



**Kiamba v Kimanthi & another (Environment and Land Miscellaneous Application  
13B of 2014) [2023] KEELC 20021 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20021 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 13B OF 2014  
A NYUKURI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**CRISPUS MAKAU KIAMBA ..... APPLICANT**

**AND**

**ESTHER KAMENE KIMANTHI ..... 1<sup>ST</sup> RESPONDENT**

**LYDIA KATILO MULWA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a chamber summons dated July 5, 2022 filed by the defendant seeking the following orders:
  - a. That this Honourable Court be pleased to set aside, review, or substitute the Taxing Master's decision issued on June 29, 2022 in the suit herein.
  - b. That the cost of this Application be in the cause.
2. The Summons is supported by the affidavit sworn by Muema Kitulu, counsel for the defendant/ applicant. he deponed that the plaintiff filed a case claiming ownership of land based on adverse possession in respect of land measuring 4 acres in Mavoko Sub County, Machakos County with an estimated value of Kshs. 100,000,000 (one hundred million shillings). He stated that the plaintiffs' suit was opposed and on February 14, 2022, the Plaintiffs withdrew their suit and costs were awarded to the Defendant.
3. He further stated that the defendant filed Advocate/Client Bill of Costs dated April 4, 2022 seeking a sum of Kshs. 3,813,528/= as Party and Party costs but that the Taxing Officer taxed the same on June 8, 2022 at Kshs. 455,176/=. He faulted the decision of the Taxing Officer on grounds that the latter



failed to apply the applicable principles and wrongly applied her discretion. Further that the Taxing Officer failed to give reasons for her decision and arrived at a wrong decision.

4. The application was opposed. Esther Kamene Kimanthi one of the respondents swore a replying affidavit dated July 25, 2022. She stated that she was not even served with the ruling notice of the decision appealed against by the applicants. she also stated that she filed application dated June 15, 2022 seeking to set aside proceedings of May 11, 2022 and be allowed to file response to the Bill of Costs and that the application is still pending. She stated that the summons were based on greed.
5. It was her assertion that the applicant had not met conditions to warrant review as provided in order 45 rule 1 of the Civil Procedure Rules. She further stated that the Applicant had not annexed a copy of the Ruling or Order sought to be reviewed.
6. She maintained that the defendant/applicant had not shown that the value of the suit property as at 2014 was Kshs. 100,000,000/=. She also stated that there was no hearing in the matter and no documents or valuation reports were produced, and that therefore the figure of Kshs. 100,000,000/= does not exist. She stated that the Applicant ought to have awaited for the reasons of the Taxing Officer before filing the Summons herein.
7. In a rejoinder, Muema Kitulu, counsel for the defendant filed a further affidavit sworn on August 4, 2022. He stated that the plaintiff was duly served. He also stated that he has never been served with the application dated June 15, 2022. He stated that the Taxing Officer failed to call for a valuation of the suit property and that the Taxation was unfair.
8. The application was disposed by way of written submissions. On record are the applicant's submissions filed on November 8, 2022 and the respondents' submissions filed on November 28, 2022.

### Submissions

9. Counsel for the applicant submitted that since the applicant indicated that the value of the subject matter was Kshs. 100 million, if the Taxing Officer doubted the value she was obligated to request for a formal valuation from the Applicant as envisaged under rule 13A of the Advocates Remuneration Order.
10. Reliance was placed on the case of Masore Nyang'au & Company Advocates v. Kensalt Limited (2019) eKLR and Ambwere T.S. Associates vs. Frank Nyambu Wafukwa & Others for the proposition that where the value of the subject matter is not discernible from the Pleadings, Judgment or Settlement, the court is not precluded from asking for evidence or refer to documents produced like valuation report so as to determine what the value of the subject matter may be for purposes of taxing costs. Counsel submitted further that the Taxing Officer was obligated to call for a valuation report which she failed therefore making unjust decision. Counsel also argued that the Applicant disputes all other items as they had been drawn to scale yet they had been taxed below the provisions of Schedule 6 of the Advocates Remuneration Order.
11. In response to the Respondents' argument that the Summons were filed due to greed on the part of the Applicant, counsel cited the decision of the Supreme Court of Uganda in the case of Rukidi v. Iguru and another (1995-1998) 2 EA 318 for the proposition that a party is free to pursue their rights irrespective of whatever intervening events have taken place since the court is entitled to pronounce on the rights of the parties.
12. Counsel further referred the court to the case of Pyramid Motors Limited v. Langata Gardens Limited (2015) eKLR for the proposition that a party seeking to challenge a Taxation award need not await the supply of the Ruling or reasons for the award. Counsel argued that where it is shown that the



