



**Githegi v Mwangi (Environment & Land Miscellaneous Case
E012 of 2023) [2023] KEELC 19017 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19017 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E012 OF 2023**

LN GACHERU, J

JULY 24, 2023

BETWEEN

JASAN GICHURE GITHEGI APPLICANT

AND

FREDRICK WANJAU MWANGI RESPONDENT

RULING

- 1 Vide a Notice of Motion Application dated 18th May 2023, the Applicant herein sought for the following orders:
 1. The taxed bill of costs amount to Kshs. 3,000/- and certified be increased, set aside and/or vacated and the bill of costs dated 8th November 2021, be re-taxed; and
 2. That the costs of this application be borne by the Respondent.
- 2 The application was premised on five grounds stated thereon, and on the Supporting Affidavit of Jasan Gichure Githegi, the Applicant herein, who averred that he was the Plaintiff in Murang'a CMELC Case No. 24 of 2020. That he was represented by the Law Firm of T.M. Njoroge & Co. Advocates. Further that his advocate filed a bill of costs dated 8th November 2021, in the said CMELC Case No. 24 of 2020, which was on the lower side and therefore did not conform to the provisions of the *Advocates Act*, and was unconscionable. He prayed that the amount be increased or the bill of costs be re-taxed or vacated. He further contended that he stands to suffer immense loss should the taxed bill be executed.
- 3 The Respondent opposed the application through an objection dated 6th June 2023, and filed on 7th June 2023. The "Objection to the Notice of Motion Dated 18th May 2023" as titled by the Respondent Fredrick Wanjau Mwangi, provided a response considering that no sworn Affidavit was filed by the Respondent. He stated that the Ruling dated 9th May 2023, indicated that the Seventh Schedule of the Advocates Remuneration Order 2014, provided that for filing of applications should be charged at Kshs. 3,000/= and therefore the Applicant could not demand a further increase.



- 4 The Respondent further stated that no orders were issued to re-tax the bill of costs, and that the only order was to pay Kshs. 3,000/=, which he did. Lastly, the Respondent stated that the bill of costs that the Applicant sought to re-tax was for a separate matter namely, CMELC No. 24 of 2020, which was closed on 27th October 2022, through the Ruling of Hon. E. M. Nyaga –SPM, where he stated that the Court lacked jurisdiction to handle the matter. The Applicant further stated that the present suit ELC Misc. No. E012 of 2023, was separate from the taxed suit namely ELC No. 12 of 2023.
- 5 The Respondent further stated that the items the Applicant sought to have re-taxed particularly items No. 1,2,3,4,5,6 & 7, amounting to Kshs. 221,000/= was for ELC Case No. 427 of 2017, which was withdrawn by the Applicant’s advocates on 2nd May 2019, and the matter was marked as withdrawn and settled by Lady Justice Kemei, and therefore the Applicant could not demand costs for what he withdrew.
- 6 Further, the Respondent stated that he had cleared various fees listed in the bill of costs, including disbursements of Kshs. 2,000/=, and further disbursements of Kshs. 6,000/=, for survey fees, which he averred was to be shared between the parties, of which he stated, he had paid up for both of them.
- 7 The Respondent filed a further response through an unsworn statement dated 14th April 2023, opposing the application further on the grounds that the Applicant had filed multiple applications before the lower Court and this Court on the same bill of costs, which were either withdrawn or closed.
- 8 The Application was canvassed by way of written submissions. The Applicant through the Law Firm of T.M. Njoroge Advocate filed his submissions on 23rd June 2023. He submitted that his advocates filed a bill of costs, which was then taxed by Hon. Sheila Karimi. He further submitted that the bill of costs was on the lower side and below the sum allowed under the Advocates Remuneration Order, and therefore necessitating this reference.
- 9 The Applicant further submitted that the lower Court did not have power to set aside the bill of costs assessed by another Court of competent jurisdiction, nor was there an application to set aside the bill of costs. The Applicant urged the Court increase the fees for the application or vacate and set aside the taxed bill by Hon. Sheila Karimi.
- 10 The Respondent who was self-representing in the present suit, filed his submissions opposing the application on 27th June 2023. It was submitted that the Respondent raised objections to the bill of costs on 27th January 2022, before the matter was referred to Hon. Sheila Karimi, for assessment on the grounds that the bill of costs, was exaggerated and premature.
- 11 The Respondent further submitted that in the Ruling dated 9th May 2023, Hon. E. M Nyaga – SPM, indicated that there were errors on the bill of costs dated 9th May 2023, by Hon. Sheila Karimi. Lastly, the Respondent submitted that the Applicant failed to contest his objections, in particular, that ELC Case No. 427 of 2017, was withdrawn and that he had already paid certain fees listed.
- 12 Having read and considered the pleadings by the Applicant and the Respondent, the evidence adduced, the written submissions, and the relevant provisions of law, this Court finds that the main issue for determination is:
1. Whether the orders sought herein are merited?
- 13 Before the Court delves into the matter at hand, it will provide a brief background of the facts as adduced by the pleadings and annexure by the parties herein.
- 14 A Ruling was delivered in the Magistrate’s Court in ELC Case No 24 of 2020, on 27th October 2022, wherein the said suit had been transferred from the High Court to the Magistrate’s Court for want



