is an Application by way of Chamber Summons dated 26th May 2022 brought pursuant to the provisions of Rule 11(2) & (4) of the Advocates Remuneration Order the and all other enabling provisions of the law in which the Applicants herein seeks the following orders:
 - i. That the ruling of the Honorable Nyakundi, the taxing officer dated 10th May 2022 be set aside and/or struck out and that the Party-to-Party Bill of costs dated 20th December 2021 be taxed afresh and/or the court do proceed to make a finding on that taxation.
 - ii. That the costs of the Reference be provided for.
2. The said Application was supported by the grounds on its face and the Supporting Affidavit, sworn on the 6th May 2022 by Mr. Joseph Kipkorir Too the 4th Applicants, on his behalf and on behalf of the other Applicants to the effect that the taxing officer failed to take into account the relevant factors



in assessment of the instruction fees which arose from the value of the subject property, importance and complexity of the matter.

3. That the award was manifestly low in the circumstances considering that the value of the property was ascertained to be Kshs. 35,000,000/= in the pleadings which led to an inference that there was an apparent error of principle.
4. The Applicants further contended that the Respondent would not suffer prejudice if the orders as sought were granted as the Party-to-Party Bill of Costs dated 20th December 2021 was manifestly biased, prejudicial and/or illogical.
5. The Application was opposed by the Respondent's Grounds of Opposition dated the 11th October 2022 to the effect that the Reference was made out of stipulated time of 14 days since the reason for the taxation was delivered on 10th May 2022 hence the same was time barred. That the Taxation of the Party & Party Bill of Costs in the sum of Kshs.462, 140/= was reasonable and based on prayers in the Plaintiff, and further that the cause of action of the suit was not a claim of monetary value but was based on a revocation of Title fraudulently acquired by the 6th Defendant and for perpetual injunction. The same was not based on a sale agreement as purported by the Applicants in their prayers in the suit. That the reasoning of the Taxing Officer was fair, reasonable and within the law.
6. Finally the Respondent's grounds of opposition was to the effect that they would suffer prejudice and irreparable loss should the taxed bill be enhanced as it would be oppressive and beyond the scope of the cause of action of the suit therein.
7. The application was canvassed by way of written submissions to which the Applicants filed their submissions dated 30th January 2023 on 31st January 2023 while the Respondent filed its submissions dated 8th February 2023 on 1st March 2023.

Applicants' written submissions.

8. The Applicants gave a brief background of the matters in issue to the effect that on the 1st December 202, the Respondent herein withdrew the suit it had filed in Kericho Environment and Land Court No. E010 of 2021, with costs to the Applicants wherein they had filed their Bill of Costs dated 20th December 2021 seeking for a total sum of Kshs. 1,726,773.33/= and which Bill of Cost had been assessed at Kshs. 462,141= vide a ruling of the Deputy Registrar dated 10th May 2022. Being aggrieved by the said ruling, they had filed the instant Reference seeking orders as herein above stated.
9. They framed their issue for determination as to whether they were entitled to the orders sought wherein they had proceeded to rely on paragraphs 11 Rule (1) and (2) of the Advocates Remuneration Order to submit that they, having lodged their Notice of Objection on the 25th May 2022 after the Taxing Master's decision of the 10th May 2022, they were within the permitted period of 14 days.
10. Reliance was placed on the decision in Evans Thiga Gaturu Advocate vs. Kenya Commercial Bank Limited [2012] eKLR to submit that the Reference would not be rendered incompetent if the taxing officer's justifications were missing. That in the present instance, the Taxing Master had given his reasons in the ruling and therefore it was not necessary to wait for further reasons and/or justifications.
11. That since it had been held that the court could only interfere with the Taxing Master's decision if he or she taxed the Bill of Costs while taking into account considerations that he shouldn't have in the first place, or if he ignored facts that he should have taken into account, in this instance, Taxing Master had disregarded factors which he should have considered among them, the clearly stated value of the subject matter in the pleadings of which he had stated in his decision, was not stated. The Applicants



relied on the decision in the case of KANU National Elections Board & 2 others vs. Salah Yakub Farah [2018] eKLR to buttress their submission that among other factors that the court should consider in awarding costs, was the value of the subject matter.

