



**Ngati & 3 others v Embakaso Village Craft Curios & Jua Kali Association & 7 others
(Environment & Land Case 614 of 2012) [2023] KEELC 21068 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 614 OF 2012**

**JO MBOYA, J
OCTOBER 26, 2023**

BETWEEN

**DAVID NGATI 1ST PLAINTIFF
YUDA JOSEPH 2ND PLAINTIFF
BONIFACE MATHEKA 3RD PLAINTIFF
JAMES M NDETO 4TH PLAINTIFF**

AND

**EMBAKASO VILLAGE CRAFT CURIOS & JUA KALI
ASSOCIATION 1ST DEFENDANT
NAIROBI CURIOS JUA KALI ASSOCIATION 2ND DEFENDANT
JOHN MUTIE, JOSEPH OBONYO 3RD DEFENDANT
JULIUS MUANGE, ANDREW MBITHI 4TH DEFENDANT
BONIFACE OMBUI, JEMIMAH KIOKO 5TH DEFENDANT
JOYCE MUSILA, KYAL SAMBA 6TH DEFENDANT
JAMES MUNANANIE 7TH DEFENDANT
DANIEL MUSEMBI 8TH DEFENDANT**

RULING

1. The Plaintiffs/Applicants' herein had hitherto filed and/or lodged the instant suit vide Plaintiff dated the 17th September 2012; and in respect of which same sought for various reliefs touching on and/or concerning L.R No. 21695, (hereinafter referred to as the suit property); which the Plaintiffs'/Applicants contend belong to the 1st Defendant, (hereinafter referred to as the Society)



2. Furthermore, the Applicants herein contended that same were the lawful and legitimate Officials of the 1st Defendant and thus the 3rd to the 12th Defendants, who purported to be Officials of the 1st Defendant ought to be restrained from (sic) transacting and/ or dealing with the affairs of the 1st Defendant.
3. Nevertheless, the Plaintiffs/ Applicants herein later on proceeded to and filed a Notice of Withdrawal of the Suit, whereupon the Court thereafter endorsed the Order marking the entire suit as Withdrawn.
4. Arising from the foregoing, the Defendants/ Respondents filed a Request for Judgment on Costs pursuant to and in line with the provisions of Order 25 Rule 3 of the Civil Procedure Rules, culminating into Judgment on costs being awarded in favour of the Defendants herein.
5. Subsequently, the Defendants/Respondents thereafter proceeded to and filed a Bill of costs, which bill was placed before the Honourable Taxing Master for purposes of taxation. Suffices it to point out that the bill of costs was eventually taxed vide Ruling rendered on the 3rd October 2022.
6. It is the said Ruling which aggrieved the Applicants and thereafter provoked the filing of the Reference vide Chamber Summons Application dated the 3rd July 2023; and in respect of which the Applicants have sought for the following reliefs;
 - i. That this Honourable court be pleased to set aside the ruling of the Taxing Master dated 3rd October 2022; in regard to the Taxation of Respondents' Bill of Costs dated 17th November 2021.
 - ii. That this Honourable Court be pleased to set aside the Respondents' Bill of Costs dated 17th November 2021, for want of capacity.
 - iii. That in the alternative to prayer 2 above; the Honourable court be pleased to refer the matter back for fresh taxation of the Respondents' Bill of costs, and the Plaintiffs/Applicants be allowed to defend the Bill of Costs.
 - iv. That in the alternative to prayer 3 above, the Honourable Court be pleased to exercise its Inherent Jurisdiction and re-tax the Respondents Bill of costs dated 17th November 2022; afresh;
 - v. That the costs of this Application be borne by the Respondents.
7. Instructively, the Chamber Summons Application is anchored on various grounds which have been enumerated in the body thereof. Additionally, the Chamber Summons Application is further supported by the affidavit of the 2nd Applicant sworn on the 3rd July 2023.
8. On the other hand, upon being served with the Chamber Summons Application, namely, the Reference; the Defendant/Respondents proceeded to and filed a Replying affidavit sworn by the 4th Defendant/Applicant. For good measure, the Replying affidavit was sworn on the 11th July 2023.
9. Moreover, when the Application came up for hearing, the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently, and in this regard, the Honourable court proceeded to and circumscribed the timeline for filing and exchange the written submissions.
10. For the sake of completeness, it suffices to point out that the Applicants duly filed written submissions, albeit which are undated. Nevertheless, same are indicated to be in respect of the Application dated the 3rd July 2023.



