



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**MISC. CIVIL APPLN. NO. 38 OF 2019**

**RICHARD OTIENO OLOO.....APPLICANT**

**-VERSUS-**

**ANASTACIA ANDITI OLOO & ANOTHER....RESPONDENT**

***(Being a Reference from the assessment of costs in Migori Chief Magistrate's Succession Cause No. 140 of 2018)***

**RULING**

1. This ruling relates to the reference filed by the Applicant against the assessment of the Respondents' costs in **Migori Chief Magistrate's Succession Cause No. 140 of 2018**. The reference was by way of a Chamber Summons dated 13/06/2019.
2. The reference in essence challenged the powers of an Executive Officer of a lower Court in assessing costs. The Applicant filed written submissions in arguing the reference.
3. In his arguments the Applicant strongly submitted that an Executive Officer is not a Court and has no jurisdiction to assess costs. The Applicant further argued that assessment of costs in the lower court is a preserve of the Magistrates.
4. The Applicant also argued that even if the Executive Officer had powers to assess costs still the assessment ought to be set-aside since the Applicant was not given an opportunity to challenge the proposed costs before the assessment was done.
5. The Applicant also challenged the assessment as injudicious in that it was too inflated. The decision in **OPA Pharmacy Ltd v MC George Ltd (1970) EA 1972** was cited in support.
6. The reference was vehemently opposed. The Respondents filed Grounds of Opposition and written submissions as well. Whereas the Respondents acknowledged that their request for assessment was by a letter dated 24/04/2019 addressed to the Magistrate, they nevertheless supported the position that *'it is the practice that executive officer assess such costs not necessarily in the presence of the parties or their advocates.'*
7. The Respondents submitted further that the executive officer did not err in assessing the party to party costs as the costs were drawn to scale. The Respondents decried the manner in which the Applicant was filing multiple suits over the same subject matter and submitted that the Applicant ought to pay costs as ordered.
8. I have certainly perused and understood the contents of the reference, the opposition thereto, the submissions and the decision referred thereto.
9. A Court dealing with a reference on assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high or low as to justify an interference. (See **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani) High Court Civil Case No. 2255 of 2000**, **Behan and Okero vs. Pan African Insurance, Kisumu High Court' Misc. Case No. 229 of 2003**, **Bank of Uganda vs. Benco Arabe Espanol (1999) 2 EA 45**, **Zacharia Barasa vs. Dubai Kenya Limited (2015) eKLR**).
10. In this matter I must determine whether an Executive Officer of a subordinate court is competent to assess costs.
11. **Section 27(1) of the Civil Procedure Act, Cap. 21** of the Laws of Kenya provides for costs in matters before Courts. The provision states as follows: -

**Subject to conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

12. Costs usually accrue in matters before Courts. The matters may be before subordinate courts or the superior courts. Pursuant to **Section 27(1)** above the Court or Judge has powers to *inter alia* determine to what extent costs are payable.

13. The determination of the costs payable in matters where Advocates appear for parties is governed by the **Advocates Remuneration Order, 1962** as amended time to time. I will henceforth refer to the Advocates Remuneration Order as **‘the Order’**.

14. **Section 10 of the Order** provides who the Taxing Officer is. The provision states as follows: -

**The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a register, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.**

15. **Section 10 of the Order** provides for who a taxing officer is in matters before the High Court and also matters relating to trademarks. The section does not deal with matters before the subordinate courts. It is therefore in order to find, which I hereby do, that bills of costs in the High Court are taxed by a taxing officer. The taxing officer may be the Registrar, a Deputy Registrar or a District Registrar of the High Court or any other qualified officer as the Chief Justice may appoint in writing. That is the reason why the term ‘taxation of bill of costs’ is usually used for process in ascertainment of costs in the High Court.

16. The position in the High Court seems to be clearly settled. That is however not the case in the subordinate courts. Whereas **the Order** provides for the costs in matters before the subordinate courts **the Order** does not provide for who shall be the officer in charge of the ascertainment of the costs. In such a scenario recourse must be to **Section 27** of the **Civil Procedure Act**.

17. **Section 27** aforesaid deals with assessment of costs. The section does not deal with taxation thereof. It is therefore still in order to find, which I hereby do, that the subordinate courts do not have powers to tax bills of costs. Instead the subordinate courts assess the bills of costs.

18. Returning to the matter at hand, the foregone distinction was well within the Respondents. They filed for assessment of costs before the Rongo Magistrates court.

19. **Section 2** of the **Civil Procedure Act** defines a ‘Court’ to mean the High Court or a subordinate court while exercising civil jurisdiction. A Magistrate’s court is a subordinate court established by **Article 169(1)(a)** of the **Constitution**. **Section 5** of the **Magistrates’ Court Act No. 26 of 2015** which came into force on 02/01/2016 provides that: -

**A magistrate’s court shall be subordinate to the High Court and shall be duly constituted when presided over by a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate.**

20. The **Magistrates’ Court Act** does not delegate any of the judicial functions of a magistrate to be undertaken by another person save a fellow magistrate or any person appointed to act in the particular office. (See the definition of a ‘Magistrate’ in **Section 2** of the **Magistrates’ Court Act**).

21. The **Magistrates’ Court Act** does not therefore provide for an executive officer to assess costs in a matter before court. To me, assessment of costs involves exercise of discretion on the part of the officer and that discretion can only be exercised by a duly constituted court. An Executive Officer of a Court does not fall within the description of a Magistrate.

22. The assessment of costs must be seen in its right perspective. When a party lodges a bill of costs for assessment, it is infact calling upon the court to ascertain the costs payable. That calls for a hearing of the assessment of the bill of costs. The other party must be accorded an opportunity to respond to the bill of costs. A court may even be called to rule on contentious issues. Anything short of that expectation renders the proceedings in contravention of **Article 50(1)** of the **Constitution** for want of a fair trial. The right to a fair trial cannot be limited in any way whatsoever (**Article 25** of the **Constitution**).

23. I am however alive to the practice where Executive Officers usually, and so unilaterally, assess costs in the subordinate courts. The practice has been on long before the promulgation of the **Constitution of Kenya, 2010**. In this new constitutional dawn, I do not think whether such a practice can stand the prevailing constitutional expectations.

24. I now find and hold that an Executive Officer has no powers to assess a bill of costs in a suit. Assessment of costs is a judicial function and can only be discharged by one who is so mandated. Gone are the days where Executive Officers would ‘assess costs’.

25. I therefore join my colleagues, *Aburili, J.* in **Nyamongo & Nyamongo v Pan African Insurance Company Limited & Another (2016) eKLR** and *Limo, J.* in **Benard Gichobi Njira v Kanini Njira Kathendu & Another (2015) eKLR** on the above finding.

26. The analysis settles this reference. The reference must succeed. The Chamber Summons is allowed and the Certificate of Assessed Costs set aside.

27. The costs shall be assessed by a Magistrate. All issues pertaining to the costs including whether costs can be assessed while the suit is still pending shall be addressed by the court.

28. The Applicant shall have costs of the reference.

29. Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of November, 2019.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Obach** Counsel instructed by Messrs. H. Obach & Partners Advocates for the Applicant.

**Mr. Gembe** Counsel instructed by Messrs. Gembe Capis Omollo & Company Advocates for the Respondents.

**Evelyne Nyauke** - Court Assistant