



Wahome & 3 others v Mwangi & 3 others (Sued as the Chairman, Vice- Chairman and trustees of Mukuru Kwa Reuben Self Help Group) (Environment and Land Case Civil Suit 841 & 910 of 2007 (Consolidated)) [2023] KEELC 19252 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19252 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 841 & 910 OF 2007 (CONSOLIDATED)

JA MOGENI, J
JULY 17, 2023

IN THE MATTER OF

PETER MWANGI 1ST DEFENDANT
NYAMWEYA ABUYA 2ND DEFENDANT
FRANCIS NGUGI 3RD DEFENDANT
SUED AS THE CHAIRMAN, VICE- CHAIRMAN AND TRUSTEES OF
MUKURU KWA REUBEN SELF HELP GROUP

AS CONSOLIDATED WITH
ENVIRONMENT AND LAND CASE CIVIL SUIT 910 OF 2007

BETWEEN

JOSEPH WARUGURU WAHOME 1ST PLAINTIFF
GEORGE KEREU 2ND PLAINTIFF
JOSEPH MWANGI WAINAINA 3RD PLAINTIFF
MARY MUGURO 4TH PLAINTIFF

AND

AFFILIATED BUSINESS CONTACTS LIMITED DEFENDANT

JUDGMENT

1. Before me this Court for determination is the 1st Applicant's Chamber Summons application dated 14/04/2023 consolidated with the 2nd Applicant's Chamber Summons dated 24/04/2023 being one



application brought under section 44 of the [Advocates Act](#), paragraph 11 of the [Advocates](#) 2014, section 1, 1B, 3, 3A and 89 of the [Civil Procedure Act](#) and All the Enabling Provisions of the Law. The 1st and 2nd defendant/applicants are seeking the following orders:

1. Spent
 2. That there be a Stay of Execution of the Certificate of Taxation given on 5/04/2023 pending the hearing and determination of this reference.
 3. That the decision of the Taxing Master dated 5/04/2023 taxing the Respondent/Plaintiffs' Party and Party Bill of Costs in the sum of Kesh 2,084,999.67 be set aside.
 4. That the Honorable Court be pleased to tax the Plaintiff's Bill of Costs in accordance with the [Advocates Remuneration Order](#) or remit the Bill back to the Taxing Master or a different Taxing Master with directions that the same be taxed afresh.
 5. That the costs of this application be provided for.
2. The application is predicated on the grounds set out on the face of the application and on the supporting affidavits dated 14/04/2023 and 24/04/2023 sworn by Peter Mwangi Kanee and Nyamweya Abuya 1st and 2nd defendant/applicant respectively hereinafter referred to as applicant. The applicant claims that the Party and Party Costs were taxed and a ruling delivered on 5/04/2023 and he is aggrieved by this ruling.
 3. That the applicant filed the instant application seeking for stay of execution of the ruling of the Taxing Master dated 5/04/2023. It is the applicant's case that he is aggrieved by the taxing master's reasons given for arriving at the award, such as the size, location of land and consolidation of the two matters and the time taken to prosecute them. He is of the view that the reasons given by the taxing master are unknown in law and that no value of the subject matter was revealed in the pleading and judgment delivered by the court.
 4. That the taxing master failed to tax the bill of costs according to the law and therefore arrived at a wrong decision leading to unfair enrichment of the plaintiff. Therefore, the decision of the taxing master dated 5/04/2023 should be set aside.
 5. It was the defendants' prayer that the decision should be set aside since if it is not they stand to suffer irreparable loss.
 6. The application was opposed vide a grounds of opposition dated 19/05/20223 filed by the plaintiff herein. It is the plaintiff's contention that the consolidated application lacks merit, is bad in law and fatally defective on grounds that Rule 11 has set out steps which are mandatory for challenging a decision made on taxation. That the objecting party should within 14 days after the decision give Notice in writing to the taxing master of the items which he objects to.
 7. The plaintiff contends that the failure to given the notice means that this application is defective for failure to comply with Rule 11 (1) of the [Advocates' Remuneration Order](#). Further that the application is incompetent since has laid no sufficient basis for the court to interfere with the decision. That the taxing master did not err in the decision made and further that the applicant had not annexed any notice done to the taxing master of the items of taxation to which the applicant objects.
 8. It was the plaintiff's case that the instant application was an abuse of the court process and ought to be dismissed.
 9. The Reference was canvassed by way of written submissions.



