



Omboko v County Assembly of Busia & another (Environment and Land Case Civil Suit E005 of 2021) [2022] KEELC 12781 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE CIVIL SUIT E005 OF 2021
AA OMOLLO, J
SEPTEMBER 28, 2022**

BETWEEN

INNOCENT ENOCE OMBOKO APPELLANT

AND

COUNTY ASSEMBLY OF BUSIA 1ST RESPONDENT

BUSIA COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The appellant and the respondents each filed a reference against the taxation of the deputy registrar of this court delivered on April 8, 2022. The appellant filed his reference *vide* the chamber summons application dated 20th April and they prayed for orders that;
 - i. spent
 - ii. that the honourable court be pleased to set aside the decision of the deputy registrar to tax off items No 2, 26, 38 and 39 of the appellant's bill of costs dated November 19, 2021.
 - iii. That the items No 2, 26, 38 and 39 of the appellant's bill of costs dated November 19, 2021 be taxed afresh and be allowed and taxed as drawn.
 - iv. That the costs of this application be awarded to the appellant/applicant.
2. The application is premised on affidavit of the appellant and on the grounds that;
 - a. that on April 8, 2022, the honourable deputy registrar/taxing master delivered a ruling taxing off items No 2, 26, 38 and 39 of the appellant's bill of costs dated November 19, 2021.
 - b. That the honourable the deputy registrar/taxing master erred in her decision to tax off items No 2, 26, 38 and 39 of the appellant's bill of costs dated November 19, 2021.



- c. That the appellant is entitled to getting-up fees as the appeal was actually heard by way of written submissions filed by the firms of Mulaku & Co Advocates for the appellant/applicant and J O Juma & Co Advocates for the respondents which a valid hearing within the Kenyan legal system.
 - d. That the appellant is entitled to costs of the application for taxation as the notice of taxation was successfully heard by way of written submissions filed by the firms of Mulaku & Co Advocates for the appellant/applicant and J O Juma & Co Advocates for the respondents which a valid hearing within the Kenyan legal system.
 - e. That the appellant is entitled to VAT as he will eventually be required to pay the firm of Mulaku & Co Advocates in the advocate client bill of costs to be subsequently taxed or otherwise paid.
 - f. That it is in the interest of fair hearing and justice that this application be allowed.
3. The respondents contested the reference by the appellant through the affidavit of Mr Allan Mabuka. He deposed that the appellant is not entitled to getting up fees because the appeal proceeding to hearing by way of written submissions. He deposed that the deputy registrar correctly taxed items Nos 26 and 39 as there is no basis for granting the said costs. The respondents averred that the subject matter was for the recovery of Kshs 7,487,922 from the appellant and the valuation report filed by the appellant was done without leave of the court after judgment. Finally, that the decree in the appeal stated the primary dispute was a civil dispute and not a land case. They urged the court to dismiss the reference.
 4. The respondents reference is as contained in their chamber summons dated April 13, 2022 praying for orders;
 - a. spent
 - b. spent
 - c. that the court be pleased to set the ruling and taxation of Hon P Y Kulecho, deputy registrar made on the April 8, 2022 with respect to the appellant party and party bill of costs dated November 19, 2021.
 - d. That there be an order directing that the appellant's party & party bill of costs dated November 19, 2021 be remitted for taxation afresh by a different taxing master, to the exclusion of the Honourable P Y Kulecho, deputy registrar.
 - e. That in the alternative, the honourable judge be pleased to tax afresh the appellant's party & party bill of costs dated November 19, 2021.
 - f. That costs of the application be provided for.
 5. The application is supported by the grounds listed on its face and the affidavit sworn in support by Mr Allan Mabuka. The grounds pleaded include;
 - a. The respondents are aggrieved and dissatisfied with the said taxation ruling, specifically on item No 1 being instruction fees of the said party & party bill of costs.
 - b. The Honourable P Y Kulecho, Deputy Registrar erred by misinterpreting and misapplying the principles of taxation, and thereby arriving at a decision that is manifestly erroneous in law.
 - c. The Honourable P Y Kulecho, deputy registrar erred in law by making a ruling on item 1 of the said party & party bill of costs, which ruling contradicts the spirit and general principles of the *Advocates' (Remuneration) Order* with regard to taxation of costs.