12. The Applicants then submitted that generally, the objective of taxation was to award the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim and to ensure that all such costs shall be borne by the party against whom such order has been awarded. That the Taxing Master was required to allow all such costs, charges and expenses that appeared to him or her to have been necessary or proper for the attainment of justice, or for defending the rights of any party but save as against the party who incurred the same.
13. That the costs as awarded by the Taxing Master were not reasonable or legally justifiable as he stated that the value of the suit land had not been stated despite the clear evidence on record to wit the Plaintiff and a copy of the sale agreement annexed as "JKT 4" and "JKT 5" which had clearly stated the subject of the property to be Kshs. 35,000,000/=. That had the value of the subject matter not been stated, which is denied, the Taxing Master should have exercised the powers donated to him vide Order 13A of the Advocates Remuneration Order to ascertain the same.
14. The Applicants also took issue with the decision of the Taxing Master for not taking into account the fact that the Plaintiff, Defence and Counterclaim were dealing with a title to land together with the improvements thereon and that this value had been in contention. That the taxing Master had not also taken into consideration that the Applicants had been ready for hearing before the matter was withdrawn and therefore they were entitled to getting up fees.
15. That the Taxing Master should have also awarded costs of the Counterclaim as a standalone suit as was held in David Manyara Njuki vs. Afraha Educational Society & 3 Others [2000] eKLR.
16. In conclusion, the Applicants submitted that it was clear that the Taxing Master erred in principle in his ruling dated 10th May 2022. They sought that their Bill of Costs dated 20th December 2021 be taxed afresh and/or the court proceeds to make a finding on the same with the costs of the Reference to be issued.

Respondent's written submissions.

17. In response to the Reference and in opposition thereto, the Respondent framed its issues for determination as follows;
 - i. Whether this Reference of the decision of the Taxing Officer before this the honorable court is time barred
 - ii. Whether the Taxing Officer's decision on taxed bill of costs of Ksh.462,120/= was reasonable?
 - iii. Who will bear the cost of the application?
18. On the first issue for determination, it was the Respondent's submission that the Taxing Master and/or Officer had delivered his Ruling/decision on the Party & Party Bill of Costs on 10th May 2022 in the presence of Counsel for both parties wherein the Applicants had failed to file a Reference to the court within the stipulated time of 14 days as provided for under Rule 11 Rule (1) and (2) Of the Advocates Remuneration Order. That the Applicants' Chamber Summons dated 26th May 2022 was filed in court on 7th June 2022 which simply meant that it had been filed after a lapse of twenty eight (28) days after delivery of the decision of Taxing Officer. That this being the case, the present Reference was fatally defective and an abuse of court process. Reliance was placed on the decision in the case of Ahmednasir & Co Advocates vs. National Bank of Kenya Ltd (2)(2006) 1EA5



19. That the Applicants had failed to seek leave of the court to enlarge time to file a Reference against the decision of the Taxing Officer as provided for under Rule 1] (4) of Advocates Remuneration Order and had further failed to give plausible reasons why they had failed to file a Reference out of time. That in the circumstances, their chamber summons dated 26th May 2022 and filed in court on 7th June 2022 was filed out of time and therefore incurably defective.
20. On the second and third issues as to whether the Taxing Officer's decision on taxed Bill of Costs of Kshs.462,120/= was reasonable and who should bear costs of this Application, the Respondents submission was that the Applicants had not specifically contested the items taxed by taxing Officer but had generally criticized the taxation without any tangible reasons to be tackled by the court.
21. That as discerned from the prayers of the suit, the Plaintiffs were seeking a claim of revocation of lease certificate issued to the 6th Defendant by fraudulent means and basically without express authority from delegates of the Co-operative Society. That the claim was not based on value of contract hence the instruction fees of the Advocate could not be based on the value of the said suit property captured in void contract. Further the suit was withdrawn prematurely before the matter was set down for pre-trials.
22. That the Applicants did not pointed out any discrepancy of taxed items which they thought was unfairly taxed under Advocate Remuneration Order and therefore the Respondent concluded that the Reference be dismissed with costs as the same was incompetent and inept.

Determination.