The Applicant's Submissions

10. On behalf of the applicant, it was submitted that the instruction fees was so high pegged at Kesh 1,400,000 and the taxing master failed to give proper reasons for arriving at the said figure making it an award of an imaginary figure. Further that this being a case that was filed in 2002 the applicable Remuneration Order that the taxing master should have used was the 2002 Order which would have placed the instruction fees at Ksh. 49,000 and thereafter increased the fees to manageable levels. That awarding the instruction fees at Kesh 1,400,000 attracted a getting up fee of Ksh. 466,666.67. That therefore the court should set aside the taxing master's decision and remit it for fresh taxation or to another taxing master.

The Plaintiff/Respondent's Submissions

11. It was submitted that the applicant failed to follow the laid down procedure on objection to a decision on Taxation and appeal as is clearly laid out under paragraph/section 11 of the [Advocates Remuneration Order](#) 2014. The respondent submitted that the applicant failed to annex any notice that he gave to the Taxing officer within the required period of 14 days of the items of taxation to which the applicant objects to enable both the court and the respondent to know the items being objected to.
12. The respondent submitted that instead of providing a list of the items they are objecting to, the applicants in their applications dated 14/04/2023 and 24/04/2023 have sought to set aside the entire decision of the taxing master including the items taxed as drawn making it difficult for the plaintiff/respondent to know which items they were objecting to. That this situation would have been addressed if the notice of objection to taxation had been filed because the reference would have been directed to the said items.
13. Further it was submitted that the values of the subject matter is not indicated in the pleading nor judgment, but the taxing master is entitled to use his discretion to assess such instruction fees which he considers just including the nature and importance of the cause or interest of the parties and many others. That the Court of Appeal provided factors to be considered which list is not exhaustive and the taxing master is required to use their discretion in considering relevant factors.
14. The respondent stated that the taxing master considered 7 factors which were itemized including among others, the location of the suit property which is industrial area, the size of property which is 2.193 hectares, the consolidation of the two suits, the interest of the parties among others. That in exercise of her discretion the taxing master found that the plaintiff's claim of Kesh 1,400,000 was reasonable and fair. Further that all factors considered that the taxing master considered were relevant to the suit.
15. It was the plaintiff/respondent's contention that there was no error nor was the taxing master capricious, unreasonable or injudicious in her decision. That all in all the applicants' applications are fatally defective for failure to comply with Rule 11 (1) of the [Advocates Remuneration Order](#) and filing of a Notice of Objection. Therefore, the Chamber Summons dated 14/04/2023 and 24/04/2023 (consolidated) are without merit and are for striking out with costs. Further the respondent submitted that the applicant did not lay out the exact misapplication of the principles of taxation the Taxing Master committed while assessing the plaintiff/respondent's bill of costs.



Analysis & Determination

16. I have considered the pleadings, the trial court records, the rival written submissions, the cited authorities and it is my view that the issue for determination is whether the instant application is merited.
17. It is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through Paragraph 11 of the Advocates Remuneration Order. In *Machira & Co. Advocates v Magugu* [2002]2 E.A, Ringera J (as he then was) held as follows:

“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.”

18. Similarly, in *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus: -

“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 master has misdirected 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 master 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 a reference.” [emphasis added].

19. Paragraph 11 of the *Advocates Remuneration Order* provides for the procedure an aggrieved party must follow in challenging taxation or assessment of costs. It provides that:“

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- (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.



