



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 99 OF 2007**

RINYA HOSPITAL LIMITED ..... PLAINTIFF

VERSUS

AWENDO TOWN COUNCIL ..... 1<sup>ST</sup> DEFENDANT

JOHN ODONGO WADEYA ..... 2<sup>ND</sup> DEFENDANT

MICHAEL NGOYA ..... 3<sup>RD</sup> DEFENDANT

RUBIN ADERA ..... 4<sup>TH</sup> DEFENDANT

JOSHUA OMBAGO OGUTU ..... 5<sup>TH</sup> DEFENDANT

MOSES ODHIAMBO OKELLO ..... 6<sup>TH</sup> DEFENDANT

MR. LOMO ..... 7<sup>TH</sup> DEFENDANT

OKETCH OWINO ..... 8<sup>TH</sup> DEFENDANT

GILBERT OLUOCH NYANDIGA ..... 9<sup>TH</sup> DEFENDANT

PHILIP OWINO ..... 10<sup>TH</sup> DEFENDANT

OKELLO OLWAL ..... 11<sup>TH</sup> DEFENDANT

KENNEDY ONIERO ..... 12<sup>TH</sup> DEFENDANT

DICKSON ONYANGO ..... 13<sup>TH</sup> DEFENDANT

JAKON KISINO NYAKWESI ..... 14<sup>TH</sup> DEFENDANT

BERNARD ONJIKO ..... 15<sup>TH</sup> DEFENDANT

CHARLES SAOKE OKODO ..... 16<sup>TH</sup> DEFENDANT

OLOO MANYALA ..... 17<sup>TH</sup> DEFENDANT

CHARLES OGADA ..... 18<sup>TH</sup> DEFENDANT  
KENNEDY OTIENO ODONGO ..... 19<sup>TH</sup> DEFENDANT  
AYUB OTIENO ..... 20<sup>TH</sup> DEFENDANT  
KENNEDY ONGATI ..... 21<sup>ST</sup> DEFENDANT  
GEORGE OWINO OWENGA ..... 22<sup>ND</sup> DEFENDANT

### RULING

1. What I have before me is a reference by the plaintiff against the taxation of the 1<sup>st</sup> to 10<sup>th</sup> and 12<sup>th</sup> to 22<sup>nd</sup> defendants' bill of costs dated 27<sup>th</sup> July 2011 by Hon. L. Kaitany Deputy Registrar on 30<sup>th</sup> May 2013 at kshs. 2,478,051/=. The plaintiff has contested the taxation of six (6) items only in the said bill of costs namely; item 3 that concerned instruction fees on the defence, item 9 that concerned instruction fees on the 1<sup>st</sup> defendant's counter-claim, item 13 that concerned attendance at the registry to pick summons in respect of the counter-claim for service, item 33 that concerned service of grounds of opposition, item 50 that concerned getting up fees and item 79 that concerned V.A.T. On item 3, the deputy registrar had assessed instruction fees to file the 1st to 10<sup>th</sup> and 12<sup>th</sup> to 22<sup>nd</sup> defendants' (hereinafter referred to only as "defendants") defences at kshs. 1,470,000/=. On item 9, the deputy registrar assessed instruction fees on the 1<sup>st</sup> defendant's counter-claim at kshs. 70,000/=. The plaintiff did not contest item No. 13 and as such the same was taxed as drawn at kshs. 210. Item 33 was taxed by the deputy registrar at kshs. 3,500/= on the ground that service was effected at Kisumu. Item 50 was taxed at kshs. 490,000 being 1/3 of the instruction fees while item 79 being V.A.T was assessed at 16% on profit costs.
2. In assessing instruction fees at kshs. 1,470,000/= the deputy registrar proceeded under schedule VI (1) of the Remuneration Order and observed that the minimum fees payable for defending a suit of this nature is kshs. 8,400/=. The deputy registrar exercised the discretion given to her and increased this minimum amount to kshs. 70,000/=. In arriving at this sum, the deputy registrar considered the nature of the case that the defendants had to face and the fact that the plaintiff's advocates had proposed to pay kshs. 50,000/= under this item. After assessing the instruction fees at kshs. 70,000/= as aforesaid, the deputy registrar multiplied the same by 21 arguing that each defendant was entitled to the said sum of kshs. 70,000/= thereby arriving at the disputed instruction fees of kshs. 1,470,000/=. The plaintiff has contested the taxation of this item on two (2) main grounds. First, the plaintiff has contended that the computation of the instruction fees by the deputy registrar has no basis because according to the judgment of the court pursuant to which the said bill of costs was filed, the court awarded costs to the 1<sup>st</sup> and 11<sup>th</sup> defendants only. The plaintiff argued that the remaining defendants were not awarded any costs and as such the deputy registrar had no basis of awarding them any costs.
3. Secondly, the plaintiff has contended that even if the costs had been awarded to all the defendants which is not the case, they would have been entitled only to one set of instruction fees of kshs. 70,000/= as they were all represented by one firm of advocates. The plaintiff has contended that the decision to award each of the defendants who were represented by the same advocate separate instruction fees was erroneous. The plaintiff has contended that this error by the deputy registrar in the assessment of the instruction fees was extended to the assessment of getting up fees under item 50 which is normally not less than 1/3 of the instruction fees and which the deputy registrar assessed at kshs. 490,000/= on the basis of the said erroneous instruction fees of kshs. 1,470,000/=. The plaintiff has contended that with the said errors made by the deputy registrar in the computation of instruction fees and getting up fees, the deputy registrar could not get the V.A.T payable (item 79) right.
4. The plaintiff did not make any submission with regard to items 9 and 13 and as such it is not clear to me on what basis the two items have been contested. Item 9 being instruction fees for the 1<sup>st</sup> defendant's counter-claim was taxed at kshs. 70,000/=. The plaintiff has submitted that the

