



Kenya Electricity Transmission Company Ltd v Kibotu Limited (Environment & Land Case 118 of 2021) [2023] KEELC 19026 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 118 OF 2021
MN MWANYALE, J
JULY 25, 2023**

BETWEEN
KENYA ELECTRICITY TRANSMISSION COMPANY LTD PLAINTIFF
AND
KIBOTU LIMITED DEFENDANT

RULING

1. The Defendant/decreed holder filed an application for review brought under Section 80 of the [Civil Procedure Act](#) Order 45 (2) of the [Civil Procedure Rules](#) as well as paragraphs 11 (1-4) of the Advocates Remuneration order.
2. The Applicant seeks that paragraph 106 of the judgment of this Court delivered on 16th day of March 2022 be reviewed and she had filed a reference seeking setting aside of the decision of the taxing officer delivered on 12th January 2023.
The specific items sought to be reviewed in respect of the bill of costs dated 31/3/2022 and ruling thereof are items 2,3 and 4 as well as item 33.
3. The grounds in support of the application are that there is an error apparent on paragraph 106 of the judgment, where the Court omits to include costs of the counterclaim which were well included in paragraph 104 of the same judgment.
4. With respect to the decision of the taxing master, the grounds for the reference were that the taxing master failed to assess getting up fees, ostensibly because the judge did not certify the suit as one warranting getting up fee.
5. That the Learned Taxing Master erred in principle and in law, taxing off instructions fees on the counterclaim whereas the same had been awarded together with costs of the suit.
6. There was an error in taxation of item 33, under drawing of replying affidavit at kshs 240/=



7. The application was supported by the affidavit of R. R. Mwetich the Counsel for the Applicant and it retorted the grounds in support of the application and annexed a copy of the Ruling by the taxing master.
8. In opposition to the application a replying affidavit by Mr. Alfred Ochieng Opiyo esquire Advocate was filed; who deponed that this Court could not interfere with the taxing master decision unless it is shown that the taxing master proceeded on wrong principles.
9. The deponent of the Replying Affidavit further deponed that he was aware of costs taxed where there is a main claim and counterclaim and the Advocate could only get costs on the counterclaim and not the getting up fees.
10. That the costs as taxed were accurate and that an award must not disturb the general economic equilibrium of the society.
11. Parties were directed to file written submissions in respect to the applications; and both parties complied with the directive.
12. I have analyzed the application and the grounds in support thereof, the Replying Affidavit, the submissions by the parties as well as the authorities in support of the submissions, I framed two issues for determination as here follows;-
 - a. Whether there is an error apparent on face of paragraph 106 of the judgement dated 16th March 2022 to warrant a review of the said judgment
 - b. Whether or not upon review of the paragraph 106 of the judgment, dated 16th March 2022, it would be necessary to set aside the ruling of Bill of costs dated 12th January 2023 with respect to items 2,3,4 and 33 in the Bill of Costs dated 31/3/2022.
13. In respect of issue a) above the Applicant submits placing reliance in the decision in *Grace Akinyi vs Gladys Kemunto Obiri & another* (2016) eKLR which decision quoted the decision in Civil Appeal No. 2111 of 1996, National Bank of Kenya vs Ndungu Njue, where the Court of Appeal held “a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter not can it be ground for review that the Court proceeded on an incorrect expansion of the law.”
14. On issue number (a) the Respondent submits that paragraph 106 of the Court’s judgment was clear and that there was no error made by the court in failing to pronounce itself on the aspect of costs of the counterclaim.
15. I have perused the judgment of the Court and at paragraph 104, the Court awarded the costs of the suit as well as the costs of the counterclaim.

At paragraph 106, only the costs of the suit and interests at Court rates seem to have been awarded and the costs of the counterclaim and interests thereon, are seemingly omitted. It is this omission that the Applicant deems an error apparent on the face of the record a qualifying or a review under Section 80 of the *Civil Procedure Act*; and Order 45 of Civil Procedure Rules upon which the application is premised on.
16. There is indeed an omission on the award of costs and interests on the counterclaim at paragraph 106 of the judgment while the said costs had been awarded at paragraph 104 and paragraphs 106 being the



disposition paragraph, the issue of costs and interests on the counterclaim ought to have been decreed thereon.

17. Accordingly, there is merit in the application for review and paragraph 106 of the judgment dated 16/3/2022, is hereby reviewed so as to rectify an error apparent on the face of the record so as to read as the follows; -

“Costs of the suit and counterclaim and interests thereon at Court rates from date of judgment are awarded to the Defendants.”