11. On the other hand, the Respondents filed written submissions dated the 6th October 2023. For coherence, both submissions are on record.

Parties Submissions:

a. Applicants' Submissions:

12. Vide (sic) the undated submissions, the Applicants have adopted the contents of the Grounds contained in the body of the Application; and thereafter reiterated the contents of the Supporting affidavit, attached to the said Application.
13. Further and in addition, the Applicants' have thereafter raised, highlighted and canvassed three (3) salient issues for consideration by the Honourable court; which issues the court shall address seriatim.
14. Firstly, Learned counsel for the Applicants has submitted that the Respondents herein are no longer officials of the Society and thus same have no capacity and or express authority of the Society to mount and/or lodge the bill of costs for taxation.
15. On the other hand, Learned counsel for the Applicants has also contended that the suit which had been filed against the Respondents herein, was filed against the Respondents in their capacities as Officials of the society; and not in their individual capacities. In this regard, Learned counsel for the Applicants has thus invited the Honourable court to find and hold that having ceased to be officials of the society, the Respondents herein could not file and/or mount the bill of costs for taxation.
16. Secondly, Learned counsel for the Applicants has also submitted that vide Letter dated the 7th June 2022, the Registrar of Societies wrote and confirmed that the Respondents are no longer the Officials of the Society. Consequently, and in this regard, Learned counsel for the Applicants has submitted that the bill of costs which was filed by the Respondents herein was similarly filed without authority of the society and thus same is invalid.
17. Thirdly, Learned counsel for the Applicants has submitted that the learned taxing master failed to properly exercise her discretion in the course of taxing the Respondents' Bill of costs and as a result of the improper exercise of discretion, the Learned taxing master proceeded to tax the instructions fees in a manner contrary to and in contravention of Schedule 6 of the Advocates Remuneration Order 2009.
18. Furthermore, Learned counsel for the Applicants has submitted that the pleadings which were filed by and on behalf of the Applicants did not contain an express value of the suit property; and in the absence of such value, the scale fee awardable on account of Instruction fees ought to have been Kes.45, 000/= only and not otherwise.
19. Notwithstanding the foregoing, Learned counsel for the Applicants has submitted that the Learned taxing master proceeded to and awarded Instructions fees in the sum of Kes.1, 000, 000/= only to the Respondents, which sum is contended to be manifestly excessive and exorbitant.
20. Other than the foregoing, Learned counsel for the Applicants has also contended that the learned taxing master has proceeded to and awarded fees for "Getting up", yet the suit beforehand was never heard or otherwise. Additionally, counsel has pointed out that the instant suit was withdrawn and hence no award ought to have been made on the basis of "Getting up".
21. In view of the foregoing, Learned counsel for the Applicants have invited the court to find and hold that the Certificate of taxation arising from the Ruling delivered by the taxing master, is wrought and replete with errors; and improper exercise of discretion.



22. In support of the foregoing submissions, Learned counsel for the Applicants has cited and relied on various decisions inter-alia the case of First American Bank of Kenya versus Shah & Others (2002) 1EA 64; Vincent Kibiwot Rono versus Abraham Kiprotich Chebet & Another (2022)eKLR; DK Law Advocates versus Zhone Gang Building Material Co Ltd & Another (2021)eKLR and Peter Muthoka & Another versus Ochieng & Others (2019)eKLR.

b. Respondents' Submissions:

