



REPUBLIC OF KENYA



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**Kaitany v Nyayo Tea Zones Development Corporation & another; National Land Commission & another (Interested Parties) (Environment & Land Case 71 of 2022) [2023] KEELC 20259 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 71 OF 2022  
L WAITHAKA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**SILVESTER K. KAITANY ..... PLAINTIFF**

**AND**

**NYAYO TEA ZONES DEVELOPMENT CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**KENYA FOREST SERVICE ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This ruling is in respect of the reference/chamber summons dated 27<sup>th</sup> April 2023, brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, paragraph 11(2) of Advocates Remuneration Order (ARO) and Schedule 6 of ARO, 2014. In the reference, the applicant seeks the following reliefs:-
  1. That the Hon. Court be pleased to set aside and/or vacate the decision of the taxing officer, Hon. V. Karanja delivered on 17<sup>th</sup> April 2023 and or any other consequential orders arising therefrom;
  2. That the Hon. court be pleased to re-tax the bill of costs dated 29<sup>th</sup> July, 2022 specifically item (1) and (2);
  3. In alternative to prayer 2 above, that the Hon. court be pleased to remit the bill of costs dated 29<sup>th</sup> July, 2022 for re-taxation before a different taxing officer with appropriate directions.



4. That costs of the reference be provided for.
2. The application/reference is premised on the grounds that the taxing officer erred by:-
  - i. Relying on the awarded damages in the judgment delivered on 3<sup>rd</sup> December 2021, of Kshs.50,000,000/- as opposed to the value of the subject matter;
  - ii. Disregarding the National Land Commission (NLC) valuation report dated 6<sup>th</sup> November 2017, which valued the suit property at Kshs.369,795,500/- despite acknowledging that the valuation formed part of the pleadings and the fact that the same was uncontested;
  - iii. Failing to give a reasoned ruling or reasons for assessing instruction fees based on the awarded general damages and not the value of the subject matter or the suit property as per the National Land Commission Valuation report dated 6<sup>th</sup> November, 2017;
  - iv. Assessing the instruction fee based on general damages awarded by the Hon. court despite that award having being one of the reliefs granted after the plaintiff was declared the absolute and indefeasible owner of the suit property and the taxing master holding that the 1<sup>st</sup> defendant was an unlawful trespasser to the suit property;
  - v. Ignoring and/or disregarding the applicant's submissions.
3. Maintaining that the taxing officer failed to ascertain the correct subject matter of the suit for purpose of taxation, the applicant contends that the taxing officer committed an error of principle warranting interference with her decision by setting aside the amount of Kshs.1,585,033/- awarded, which is manifestly low as to occasion a grave miscarriage of justice.
4. Arguing that the value of the subject matter is ascertainable and acknowledged by the taxing officer in paragraph 8 of the taxation ruling, the applicant maintains that the taxing master erred by failing to use the correct value of the subject matter of the suit, being Kshs.369,795,500/-.
5. The reference/application is supported by the supporting affidavit of Silvester Kaitany sworn on 27<sup>th</sup> April 2023, in which the grounds on the face are reiterated.
6. The 1<sup>st</sup> defendant/respondent filed grounds of opposition, dated 5<sup>th</sup> May 2023, through which it opposes the reference on the grounds that:-
  - a. The affidavit sworn in support of the reference does not make out a case to warrant the orders sought.
  - b. The deputy registrar as the taxing master applied the correct principles of law in determining the value of the subject matter contrary to the plaintiff/applicant's contention;
  - c. It is trite law that the value of the subject matter for purposes of assessing the instruction fees is determined from the pleadings, judgment and settlement between the parties but not from documents produced in evidence;
  - d. The valuation report by the National Land Commission dated 6<sup>th</sup> November 2017, being relied on by the plaintiff/applicant as proof of the subject matter cannot in law be taken as the value of the subject matter for purposes of assessing instruction fees.
  - e. The contention and/or averment by the applicant that the instruction fees have been taxed at Kshs.5,671,932 based on the said valuation report is contrary to well settled principles of law regarding taxation;



- f. The taxing master clearly gave the reasons on how the instruction fee was arrived at and the same cannot therefore be faulted in the circumstances.
7. Pursuant to directions given on 15<sup>th</sup> May 2023, the reference was disposed off by way of written submissions.