23. I have considered the Applicants' Reference dated the 26th May 2022 as well as the Respondent's Grounds of Opposition dated the 11th October 2022. Vide the said Chamber Summons, the Applicants seek to set aside the decision of the Taxing Master, F.M Nyakundi the Deputy Registrar, dated 10th May 2022 on the Party-to-Party Bill of Costs dated 20th December 2021 so that the same could be taxed afresh and/or the court to make a finding on the said taxation for reasons that;
 - i. The taxing officer failed to take into account the relevant factors in assessment of the instruction fees which included the value of the subject property, importance and complexity of the matter.
 - ii. That the award was manifestly low in the circumstances considering that the value of the property in the pleadings had been ascertained to be Kshs. 35,000,000/=.
 - iii. That the Taxing Master had failed to award costs of the Counterclaim as a standalone suit
 - iv. That the Applicants having had been ready for hearing before the matter was withdrawn, were entitled to getting up fees
24. In opposition of the said Reference the Respondent, filed its Grounds of Opposition dated the 11th October 2022 arguing that the Reference herein having had been filed out of time, be dismissed with costs.
25. That Secondly, the Taxing Officer's decision on the taxed bill of costs of Kshs.462,120/= was reasonable. That the Applicants had not specifically contested the items taxed but had generally criticized the taxation without any tangible reasons to be tackled by the court.
26. From the above captioned summary of the Reference herein I find the issues that stand out for determination as follows;



- i. Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.
 - ii. Whether the Taxing Officer had committed any errors of principle while taxing the bill of costs.
27. From the analysis of the issue at hand it is clear that the Taxing Officer rendered a written ruling on the 10th May 2022 wherein the Applicants herein filed their Notice of Objection to the decision on taxation on the 7th June 2022 on the decision of the Taxing Officer on Item No 1 & 2 in the bill of costs and sought for reasons for the decision.
28. Rule 11 of the Advocates Remuneration Order provides 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. On the first issue for determination, I find that the ruling herein was delivered on 10th May 2022. I also note from the footnote of the ruling that Counsel to the parties were both present. The ruling having been delivered on the 10th May 2022, the Applicants had, pursuant to the provisions of Rule 11(1) of the Advocates Remuneration Order, a window of 14 days to file their Notice of Objection on item No 1 & 2 and/or to file their Reference to this court. They had however filed the same on the 7th June 2022.
30. From the annexure of the Notice of Objection herein annexed to the Reference, the court cannot tell when the said Notice dated 25th May 2022 was filed however upon considering the fact that the Taxing Master had captured the reasons for his taxation on item No 1 in the written ruling, it was incumbent upon the Applicants to exercise their option of filing their Reference, as it would have been futile to expect the Taxing Officer to furnish further reasons.
31. I therefore find that the present Reference which was filed after the lapse of twenty eight (28) days after delivery of the decision of Taxing Officer was filed out of time and the delay ran afoul the provisions of Rule 11 of the Advocates Remuneration order.
32. The Court in the case of Ahmednasir Abdikadir & Company Advocates vs. National Bank of Kenya Ltd(2)[2006]1 EA held as follows:-
- ‘...although Rule 11 (1) of the Advocate Remuneration Order stipulates that any party who wishes to object to the decision of the Taxing Officer, should do so within 14 days after the said decision and thereafter file his Reference within 14 days from the date of receipt of the



reasons, where reasons for taxation on disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reason simply because of unfortunate wording of sub Rule (2) of Rule 11 of Advocates Remuneration Order demands so.’