instruction fees of kshs. 70,000/= that was arrived at by the deputy registrar was correct. I would take it therefore that the plaintiff had no issue with this item. As I have stated above, item 13 was not contested by the plaintiff during the taxation and the same was taxed as drawn. The plaintiff has not made any submission in respect thereof. I would also take it that he is comfortable to let it rest. For item 33, the plaintiff submitted that the deputy registrar fell into error in awarding the defendants kshs. 3,500/= without any vouchers to prove the disbursement. The plaintiff has submitted that the defendants were entitled only to a sum of kshs. 1,000/=.

5. The plaintiff's application was opposed by the defendants through grounds of opposition dated 22<sup>nd</sup> July 2013. In their grounds of opposition, the defendants contended that the plaintiff's application is incompetent the same having been filed out of time without leave of the court. The defendants contended further that the taxation complained of was proper in law and as such the reference herein is unjustified. In their submissions, the defendants contended that the ruling on the taxation the subject of this reference was made on 30<sup>th</sup> May 2013 and the plaintiff lodged its objection within 14 days as provided by law. The defendants submitted that upon receipt of the plaintiff's objection and request for the reasons for the items objected to, the deputy registrar indicated that her reasons were contained in the ruling. The defendants have contended that the plaintiff's application herein should have been filed within 14 days from the date when the deputy registrar indicated that her reasons are contained in her ruling. The defendant's contention is that the application herein that was filed on 3<sup>rd</sup> July 2013 was filed out of time in that it was lodged after a lapse of 14 days from the date when the deputy registrar communicated her reasons to the plaintiff. The defendants have for the foregoing reasons contended that the plaintiff's reference is incompetent.
6. On the plaintiff's contention that only the 1<sup>st</sup> and 11<sup>th</sup> defendants were awarded costs, the defendants have submitted that costs follow the event and since the court did not give any reason as to why the other defendants were not entitled to costs, they must be taken to have been awarded costs. All the defendants were therefore entitled to instruction fees and getting up fees which have been contested by the plaintiff. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants grounds of opposition to the said application. In addition to the above, I have considered the respective written submissions which were filed herein by the advocates for the parties and the authorities that were cited by them. In the case of **Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] 1 KLR 528** that was cited by the plaintiff, it was held among others that:
  - i. **On a 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; and**
  - ii. **If a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum to the decision of the taxing officer. The judge has however a discretion to deal with the matter himself if the justice of the case so requires.**
7. I have perused the judgment delivered herein by Musinga J. (as he then was) on 11<sup>th</sup> September 2010 which forms the basis of the bill of costs which is the subject of this reference. In the final part of the said judgment, the judge stated as follows:-