20. The procedure contemplated above is that:
- a. The aggrieved party issues a notice within 14 days on the items objected.
 - b. The Taxing Officer shall forthwith give reasons for his decision.
 - c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection.
 - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
21. It is clear from the above provision that the only avenue available to a party who wishes to object to a decision following a Taxation would be to approach the Court under Paragraph 11 of the [Advocates Remuneration Order](#).
22. The applicant is seeking an order that the ruling delivered on 6/04/2023, be set aside.
23. The principles for setting aside the decisions of Taxing Master were well established by the Court of Appeal in the case of [Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board](#) [2005] eKLR that:
- “On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”
24. The proper exercise of discretion by the Taxing Officers was restated in the case of [Kamunyori & Company Advocates v Development Bank of Kenya Limited](#) [2015] Civil Appeal 206 of 2006, where it was held that;
- “...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”
25. Before turning to whether the taxing officer did or did not make an error of principle, I note that the plaintiff/respondent’s bill of costs dated 29/07/2022 was duly served upon the applicant on the 24/02/2023 and fixed for assessment on the 29/03/2023 and that the applicant had ample time of almost one month to file written submissions to the items that the applicant was opposed but failed to do so.
26. In my opinion, the Taxing Officer was well within her discretion to proceed with the Taxation as she had given the applicant more than sufficient indulgence to challenge the bill which was before her. There is only so much that a court of law can do for a party whose intention in the proceedings is, clearly, to delay the disposal of those proceedings without any justification. I find no fault on the part of the trial magistrate proceeding to assess the bill of costs that was before her as she did.
27. The next question for consideration is whether sufficient grounds have been laid out to warrant the setting aside of the decision of the Taxing Officer.



28. There are two aspects to this Reference namely, whether the applicant wrote to the taxing master asking for reasons for taxation on specific items that the applicant was opposed to, as required by Paragraph 11 of the *Advocates Remuneration Order*. The other aspect is whether the now objected to items were properly assessed and awarded to the respondent.
29. Under Paragraph 11 of the *Advocates Remuneration Order*:
- “11
- (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...”
30. From the documents on record, the judgment in this matter was delivered on 29/01/2020, the party and party bill of costs dated 27/07/2022 was assessed on 6/04/2023. The application herein was filed on 14/04/2023 just eight (8) days later. There is nothing on record to show that the applicant herein wrote or gave Notice to the taxing master within the 14 days stipulated in the Paragraph 11 of the *Advocates Remuneration Order*, objecting to any specific items that had been assessed and asking reasons for such assessment. The applicant simply filed this application by way of reference before complying with the procedure required under Paragraph 11 of the *Advocates Remuneration Order*. I therefore find that no Notice of objection was ever filed asking for reasons for taxation of any of the item listed in the assessed bill of costs not even the instruction fees that the applicant has elaborately submitted on.
31. It is important to emphasize that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in an injustice.
32. The sum effect of the above is that I find no error on the part of the taxing master in assessing the plaintiff/respondent’s bill of costs dated 27/07/2022.
33. I therefore find that there was absolutely no basis upon which the Reference herein, which does not even adhere to the procedure established under paragraph 11 of the Advocates Remuneration Order was filed. I find this application frivolous and vexatious and intended to delay the settlement of costs of the suit as properly assessed by the trial magistrate, Hon I.N. Barasa Deputy Registrar. I therefore hold and find that both Chamber Summons dated 14/04/2023 and 24/04/2023 are devoid of any merit and the same are hereby dismissed with costs to the Plaintiff/Respondent assessed at Kshs.2,084,999.67 payable within 14 days of this order in default, the Respondent is at liberty to execute for recovery.
34. I so order.
35. This file is now closed.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY, 2023.



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MOGENI J

JUDGE

In the virtual presence of:-

Mr. Opole holding brief for Mr. P Muage for the Plaintiff

Mr. Mageto for the 1st and 2nd Defendants/Applicant

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