Taxing Officer did not exercise their discretion properly, this court can interfere with the exercise of such discretion. To buttress this argument reliance was placed on the case of *Kanu National Elections Board and 2 Others v. Salah Yakub Farah* (2018) eKLR.

13. On their part, counsel for the Respondent submitted that no evidence was placed before court to show that the suit property measures four (4) acres as alleged by the Applicant. Counsel referred to the case of *Joreth Limited v. Kigano & Associates* (2002) 1 E.A 92 for the proposition that the value of the subject matter ought to be determined from Pleadings, Judgment or Settlement and where the same cannot be so ascertained, the Taxing Officer is entitled to use their discretion to assess instruction fees. To buttress this point, counsel referred the court to the cases of *Otieno Ragot & Company Advocates v. Kenya Airports Authority* (2021) eKLR and *Moronge & Co. Advocates v. Kenya Airports Authority* (2014) eKLR. Counsel argued that the Taxation on the other items were as per the scale.

### **Analysis and determination**

14. I have considered the Chamber Summons and the response thereto together with the rival submissions made by the parties. The only issue for determination is whether the Applicant has placed material before this court to warrant interference with the exercise of discretion by the Taxing Officer.
15. I must point out at this stage that from the Chamber Summons herein, the only item in contention is that of instruction fees. The arguments concerning the other items as raised in the Parties' submissions are arguments that do not arise from the Pleadings (Chamber Summons and the response thereto) and therefore this court shall restrict itself to the issue raised in the Chamber Summons. This is because parties are bound by their pleadings and issues flow from Pleadings. Submissions cannot be a platform of generating issues not raised in the Pleadings because submissions are merely a persuasive tool and not the dispute and parties should be discouraged from convoluting issues and creating new issues through submissions. In the premises, this court will only address the issue of whether the Taxing Officer properly exercised her discretion in the assessment of the instruction fees.
16. Principles for Taxation are well settled. In assessing instruction fees, the Taxing Officer ought to consider the value of the subject matter as the basis of her award for instruction fees. The value of the subject matter may be ascertained from the Pleadings, Judgment or Settlement by the parties. Where the material before the Taxing Officer is not sufficient to show the value of the subject matter, the Taxing Officer will then apply his or her discretion in arriving at the instruction fees. Where the value of the subject matter is unascertainable, the Taxing Officer should use his or her discretion to assess instruction fees. In this regard, the discretion of the Taxing Officer ought to be exercised judiciously by considering among other matters, the nature and importance of the suit, parties' interest and other relevant matters.
17. In the case of *Joreth Limited v. Kigano & Associates* (2002) 1 E.A 92, the court held as follows:

We would at this stage point out that the value of the subject matter of a suit 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 discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.
18. Taxation of Costs is within the competence and judicial discretion of the Taxing Officer and therefore this court will not ordinarily or lightly interfere with the exercise of that discretion unless it is demonstrated clearly that the Taxing Officer erred in principle and failed to properly exercise his or her



discretion. In the case of *Kamunyori & Company Advocates v. Development Bank of Kenya Limited* (2015), the court held as follows:

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 instruction fee is arrived at on the wrong principles, it will be set aside.