**“The plaintiff has not succeeded in her suit and the same is therefore dismissed with costs to the 1<sup>st</sup> and 11<sup>th</sup> defendants. On the other hand, the 1<sup>st</sup> and 11<sup>th</sup> defendants have succeeded in their counter-claims. They are awarded costs of their respective counter-claims as against the plaintiff.”**

It is clear from the foregoing that Musinga J. awarded costs only to the 1<sup>st</sup> and 11<sup>th</sup> defendants for the main suit and the counter-claim. There is no ambiguity at all in the said judgment of Musinga J. as concerns the award of costs. There is no room therefore for making inferences as to what the judge had ordered in relation to the issue of costs. I am in agreement with the defendants that costs normally follow the event unless the judge for good reason otherwise orders.

8. I am not however in agreement with the contention by the defendants that where the court has like in this case expressly awarded costs to some of the winning parties and left out others without giving reason for doing so, the court must be taken to have awarded costs to all the winning parties. Section 27 (1) of the Civil Procedure Act, Cap. 21 Laws of Kenya gives the court full discretion on the issue of costs. The court has unfettered power to determine by whom and to whom costs shall be payable. Where the court expressly orders that costs shall be paid to a particular party or parties only, that must be taken to have been the intention of the court even if no reason has been given for the decision. The only recourse available to a party aggrieved by such order is either to apply for the review of the same or to appeal. He cannot assume that he was awarded costs merely because he was successful even when the court has ordered otherwise.
9. For the foregoing reasons, I am fully in agreement with the submission by the plaintiff that the court did not award any costs to the 2<sup>nd</sup> to 10<sup>th</sup> and 12<sup>th</sup> to 22<sup>nd</sup> defendants and as such it was not open to the deputy registrar to assess any costs in their favour. The deputy registrar fell into error when she entertained the bill of costs that was filed on behalf of the 2<sup>nd</sup> to 10<sup>th</sup> and 12<sup>th</sup> to 22<sup>nd</sup> defendants and proceeded to assess costs in their favour although they were not entitled to any costs. In the circumstances, the sum of kshs. 1,470,000/= that was awarded to the defendants as instruction fees was improper. As rightly submitted by the plaintiff, only the 1<sup>st</sup> defendant was entitled to costs and should have been awarded kshs. 70,000/= only which the deputy registrar had assessed as reasonable instruction fees in the circumstances. With this sum of kshs. 70,000/= as instruction fees, the 1<sup>st</sup> defendant was entitled to kshs. 23,333/= as getting up fees based on the assessment by the deputy registrar who had assessed getting up fees at 1/3 of the instruction fees. The sum of kshs. 490,000/= that was awarded by the deputy registrar to the defendants as getting up fees was equally erroneous.
10. Having held that the assessment of the instruction fees and getting up fees was erroneous and improper, it follows that the assessment 16% VAT that was based on the said erroneous assessment was equally incorrect. The plaintiff had taken issue also with the sum of kshs. 3,500/= that the deputy registrar had awarded to the defendants for service of process at Kisumu. The deputy registrar's justification for this assessment was that since Kisumu is more than 3km from Kisii High Court, the sum of kshs. 3,500/= that was claimed for service effected at Kisumu was fair. Since the plaintiff has not denied that service was indeed effected at Kisumu, I see no reason why I should interfere with the deputy registrar's exercise of discretion on this item.
11. Having disposed of the grounds upon which this reference was brought, I now turn to the defendant's main objection to the reference namely, that the reference was filed out of time. There is no dispute that the ruling of the deputy registrar that is the subject of this reference was made on 30<sup>th</sup> May 2013. It is also not in dispute that the plaintiff filed its notice of objection within 14 days as provided for under rule 11 (1) of the Advocates Remuneration Order. What is disputed is the date when the deputy registrar gave to the plaintiff her reasons for the items in the bill of costs that the plaintiff had objected to. Whereas the plaintiff has contended that the deputy registrar gave her reasons on 2<sup>nd</sup> July 2013 the defendant has contended that the reasons for the deputy registrar's decision on the contested items were contained in the deputy registrar's ruling that was delivered on 30<sup>th</sup> May 2013 and that this was communicated to the plaintiff as soon as the plaintiff lodged its notice of objection on 4<sup>th</sup> June 2013.
12. Whereas the plaintiff has furnished a copy of the deputy registrar's ruling that was certified on 2<sup>nd</sup> July 2013 that the plaintiff has claimed to be the date when the same was delivered to plaintiff, the defendants have not provided any basis for their contention that the plaintiff was advised when it filed its notice of objection that the reasons for the deputy registrar's decision were contained in her ruling. The defendants have referred me to the hand written ruling by the deputy registrar for that alleged advise to the plaintiff. I have perused the hand written proceedings of the deputy registrar. There is a remark in the file as follows:

**“Reasons for taxation.**

**I wish to rely entirely upon the reasons given in the ruling dated 30<sup>th</sup> May 2013 save to add that there were 21 defendants each entitled to their costs.**

## **Signed”.**

This remark in the file is not dated. It is not clear therefore when it was made. Furthermore, it is not clear whether it was communicated to the plaintiff and if so when.

13. In the case of **Kipkorir, Titoo & Kiara Advocates –vs- Deposit Protection Fund Board** (Supra), the court observed that when the deputy registrar decides to rely on his/her ruling for the reasons for her/his decision on contested items in a bill of costs, that fact must be communicated to the party objecting to the taxation, and the time for filing reference would be reckoned from the date of such communication. The only communication between the plaintiff and the deputy registrar on the plaintiff's request for reasons is the certified copy of the ruling of the deputy registrar which was certified on 2<sup>nd</sup> July 2013. I am inclined to agree with the plaintiff that the said ruling was delivered to the plaintiff on 2<sup>nd</sup> July 2013. The reference filed herein on 3<sup>rd</sup> July 2013 was therefore filed within time. I therefore find no merit in the defendant's contention that the reference herein is time barred.
14. In conclusion, it is my finding that the deputy registrar erred in principle when she assessed costs for defendants who had not been awarded costs by the judge. The decision of the deputy registrar cannot therefore be allowed to stand. I would have remitted this matter back to the deputy registrar with directions that she proceeds to assess the costs only for the 1<sup>st</sup> defendant. I feel however that this matter having been in court now for seven (7) years should be laid to rest at the earliest opportunity. I would therefore deal with the matter conclusively. For the reasons, I have given above, I hereby set aside the taxation of items 3, 50 and 79 in the bill of costs dated 27<sup>th</sup> July 2011 that was done by L. Kaitany Deputy registrar on 30<sup>th</sup> May 2013. I also set aside the sum of kshs. 2,478,051/= that was assessed to be due to the 1<sup>st</sup> to 10<sup>th</sup> and 12<sup>th</sup> to 22<sup>nd</sup> defendants. In place thereof, I hereby tax item 3 in the bill of costs dated 27<sup>th</sup> July 2011 at kshs. 70,000/= and item 50 at kshs. 23,333/=. The total amount taxed off from the two items from the amount that was assessed by the deputy registrar comes to kshs. 1,866,667.00. This amount had attracted 16% VAT amounting to kshs. 296,667/=.
15. I would therefore reduce the sum of kshs. 2,478,051.00 that was assessed by the deputy registrar to be due to the defendants by a sum of kshs. 2,163,334.00 (kshs. 1,866,667/= + kshs. 296,667/=). The bill of costs dated 27<sup>th</sup> July 2011 is accordingly taxed at kshs. 314,717/= which amount is payable to the 1<sup>st</sup> defendant only. The plaintiff's reference is allowed on the foregoing terms. The plaintiff shall have the costs of the reference. Orders accordingly.

**Delivered, signed and dated at KISII this 31<sup>st</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya for the plaintiff

Mr. Soire h/b for Kisera for the 1<sup>st</sup> to 22<sup>nd</sup> defendants