- of jurisdiction under Section 18(2) of the *Land Registration Act*. The Magistrate’s Court additionally dismissed the Preliminary Objection dated 20th May 2021, with costs. However, since the Court lacked jurisdiction on the matter, it directed that each party to bear its own costs.
- 15 Further orders were issued in CMELC Case No 24 of 2020, on 9th May 2023, wherein the Court held that costs were erroneously taxed by Hon. Sheila Nyaga at Kshs. 475/= as opposed to the amount provided for of Kshs. 3,000/= under Schedule 7 of the Advocates Remuneration Order. It is on these grounds that the present application was made.
- 16 The present application is seeking to set-aside, vacate or re-tax the bill of costs and was made on the grounds that the Applicant’s advocates drew a bill of costs that failed to adhere to the fee structure set under the Advocates Remuneration Order, in particular that the bill of costs was below the allowed minimum, in respect of the fees for filing of applications, which fee is set at Kshs 3,000/- under the Advocates Remuneration Order 2014, as opposed to the Kshs 475/= as stated in the bill of costs dated 8th November 2021.
- 17 Further, in the Chief Magistrate’s Ruling in ELC No. 24 of 2020, the Court stated that costs in the suit were erroneously taxed by Hon Sheila Nyaga, from the High Court, as the 7th Schedule of the Advocates Remuneration Order, provides that any application to proceed with a matter will be assessed at Kshs. 3,000/=. The Court therefore allowed the application and assessed the bill of costs at Kshs. 3,000/=.
- 18 Dissatisfied, the Applicant filed the present application seeking to have the bill of costs increased or set aside entirely. This Court will bear in mind that Section 51(2) of the *Advocates Act*, provides that the certificate of taxation of the taxing officer unless set aside or altered by the court is final in regard to the amount of costs covered therein.
- 19 Further, the Court will be guided by the principles as reiterated in the case of *First American Bank of Kenya vs Shah and Others* [2002] EALR 64 at 69, wherein Ringera J (as he then was) observed as follows:
- 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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him...”
- 20 This Court will first address the Respondent’s response to the application, which it finds wanting. Order 51 Rule 14 of the *Civil Procedure Rules* provides for grounds of opposition to an application in High Court. It states:
- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
- (a) a notice preliminary objection: and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition.”



21 In the present case, the Respondent has filed an Objection dated 6th June 2023, to the Notice of Motion dated 18th May 2023. The legal position on Preliminary Objections was well established in the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.

22 The Court further held:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

23 For a Preliminary Objection to succeed, the same must raise pure points of law that it would not be difficult to ascertain and there must be no proper contests of facts. The purpose of a Preliminary Objection was well stated by the Supreme Court in Civil Application No. 36 of 2014 *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, which held; -

The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

24 This Court will first determine the Preliminary Objection which was made on the grounds that the 7th Schedule of the Advocate Remuneration Order provides that the bill of costs for the filing of applications is Kshs. 3,000/= and therefore the Applicant could not demand more, and that the Respondent had already paid the taxed amount. The Respondent further averred that CMELC No. 24 of 2020, was closed by the Ruling of Hon. E.M.Nyaga- SPM on 27th October 2022.

25 For this Court to grant a Preliminary Objection, it must be convinced that the objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. Considering that this Court has had to examine and scrutinize the facts of the present case through various facts, dates and documents relating to the matter, the Court finds that the Respondent’s objections fail to meet the threshold raise by in the Mukisa Biscuits Case (Supra), and that the objection does not raise pure points of law.

26 On the final issue on the Preliminary Objection that the Applicant has filed multiple applications relating to the same item on the bill of costs, which would amount to res judicata, this Court is guided by the Court finding in the case of *George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another* [2014] eKLR where the Court opined:



One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata”.

- 27 The upshot of the foregoing that this Court finds and holds that the instant Respondent’s Preliminary Objection must fail.
- 28 The final matter for determination is whether this Court ought to allow the application to increase the remuneration for filing of an application from the amount stated in the bill of costs of Kshs. 475/=, to the revised amount of Kshs. 3,000/= as provided for under 7th Schedule Rule 5 of the Advocates Remuneration Order and as provided in the Ruling of the Hon. E M Nyaga (SPM) dated 9th May 2023.
- 29 This Court notes that the matter was already determined and the Court awarded Kshs. 3,000/=, but despite this revision, the Applicant is not satisfied with the set amount and therefore filed this Reference on the grounds that the amount is on the low side. The Respondent opposed the application stating that the amount cannot be raised further than that set under the Advocates Remuneration Order.
- 30 On matters remunerations, Section 36 of the *Advocates Act*, provides that no advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of Professional business, which is less than the remuneration prescribed, by Order, under this Act. Therefore, this Court has the discretion to increase the fees in the event that it finds that there was an error of principle, or the fee awarded was so manifestly excessive or low, as to justify inference that it was based on an error of principle. In the present case, the Court found that the initial fee was low and the Court later awarded the sum as provided in the Advocates Remuneration Order of Kshs. 3,000/= for an application that was earlier withdrawn. In the premise, this Court finds that the Applicant has failed to meet the threshold for the Court to interfere with the taxing master’s decision.
- 31 For the above reasons, the Court finds the instant Application is not merited, and the same is dismissed entirely with no orders as to costs.
- 32 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 24TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Applicant – Absent

Respondent – Present in person

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

24/7/2023