## **Submissions**

### **The Applicant's Submissions**

8. In the Applicant's submissions filed on 31<sup>st</sup> May 2023, a brief background of the circumstances leading to the filing of the reference is given and the following questions/issues identified as the issues for the court's determination:-
  - i. Whether the taxing officer erred by relying on the awarded damages in the judgment delivered on 3<sup>rd</sup> December 2021, of Kshs.50,000,000/- as opposed to the value of the subject matter of Kshs.369,375,500/- as per the NLC valuation report dated 6<sup>th</sup> November 2017, in assessing instruction fees;
  - ii. Whether the taxing master erred by failing to give a reasoned ruling or reasons for assessing instruction fees based on the awarded general damages and not the value of the subject matter or the suit property as per the valuation report;
  - iii. Whether item 1 and 2 in the bill of costs dated 29<sup>th</sup> July 2022, should be re-taxed.
9. With regard to the first issue it is submitted that the taxing master erred by relying on the awarded damages in the judgment delivered on 3<sup>rd</sup> December 2021, of Kshs.50,000,000/- as opposed to the value of the subject matter. The taxing officer is said to have erred in law and principle by disregarding the NLC Valuation report dated 6<sup>th</sup> November 2017, which had put the value of the suit property at Kshs.369,375,500/- despite having acknowledged that it formed part of the pleadings yet it was not contested;
10. Lamenting that the instruction fees payable to him under item one 1 of his bill of costs was not computed to scale as provided under Schedule 6(1) (b) of ARO, the applicant maintains that in the circumstances of this case the value of the subject matter is ascertainable from a copy of the NLC Valuation report dated 6<sup>th</sup> November 2017, which put the value of the suit property at Kshs.369,795,500/-.
11. Based on the decision in the case of Kenya Power & Lighting Co. Ltd vs. Msellem (Miscellaneous Civil Application E056 of 2021) (2022) KEELC 2624 (KLR), where it was inter alia stated that the fact that the respondent was awarded Kshs.274,560.00 does not mean that the instruction fee was to be based on that amount; it is submitted that the fact that the plaintiff was awarded Kenya shillings 50,000,000/- as damages does not mean that the instruction fees should be based on that amount.
12. It is the applicant's case that the assessment of instruction fees should not have been based on the assessed damages because his case was not premised on that relief alone. Further reference is placed on the case of Tom Ojienda & Associates Advocates vs. County Government of Narok (Miscellaneous Application E608) (2021)KEHC452 (KLR) where the court is said to have relied on the valuation report to ascertain the value of the subject matter of the suit after pointing out that the basis of the suit was ownership and use of the suit property just as in the instant case.



13. Further reliance is placed on the case of Masore Nyangau & Co. Advocates vs. Kensalt Ltd ELC Nakuru Misc App 196 of 2015 where it was held that the value of the subject matter could be ascertained from the documents other than the pleadings.
14. Arising from the authorities cited herein above, it is submitted that the instruction fee of Kshs.5,671,932/- charged by the plaintiff/applicant is properly computed.
15. On whether the taxing master erred in law by failing to give a reasoned ruling or reasons for assessing instruction fees and the bill of costs, it is asserted that the taxing officer erred in law by failing to give reasons for assessing instruction fees based on the awarded damages and not the value of the subject matter or the suit property as per the NLC Valuation report dated 6<sup>th</sup> November, 2017.
16. The taxing officer is faulted for having failed to give justification for her decision to rely on the awarded damages as opposed to the value of the subject matter which, according to the applicant, was/is ascertainable from the pleadings filed.
17. The taxing officer is said to have acknowledged that there was a valuation report filed which indicated that the value of the subject matter of the suit was Kshs.369,795,500/-. Based on the decision in the case of Khushbir Harjeet Singh Chadha vs. Wesley Maranga Robinson Gichaba (2020) eKLR and the provisions of paragraph 11(1)(2) of ARO, the taxing master is faulted for failing to give reasons for assessing instruction fees on the basis of damages awarded by the court as opposed to the ascertainable and acknowledged value of the subject matter.
18. It further submitted that even if the pleadings and the judgment in the present case did not disclose the value of the subject matter, the taxing officer would still be required to consider all relevant factors in arriving at the right instruction fees. Those factors include the nature and importance of the matter, the complexity of the matter, the novelty of the questions raised, the value of the subject matter and the time expended by the advocate. The taxing master is said to have failed to consider all these factors in assessing the instruction fees payable to the plaintiff/applicant.
19. On whether item 1 and 2 on the bill of costs dated 29<sup>th</sup> July 2022, should be re-taxed, based on the decision in South African Case of Visser v. Gubb 1981 (3) SA 753 ( C) 754H-755C, where the general principles governing interference with the exercise of the taxing master's discretion are given, it is submitted that the taxing master misdirected herself on the issue of the value of the subject matter resulting to a wrong decision in assessing the instruction fees payable to the plaintiff thus rendering her decision subject of interference by this court.
20. The taxing officer is also said to have ignored the applicant's submissions in support of his bill of costs.