33. Since the present Reference was filed on the 7th June 2022 which was about 28 days after the delivery of the decision of Taxing Officer, I uphold the Respondent’s grounds of objection to the effect that the Reference herein is incompetent in relation to the provisions of Rule 11(1) of the Advocates Remuneration Order as no leave was sought to file the same out of time. In case I am wrong, than I shall consider the second issue for determination as follows;
34. The often cited case of *First American Bank of Kenya vs. Shah and 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 Officer’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in *Premchand Raichand Limited vs. Quarry Services of East Africa Ltd* (No. 3) [1972] EA 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 & Associates* [2002] 1 E.A 92. These principles include
 - i. that the Court cannot interfere with the Taxing Officer’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 Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer 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 Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
35. From the above, it can be discerned that there is thus 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 as to lead to an injustice, see *Premchand’s case* (supra)
36. The Applicants contend that the Taxing Master ought to have considered the instruction fee in Item 1 in regard to the parcels of land whose value had been concluded to have been Ksh 35,000,000/= and that the matter had been complex and therefore the instruction fee ought to have been taxed at a more higher rate than Ksh 250,000/= which amount was manifestly low and amounted therefore to a misdirection.
37. That further, the Taxing Master had failed to award costs of the Counterclaim as a standalone suit and as well as fee for getting up since they been ready for hearing before the matter had been withdrawn.
38. I have considered the Plaintiff annexed to the Applicants’ application herein, the Defendants herein had been sued for colluding to dispose the Kericho District Cooperative Union Limited without an endorsements. The Plaintiff had thus sought for a declaration that the contract entered between them and the Defendants on the 27th June 2017 was null and void abinitio and therefore the transfer of



the suit property namely Kericho/ Municipality Block 2/65 to the 6th Defendant was done illegally, fraudulently and without due procedure of the law. The Plaintiff had also sought for an order of rectification of the register to the said suit property which had been registered to the 6th Defendant so that the title could be reverted back to themselves.

39. In the case of Joreth Limited vs. Kigano & Associates [2002] 1 EA 92 at 99, the Court of Appeal had 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.

40. Schedule 6 paragraph 1b of the Act provides that,

“In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.”

41. Item 1(b) of the same schedule provides as follows;

“To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds Kshs. But does not exceed Kshs. Kshs.

- 500,000 75,000

500,000 750,000 90,000

750,000 1,000,000 120,000

1,000,000 20,000,000 fees as for Kshs. 1,000,000 plus an additional 2%.

Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.

42. The Applicants have sought that the instruction fee ought to have been taxed higher because the matter had been complex and that they were entitled to getting up fees for having been ready for hearing. It is however clear from the submission of Counsel that the matter did not go to full trial but had been withdrawn prematurely before it had been set down for pre- trials. Further there was nothing to show that the matter was complex, the nature of the forensic responsibility placed upon Counsel in terms of the considerable amount of industry that was time-consuming, the large volumes of documentation that had to be classified, assessed and simplified, and the details of such initiative by Counsel which ought to have been specifically indicated were not specified cogently and with conviction nor placed before the Taxing Master. In my view, 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.

43. Although the Taxing Master had erred in stating that the value of the subject matter had not been stated, yet the Applicants failed to demonstrate that the calculation of instruction fees was erroneous and was not based on any discretionary powers vested on the Taxing Master, indeed if anything, I find the taxed amount as herein above elaborated was in excess of what was due to the Applicants.



44. In the case of Paul Ssemogerere & Olum vs. Attorney General - Civil Application No.5 of 2001 [unreported] the Court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the Taxing Officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the Taxing Officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that Courts would remain accessible to only the wealthy. Also while the Taxing Officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that Taxing Officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”

45. I thus find that there was nothing to show that the amount allowed by the Taxing Master on the instruction fees was inadequate and not within the scale fees. The Taxing Master used his discretion to award Kshs.250,000/- as instruction fees and I will not fault him.

46. On item No 2 which is the getting up fee, I find that there has been concerns as that the matter was withdrawn prematurely before it had proceeded for pre-trials. Indeed no tangible evidence has been placed before the court to illustrate that the Applicants had been ready for the hearing, and matter having been withdrawn prior to pre-trials, it cannot be confirmed that the Applicants had been ready for the hearing.(no proceedings had been annexed)

47. The Applicants have further sought that the Taxing Master should have also awarded costs of the counterclaim as a standalone suit. I find that this issue was neither raised in the Notice of Objection pursuant to Rule 11(1), in the Bill of Costs dated 20th December 2021 nor was it a subject of the ruling dated 10th May 2022. As was held in the decided case in Paul Imison & Another vs Jodad Investments Limited [2014] eKLR the Applicants could only pursue the Reference only with regard to those items which they had given notification in writing that they were objecting to and no more. To do otherwise would amount to sneaking into the Reference items which were outside the objection.

48. The end result is that I find no merit in the Reference herein and proceed to dismiss the same with cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