18. Issue number 1 of the issues is thus answered in the positive.
19. Having found merit and reviewed paragraph 106 of the judgment dated 16/3/2022, whether it would be necessary to set aside the ruling dated 12/01/2022 in respect of items 2, 3, 4 and 33 of the Bill of Costs dated 31/3/2022.
20. Item 2 on the Bill of Costs dated 31/03/2022 related to getting up fees, with respect to the instruction fees of the main suit. This item was wholly taxed off in the ruling dated 12/01/2023, a decision that the Applicant seeks to set aside.
21. Getting up fees is provided for under paragraph 2 of the schedule 6 which provides as follows; “in any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be less than one third of the instruction fee allowed on taxation.”
22. The learned taxing master had taxed off the getting up fees on account that the judge had not certified the same.
23. The Applicant submits that the taxing off by the learned taxing mater was based on a wrong principle as getting up fees need not be certified by the judge, but the same flow directly from the instruction fees once a matter goes up for trial. In support of these submissions, the Applicant has cited the decision in the case of *Kiambu Murutani Company Limited Vs Kamindi Selfridges Supermarket* (2021) eKLR where the Court held; “getting up fees flows directly from the instruction fees.....”
24. The Respondent did not submit on item 2 of the Bill of Costs relating to getting up fees on instruction fees but submitted on getting up fees on the counterclaim.
25. As observed, paragraph 2 of the schedule 6, provides for getting up fees. The getting up fees emanate from the instruction fees and need no certification from a Judge. Clearly and with respect, the Learned Taxing Master acted on the wrong principles of the law and should not have taxed off the same, but to have allowed it at one third of the instruction fees.
26. The ruling dated 12/01/2023 in respect of item 2 of the Bill of Costs dated 31/3/2022 is thus set aside and remitted to the taxing master for taxation.
27. Item 3 and 4 of the Bill of Costs dated 31/3/2022 relating to instructions fees on the counterclaim and getting up fees on the counterclaim respectively.
28. In taxing off item 3, the Learned Taxing Master stated that the counterclaim and the main suit were heard together and that paragraph 106 of the judgment only awarded costs and interests of the suit.
29. The Court has now reviewed paragraph 106, of the judgment to include costs and interests on the counterclaim. It follows thus the costs and interests on the counterclaim were awarded and they are the basis of item 3 of the Bill of Costs.



30. Are the costs of a counterclaim that are awarded separate from the costs of the main suit?
31. The Applicant has cited the decision in the case of *William Nembe Obora & 73 others vs Rift Valley Railways Limited* (2018) eKLR for the proposition that a suit is not the same as a counterclaim, and costs for a counterclaim ought to be assessed separately. The Applicant further places reliance on the decision in *Kenyariri & Associates Advocates vs Salama Beach Hotel & 4 others* (2014) eKLR. Where the Court held inter alia “The Applicant is therefore entitled to instructions fees on the counterclaim. The taxing officer erred in not awarding the Applicant instructions fees on the counterclaim....”
32. In response the Respondent has cited the decision in the case of *Mumias Sugar Company Limited vs Prof. Tom Ojienda & Associates Advocates* 2021 eKLR for the proposition that fees on a counterclaim would not be assessed separately and quotes paragraph 23 of that decision.
33. I have read the whole of the *Mumias Sugar Company* decision (supra) and contrary to the submission by Mr. Opiyo for the Respondent at paragraph 26 of that decision, the Learned Judge held as follows; “in conclusion, the Deputy Registrar based the instruction fees on the counterclaim yet the Advocates were entitled to fees for defending the main claim and prosecuting the counterclaim.....”
34. It follows therefrom that the Applicant herein was entitled to instruction fees on the counterclaim as well as costs thereof having been awarded to paragraph 104 of the judgment and paragraph 106 of the judgment having been reviewed to include the costs so awarded.
35. The Court thus sets aside the Ruling in respect of items 3 and 4 of the Bill of Costs dated 31/3/2023 and remits the same for taxation before the Learned Taxing Master.
36. On item 33, I find that the same was drawn to scale and the same is hereby allowed as drawn.
37. The upshot is that the application is allowed and the judgement is reviewed in terms as captured at paragraph 17 of this Ruling to wit,

“Costs of the suit and counterclaim and interests thereon at Court rates from date of judgement are awarded to the Defendant.”
38. The Ruling of the taxing master dated 12/01/2023 in relation to the Bill of Costs dated 31/3/2022 is set aside in respect of items 2,3,4 and 33 only.
39. Items 2, 3, and 4 of the Bill of Costs dated 31/3/2022 are emitted to the Taxing Master for taxation. Costs of this application is awarded to the Applicants.

DELIVERED AND DATED AT KAPSABET THIS 25TH DAY OF JULY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Achola holding brief for Mr. Ochieng for the Respondent

Ms. Salim holding brief for Mr. Mwetich for the Applicant.