### **The 1<sup>st</sup> Defendant's Submissions**

21. In the 1<sup>st</sup> defendant's submissions, dated 9<sup>th</sup> June 2023, and filed on 12<sup>th</sup> June 2023, it is pointed out that the plaintiff applicant's case which forms the subject matter of this reference was allowed in the following terms:-
  - a. A declaration is hereby issued that the plaintiff is the absolute and indefeasible owner of land reference No.22209 (I.R. 82519);
  - b. A declaration is hereby issued that the 1<sup>st</sup> defendant whether by itself or its servants agents or otherwise howsoever as trespassers are not entitled to remain in the suit property unless it legally adheres to the requirements for acquisition of private property as set out in part VIII of the [Land Act](#), 2012 Laws of Kenya;



- c. A permanent mandatory injunction restraining the 1<sup>st</sup> defendant whether by itself or its servants agents or otherwise howsoever from trespassing onto the suit property;
  - d. General damages for trespass for loss of use of the suit property for Kenya shilling fifty million (Kshs.50,000,000/-);
  - e. Costs of the suit plus interest to be paid by the 1<sup>st</sup> defendant.
22. It is pointed out that pursuant to that judgment, the plaintiff filed his party & party bill of costs claiming a total of Kshs.7,964,826/-. It is also pointed out that the bill was taxed at Kshs.1,585,033/-.
23. Aggrieved by the decision of the taxing officer, the plaintiff/applicant filed the instant reference.
24. It is pointed out that schedule 6 paragraph 1 (b) of the ARO provides that fees chargeable shall be based on value of subject as can be determined from the pleadings, judgment or settlement.
25. Based on the decision in the case of Joreth Limited v. Kigano & Associates (2002) e KLR where the principles that undergird taxation on instruction fees were espoused, it is submitted that it is trite law that in taxing the bill of costs, the instruction fee is to be based on the value of the subject matter where the value of the subject matter can be determined from the pleadings, judgment or settlement regardless of the prayers or orders sought in the plaint.
26. Concerning the instant application, it is submitted that the value of the subject matter was not disclosed and that the plaintiff claim was based on trespass to land; that it is in respect of that claim that the plaintiff was awarded Kshs.50,000,000/-. That the contention that the value of the suit property is Kshs.369,795,500/- is misconceived as that amount includes loss of user of the suit property for a period of 12 years.
27. It is further submitted that for purposes of assessing the instruction fees, the value of the subject matter has to be specifically pleaded and that the requirement for pleading the value of the subject matter specifically cannot be cured by filing a valuation report. In that regard reliance is placed on the case of Tom Ojienda & Associates Advocates vs. County Government of Narok (Miscellaneous Application E608) (2021) KEHC452 (KLR) where the court cited with approval the decision in the case of SG Mbaabu & Co. Advocates v. Joseph Muoki Kakenyi & 2 others (2018)e KLR reports thus:-
- “Indeed filing of valuation reports for purpose of guiding the taxing officer in taxation ought to be discouraged for the simple reason that such a value was never the basis of the suit in the first place. If the value of a suit property is so important to a litigant, then it should form the basis of his claim and should be specifically pleaded.”
28. It is pointed out that the valuation report sought to be relied on for assessment of instruction fees is at variance with the plaintiff total monetary claim which was Kshs.114,120,000/-.
29. It is further submitted that the applicant has not met the threshold for interfering with exercise of the taxing master’s direction set out in the case of First American Bank of Kenya vs. Shah & others (2002) EA 64.



30. The 1<sup>st</sup> respondent urges the court to uphold the decision of the taxing master's decision. Reliance is placed on the case of *Otieno, Ragoti & Company Advocates v. Kenya Airport Authority* (2021) eKLR where it was inter alia held/stated:-

“The taxing officer and the learned judge were right in concluding that the value of the subject matter was not ascertainable from the pleadings, in which case, the taxing officer, rightly used the discretion based on other relevant considerations to assess the instruction fee.”

### **Analysis and determination**

31. The reference herein is brought under inter alia paragraph 11(2) of the (ARO) which provides as follows:-

“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 receipt of reasons apply to a judge in chamber summons which shall be served on all parties concerned, setting out the grounds of his objection.”