19. In the instant Application, the Applicant argues that he stated in the Bill of Costs that the value of the subject matter was approximately one hundred million because it is in respect of land in Mavoko Sub County, Machakos measuring 4 acres. From the Ruling of the Taxing Officer, she stated as follows:

I have perused the Pleadings in this matter, the value of the subject matter has not been ascertained. The suit was also withdrawn before hearing commenced. A Taxing Officer when faced with such a scenario is to exercise discretion in determining what is reasonable instruction fees. This was the holding of court in *Joreth v. Kigano*.

20. Considering the above position taken by the Taxing Officer, I have considered the Pleadings filed by the parties, and I note that the respondents herein filed a Plaint dated February 11, 2014 on February 20, 2014 alleging to have been in occupation of the parcel of land known as L.R. No. 337/1130 since 1977. They sought for a declaration that they were the owners of the suit property as well as orders of permanent injunction restraining the Defendants from interfering with their possession thereof, together with costs of the suit. The Defence denied the Plaintiffs' claim and like the Plaint it did not disclose the value of the subject matter.
21. It is therefore clear that neither the acreage nor the value of the suit property was disclosed in the Pleadings. As the matter was withdrawn before it was heard, no Judgment or Settlement was arrived at. Therefore, the value of the subject matter cannot be ascertained from the Pleadings.
22. Relying on the case of *Masore Nyang'au & Co. Advocates vs. Kensalt Limited* (supra), the Applicant argued that the Taxing Officer was obligated to order for a valuation of the subject matter. Essentially, the Applicant concedes that the value of the subject matter is unascertainable from the Pleadings but insists that where the value cannot be ascertained then it is for the Taxing Officer to do everything to ensure that they get to know the value of the subject matter. I do not agree with the arguments put forth by the Applicant that the Taxing Officer should only proceed to tax a Bill only upon establishing the value of the subject matter even where the parties have failed to demonstrate such value.
23. While section 13A of the *Advocates Remuneration Order* provides for powers of the Taxing Officer where he has authority to Summons and examine witnesses, administer oaths, direct production of books, paper and documents and to direct and adopt all such proceedings necessary for determining the dispute before him or her; there is nothing in that Section that provides that a Taxation cannot proceed on the premise of what is before the Taxing Officer, and that where the value of the subject matter cannot be ascertained, the Taxing Officer must obtain a valuation report.
24. The legal burden of proof still lies with the person filing a Bill of Costs to demonstrate that they are lawfully entitled to what they have sought in the Bill. If the Applicant thought that the Taxing Officer needed a valuation report as he claims, nothing precluded him from availing it together with the Bills of Costs. The Taxing Officer could not be fettered from exercising her discretion just because the value of the subject matter was unascertainable and no valuation report had been placed before her.



25. In this case, the Applicant did not provide a valuation report or seek for leave to provide a valuation report and cannot therefore fault the Taxing Officer for failure to refer to a non-existent valuation report. If the applicant had for instance attached a valuation report to the Bill of Costs then the Taxing Officer would invoke the provisions of section 13A of the *Advocates Remuneration Order* to cross-examine the author of the report to ascertain its relevance to the Bill in exercising her discretion. In the premises, I find and hold that the Taxing Officer was not obligated in the circumstances of this case to order for valuation of the suit property before Taxation of the applicant's Bill of Costs. I further find and hold that as the value of the subject matter was unascertainable the Taxing Officer was in law allowed to apply her discretion in assessing instruction fees.
26. On whether the Taxing Officer rightly exercised her discretion, the impugned Ruling shows that the Taxing Officer took into account the fact that the suit was withdrawn before the trial commenced and took into account principles set out in the case of *Joreth v. Kigano* (supra), whereof she made an award of Kshs. 200,000 for instruction fees.
27. As the value of the subject matter was not ascertainable and the suit having been withdrawn before commencement of hearing and considering that where a suit is determined in a summary manner without going to full trial, the fees payable shall be 75% of the fees chargeable under paragraph 1(b) of Schedule 6, I am not persuaded that the Taxing Officer improperly exercised her discretion. In my view no material has been placed before me to warrant the interference with the Taxing Officer's exercise of discretion.
28. In the premises, the chamber summons dated July 5, 2022 lacks merit and the same is hereby dismissed. Each party shall bear its own costs.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