23. The Respondents filed written submissions dated the 6th October 2023; and in respect of which the Respondents have raised, highlighted and canvassed three (3) salient issues for due consideration by the court;
24. First and foremost, Learned counsel for the Respondents has submitted that the issues as to whether or not the Respondents had the capacity to file and/or mount the bill of costs for taxation is misconceived and otherwise legally untenable.
25. Furthermore, Learned counsel for the Respondents has contended that this court granted an express order whereby costs were awarded to and in favour of the Respondents and thereafter the court also granted liberty to the Respondents to proceed and file the requisite bill of costs for taxation.
26. Owing to the fact that the court had authorized the Respondents to proceed and file their bill of costs for taxation, Learned counsel for the Respondents has thus submitted that the question of capacity therefore does not arise.
27. Further and in any event, Learned counsel for the Respondents has submitted that if the Applicants were aggrieved by the award of costs to the Respondents and by extension the Respondents capacity to lodge a bill of costs; then the Applicants herein ought to have filed an appeal against the Ruling of the court dated the 24th September 2021.
28. Secondly, Learned counsel for the Respondents has also submitted that the question of whether or not the 3rd to the 12th Respondents were the lawful and legitimate officials of the 1st and 2nd Defendants, was considered and adjudicated upon vide the Ruling of Hon. Justice Mutungi, Judge; rendered on the 20th September 2013.
29. Arising from the foregoing, Learned counsel for the Respondents has therefore contended that the question of capacity of the Respondents, namely, whether or not same are officials; is Res-Judicata and cannot therefore be re-agitated.
30. Thirdly, Learned counsel for the Respondents has submitted that the learned taxing master correctly exercised her Jurisdiction whilst taxing the item relating to instruction fees. Furthermore, counsel invited the court to take cognizance of the fact that the learned taxing master indeed confirmed that there was no monetary value displayed and or exhibited on the face of the pleadings.
31. Additionally, Learned counsel for the Respondents has submitted that even though no monetary value was displayed on the face of the Complaint, the learned taxing master still took into an account the nature of the dispute, the interests of the Parties and the duration of time that the suit took before same was eventually withdrawn.
32. Based on the foregoing submissions, Learned counsel for the Respondents has therefore invited the court to find and hold that the Certificate of taxation issued by the taxing master accords with the relevant principles that underpin Taxation of costs; and thus same ought not to be disturbed.



33. In support of the foregoing submissions, Learned counsel for the Respondents has cited and relied on various decisions inter-alia *First American bank of Kenya vs Shah & Another* (2002) EA 64; *Joreth vs Kigano & Associates* (2002)1EA 92 and *Republic vs Ministry of Agriculture & 20 Others ex-parte Muciri W Njuguna* (2006)eKLR, respectively.
34. In a nutshell, Learned counsel for the Respondents has thus invited the court to find and hold that the Reference vide chamber summons Application, is not only misconceived, but same is legally untenable.

Issues for Determination

35. Having reviewed the Reference vide Chamber Summons dated the 3rd July 2023; and the Response thereto and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do emerge and are worthy of determination;
 - i. Whether the Respondents herein have the requisite capacity to file and/or mount the Bill of costs for taxation or otherwise.
 - ii. Whether the Applicants herein have demonstrated any error of principle to warrant review, variation and/or setting aside of the Certificate of Taxation issued by the taxing master.

Analysis and Determination

Issue Number 1

Whether the Respondents herein have the requisite capacity to file and/or mount the Bill of costs for taxation or otherwise.

36. The Applicants herein have contended that the suit beforehand was filed against the Respondents, albeit in their capacities as officials of the 1st and 2nd Respondents societies. For good measure, the Applicants contend that the Respondents were never sued in their personal/individual capacities.
37. Furthermore, the Applicants have ventured forward and contended that the Respondents (without qualification), have since ceased to be officials of (sic) the Society. Consequently, and in this regard, it has been submitted that insofar as the Respondents have ceased to be officials to the society, same therefore have no capacity/ mandate to file the bill of costs and seek to recover the costs from the Applicants.
38. Arising from the foregoing, the Applicants have taken a position that by virtue of cessation to be officials of the Society, the Respondents' therefore cannot file the Bill of costs and hence the Bill of costs which was filed by the Respondents was therefore invalid and thus illegal.
39. On the contrary, the Respondents herein have submitted that upon the withdrawal of the suit, the court proceeded to and awarded costs to the Respondents, jointly and/or severally, to be borne by the Plaintiffs'/ Applicants.
40. Additionally, the Respondents have further submitted that other than the award of costs, the Honourable court proceeded to and granted liberty to the Respondents to file the requisite bill of costs for taxation.
41. To the extent that the court awarded costs to the Respondents and thereafter granted liberty to the Respondents to file their bill of costs for taxation; the Respondents herein have thus contended that the arguments by and on behalf of the Applicants are therefore misconceived and warped-up.