32. The obligation of the taxing master provided for in paragraph 11(2) above is set in motion by an objector fulfilling the obligation imposed on him under paragraph 11(1) of the ARO which provides as follows:-

“Should any party object the decision of the taxing officer, he may within fourteen days after the decision give notice to the taxing officer in writing of the items of taxation to which he objects.”

33. In the case of *Elijah Ileri t/a Ileri & Company Advocates v. County Government of Embu* (2021) e KLR, the court held that what the above provision means is that before a party can object to the decision of the taxing master, he ought to give notice in writing to the taxing officer of the items of taxation which he objects. The taxing officer is then required to forthwith record and forward to the objector the reasons for his/her decision. The objector has the discretion to file his reference within 14 days. The court further held that failure to seek reasons from the taxing officer and/or attach the reasons to the reference renders the application defective.

34. The import of seeking for the reasons for taxation on the objected items was given in the case of *Evan Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd* (2012) e KLR where it was held that where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound principles.

35. In the instance reference, there is no indication that the plaintiff/applicant complied with the procedure provided in paragraph 11(1) of the ARO.

36. I have perused the ruling of the taxing master and established that no reasons were provided by the taxing master for basing the instruction fee on the assessed general damages of Kshs.50,000,000/- as opposed to the value of the subject matter indicated in the ruling being Kshs.369,795,500/- as per the valuation report done by the NLC.

37. It is noted that one of the grounds on which this reference is premised is failure of the taxing master to give a reasoned ruling or reasons for assessing instructions fees based on the awarded general damages



and not the value of the subject matter or the suit property as per the NLC valuation report dated 6<sup>th</sup> November, 2017.

38. As observed in the case of *Evan Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd supra* the import of seeking for reasons for taxation on the objected items is to enable the judge in determining whether or not the discretion of the taxing master was exercised on sound principles. Without those reasons, this court has no basis of determining whether the taxing master exercised her discretion properly or not.
39. The instant reference was filed without compliance with the procedure of filing a reference against taxation of bills of costs by taxing master as the applicant did not file an objection with the taxing officer seeking reasons for basing the instruction fee on the assessed damages by the court and not on the valuation report done by NLC concerning the suit property.
40. Failure to adhere to the procedure provided for under paragraph 11(1) and (2) of the ARO for challenging the decision of the taxing master renders the application defective as this court has no basis of determining whether or not the discretion of the taxing master was exercised in accordance with sound principle.
41. It is noted that the trial court, just like the taxing master, merely acknowledged that there was a valuation report filed by NLC that had put the value of the subject matter of the suit at Kshs.369,795,500/- but did not address that valuation report in determining whether or the plaintiff had made up a case for being granted the reliefs sought as none of the reliefs was premised on that valuation report.
42. From the plaintiff's pleaded case, it is clear that the plaintiff was not seeking any reliefs on the basis of that valuation report and had not stated in his pleadings that the value of the subject matter is Kenya Shillings 369,795,500/-. If he had done so, it is possible that the defendants and/or the court might have addressed the issue in their pleadings and judgment respectively. It is not enough for the plaintiff/applicant to say that the valuation report formed part of the court record when he had not referred to it in his pleadings.
43. In *World Explorers Safaris Limited v Cosmopolitan Travel Limited & another (2021)e KLR* the court stated as follows concerning the function of pleadings:-

“The function of pleading in civil proceedings is to alert the other party the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (defence). Material facts are only those relied on to establish the essential elements of the cause of action.....parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unpleaded issues as having been fully investigated. The need for pleadings to be precise cannot be doubted.”
44. In *Chalicha FCS Ltd v. Odhiambo & 9 others (1987)KLR 182*, it was held that the court has no power to make an order, unless by consent, which is outside the pleadings.
45. In applying the above principles to the circumstances of this case, where the plaintiff/applicant had neither indicated in his pleadings that the value of the subject matter was Kshs.369,795,500/- nor sought for any reliefs based on the said value of the subject matter and further where no relief was granted by the court based on such valuation, he may not be heard to insist that the taxing master erred by basing the instruction fees on the general damages awarded by the court.



46. A review of the case presented before court shows that it was basically a case in which the plaintiff sought for declarations, injunction and general damages for unlawful trespass to his land. There was no relief whatsoever based on the value of the suit property and none was granted.
47. The upshot of the foregoing is that the reference is not only incompetent for failure to adhere to the mandatory provisions of paragraph 11(1) and (2) of the ARO but also lacking in merit as the plaintiff had not sought for any relief based on the valuation report and none was granted by the court based on the valuation report.

Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 29<sup>TH</sup> DAY OF SEPTEMBER AT KABARNET.**

**L. N. WAITHAKA**

**JUDGE**