42. Having taken cognizance of the rivalling submissions, it is now appropriate to venture forward and to resolve the question as to whether or not the Respondents were seized of the capacity and mandate to file the bill of costs for taxation.
43. To start with, it is imperative to recall and reiterate that upon the withdrawal of the suit, the Respondents filed a Request for Judgment on costs.
44. Pursuant to and in line with the request for Judgment on costs, the court proceeded to and indeed entered Judgment on costs in favour of the Respondents. For good measure, the order awarding costs to the Respondents has never been quashed, set aside and/or varied.
45. Other than the foregoing, it is also apparent that the Honourable court granted liberty to the Respondents to file the requisite bill of costs for taxation by the Taxing master/ Deputy Registrar of the Court.
46. To my mind, the order granting costs to the Respondents and also directing the filing of the bill of costs for taxation, was neither appealed against nor reviewed. Consequently, and in this regard, there cannot be a debate on whether the Respondents have the requisite capacity to mount the bill of costs for taxation or otherwise.
47. In my humble albeit considered view, the Respondents were awarded costs and were granted the liberty to file the bill of costs. In this regard, the bill of costs which was filed by the Respondents was anchored and premised on a lawful court order.
48. Further and in addition, the issue as to whether the Respondents could file the Bill of costs in question, constitutes and amounts a thinly veiled, but misconceived invitation to this Honourable court to sit on appeal on own decision.
49. Clearly and to my mind, the moment this court made the decision awarding costs to the Respondents and thereafter granting liberty to file bill of costs for taxation, the Honourable Court became Functus Officio; and hence such an order could only be reversed and/or rescinded by way of an appeal and not otherwise.
50. Consequently and in this respect, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another versus City Council of Nairobi [2015] eKLR, where the court held thus;

“We reiterate this Court’s findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same.”
51. Whereas the Court of Appeal was dealing with a situation where one Judge reviewed the decision of another Judge of concurrent Jurisdiction, the dictum in terms of the excerpt cited, applies with equal force and thus deprives one Judge from having a second bit on his/her own decision, which was rendered on merits.
52. In view of the foregoing position, it is my finding and holding that the Applicants herein cannot be allowed to re-visit the terms and tenor of the order of the court made on the 24th September 2021, albeit by sidewind and through the backdoor.



53. In a nutshell, my answer to issue number one is to the effect that the Respondents having been duly awarded costs, had the requisite capacity to mount the Bill of costs for taxation in obedience to and in compliance with the Court Order.

Issue Number 2

Whether the Applicants herein have demonstrated any Error of Principle to warrant review, variation and/or setting aside of the Certificate of Taxation issued by the taxing master.

54. Other than the contention that the Respondents were not seized of the capacity to mount the bill of costs for taxation, the Applicants herein have also contended that the learned taxing master/ Deputy Registrar, improperly exercised her discretion in taxing and awarding Instruction fees.
55. According to the Applicants, the Plaint which was filed before the Honourable court did not contain any express monetary value on the face thereof and hence, the Learned taxing officer ought to have awarded the Respondents instruction fees in the sum of Kes.45, 000/= only; and not Kes.1, 000, 000/= only.
56. Arising from the foregoing, Learned counsel for the Applicants has thus contended that the award of Kes.1, 000, 000/= Only, on account of instruction fees therefore constitutes improper exercise of discretion to warrant intervention of the court.
57. Other than the foregoing, the Applicants have also contended that though the matter did not proceed for Full hearing, the Learned taxing master still proceeded to and awarded to the Respondents “Getting up fees”.
58. In this respect, the Applicants have therefore invited the court to find and hold that the award of “Getting up fees” whereas the suit did not proceed for hearing was therefore erroneous and constituted an error in principle, which ought to be corrected by this court.
59. To start with, it is important to underscore that the Learned taxing master properly appreciated that the Plaint which was filed before the court did not contain any monetary value on the face thereof. In this regard, the learned taxing master thereafter observed that in the absence of such value, the Instruction fees could not be pegged on value of the Disputed Property.
60. After making the foregoing observations, the Learned taxing officer thereafter proceeded to and indicated in her Ruling that the dispute beforehand touched on and/ or concerned L.R No. 21695; measuring 2.610 Ha or thereabout, and which property is situated within the city of Nairobi.
61. Furthermore, the Learned taxing master ventured forward and took into account the nature of the suit, the interests of the Parties, the volume of documents; and the duration of the suit, prior to its ultimate withdrawal.
62. Having taken into consideration the various perspectives, (whose details have been alluded to in the preceding paragraphs), the Learned taxing master thereafter proceeded to and assessed Instruction fees in the sum of kes.1, 000, 000/= only.
63. In my humble view, the Learned taxing master properly addressed her Judicial mind to the various nuances that are stipulated under the Advocates Remuneration Order; and which are important in the assessment and award of Instruction fees.
64. Other than the foregoing, it is also not lost on the court that the learned taxing master was also conferred and vested with discretion, whilst engaging in the process of taxation. Instructively, the Learned taxing master appreciated the scope, tenor and extent of her discretion and upon exercising the said discretion,



came to the conclusion that the sum of Kes.1, 000, 000/= only, reflected and constituted reasonable Instruction fees.

65. Having reviewed the Ruling by the Learned taxing master and upon taking into the consideration the various nuances alluded to in the body of the Ruling, it is my finding that the taxing master/ Deputy Registrar did not commit any error of law, in the manner same calibrated upon and ultimately arrived at the Instruction fees.
66. Suffice it to point out that before a Judge can interfere with the exercise of discretion of the taxing officer, it must be shown that the taxing officer committed a serious error of Principle and/or improperly exercised his/her discretion.
67. Other than the foregoing, a Judge is called upon to exercise due restraint and necessary circumspection before venturing to interfere with the discretion of the Taxing officer, who ordinarily is more versed with taxation matters. Instructively, the position of the law relating to circumstances where the court can interfere with the taxation by the taxing master has been elaborated upon in various decisions of the Court of Appeal.
68. Pertinently, the circumstances under which a Judge can interfere with the discretion of the Taxing officer were underscored/ elaborated upon in the case of Joreth Limited versus Kigano & Associates [2002] eKLR, where the court held thus;

“We have found that the learned judge erred in reassessing the instruction fee and we have also found that the taxing officer applied correct principles in arriving at the figure of instruction fee that he awarded. What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle”.

69. Suffice it to point out that I have not been able to discern and/or decipher any error in principle to warrant interference with the Certificate of taxation. Further and in any event, the mere fact that a Judge could have awarded a higher or lower amount per se, ought not to influence interference with the discretion of the Taxing officer.
70. To buttress the position (supra), it suffices to adopt and reiterate the dictum of the Supreme Court of Uganda in the case in the case of Bank of Uganda versus Banco Arabe Espanol SC Civil Application No. 23 of 1999, where the court stated thus;

“save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference in assessing or arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred of an award of an amount which is manifestly excessive or manifestly low”



71. Before departing from the issue herein, it is also worthy to recall that the Applicants had also complained that the Learned taxing master proceeded to and awarded “Getting up fees”, yet the suit was withdrawn before same underwent trial.
72. As a matter of principle, I beg to agree with the Applicants that an award of “Getting up Fees” can only be decreed and awarded where the suit has been confirmed for hearing and indeed proceeded for hearing. Simply put, no award for “Getting up Fees” can be made if and where the suit was never confirmed for hearing.
73. However, in respect of the instant matter, the complaint by the Applicants have been made without any lawful basis or at all. For coherence, the complaint appears to be informed by a misconception and misapprehension on the part of the Applicants; and their Learned counsel.
74. Be that as it may, it is worthy to point out and clarify that the Learned taxing officer declined to make any award in respect of item two (2); which related to Getting up fees. For the avoidance of doubt, it suffices to reproduce the holding of the Taxing officer/ Deputy Registrar.
75. Same is reproduced as hereunder;
- “Item 2 on Getting up fees is disallowed”.
76. From the foregoing, I do not understand the basis of the Applicants complaint as captured vide Paragraph 14 of the written submissions which states as hereunder;
- “Getting up fees is applicable when the suit goes for trial. The suit herein never reached that stage. It was purely contested on interlocutory applications and as such, the item on Getting fees is not applicable and the same ought to be taxed off”.
77. In a nutshell, the Applicants herein are labouring under misapprehension and hence the complaint under reference reeks of mala fides. In any event, the Applicants are also not being candid with the Court.

Final Disposition:

78. From the foregoing discourse, there is no gainsaying that the Reference vide Chamber Summons dated the 3rd July 2023; is not only misconceived and bad in law; but same is Legally untenable.
79. Consequently and in the premises, I am minded to make; and Do hereby make the following orders;
- i. The Chamber Summons Application dated the 3rd July 2023; be and is hereby Dismissed.
 - ii. Costs of the Reference be and are hereby awarded to the Respondents.
 - iii. For good measure and to avoid the filing of a Further bill of costs; the costs are hereby assessed and certified in the sum of Kes.45, 000/= only.
80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:



Benson - Court Assistant.

***Ms. Nzilani h/b for Mr. Philip Omoiti for the Plaintiffs/Applicants.**

Ms. Wambua h/b for Mr. Opiyo for the Defendants/Respondents.