- d. The Honourable P Y Kulecho deputy registrar misdirected herself in holding that the value of the subject matter of the primary suit and the appeal was Kshs 33,987,922.59 which holding is clearly contrary to the pleadings before the honourable court.
 - e. The Honourable P Y Kulecho, deputy registrar erred in law in placing reliance on the valuation report by Adept Realtor Ltd dated January 11, 2022 for the following reasons;
 - i. The said valuation report was filed without leave of court.
 - ii. The veracity of the said valuation report is doubtful and dubious, the same having been procured by the appellant without the input of the respondents.
 - iii. The honourable deputy registrar failed to give the respondents an opportunity to challenge the said valuation report.
 - f. The honourable deputy registrar erred in law in holding that the appellant, being an unqualified person could appear in court as an advocate and hold brief for an advocate, and that such an unqualified person is entitled to “instruction fees” under the *Advocates’ (Remuneration) Order*.
6. The appellant in response to the issues raised by the respondents filed a replying affidavit deposed on June 6, 2022 by Patrick Mulaku. He annexed an instructions note which he deposed had also been placed before the deputy registrar in his affidavit dated February 7, 2022. Mr Mulaku accused the respondents advocates in engaging in unprofessional conduct just to excuse their client from paying costs awarded. That the pleadings on record were drawn by Mulaku & Co Advocates and not the appellant in person and that the issues of representation were never raised during the hearing of the appeal. In respect to contents of the impugned valuation report, the appellant argues that the respondents never filed any even after being given time to do.
 7. I have read and considered submissions filed by both parties, the reference to the submissions will be merged in this determination. I have framed the following questions for determination of the two references;
 - a. Whether or not the appellant is entitled to party and party costs.
 - b. If a) is answered yes, what should the instruction fee be?
 - c. Whether the appellant is entitled to getting up fee.
 - d. Whether or not the deputy registrar erred in taxing off items listed by the appellant.
 8. On the first question which was taken up by the respondents, it is pleading that the appellant is an unqualified person therefore not entitled to party and party costs. The memorandum of appeal lodged before this court dated May 31, 2021 on the face of the document is drawn and filed by Mulaka & Co Advocates, Alpha house suit No 25 Oginga Odinga street Kisumu. The record of appeal filed on June 30, 2021 was also drawn by the same firm. All pleadings filed including the impugned bill of costs was drawn and filed by Mulaku & Co Advocates. The appellant did not file any document in his name therefore the question of whether or not the said law firm is entitled to costs does not arise.
 9. The other issue raised is the amount of instruction fee that was chargeable in the instant case. The appellant asked to be awarded Kshs 1,800,000 as instruction fee which was granted. The basis for charging the instruction fee of Kshs 1.8m was because the property Bukhayo/Mundika/2842 was assigned a value of Kshs 26,500,000 added to the Kshs 7,487,922 claimed by the respondents thus



giving a total of Kshs 33,987,922. The question the court is called to determine is whether the instruction fee should be based on the figure of Kshs 7,487,922 or Kshs 33,987,922?

10. The appellant submitted that the taxing officer must look at the pleadings as the legal starting point. Therefore, the respondents' pray for Kshs 7,487,922 and in addition an order compelling the appellant to surrender title deed for LR No Bukhayo/Mundika/2842 brought in the issue of the value of the property which was not disclosed in the pleading. The appellant filed a valuation report after judgment to give the value of the said land. In support of their entitlement, the appellant cited *Munyao Silas J in the Land Misc Application No 196 of 2015, Masore Nyangau & Co Advocates v Kensal Ltd* (2019) eKLR thus;

“20. schedule 6 above, does prescribe how costs should be assessed ‘where the value of the subject matter can be determined from the pleading, judgement or settlement between the parties’. The said schedule does not however explicitly prescribe what should be done, where the value of the subject matter is not in the pleadings, judgement or settlement. You could indeed have litigation where the value of the subject matter is not given in the pleadings, judgement or settlement. A common example is in land cases, where say, the plaintiff files suit to cancel the defendant’s title claiming that the defendant acquired the title through fraud but the title rightfully belongs to the plaintiff. In such a case, all that may be given in the pleadings is the registration particulars of the said land and no more. Assuming the plaintiff in such a case succeeds, and the court orders the defendant’s title to be cancelled, and in place, the plaintiff to be registered as proprietor, what would the plaintiff be entitled to as costs in respect of instruction fees since no actual value may be given in such a judgement.”

21. At the end of the day, costs will need to be pegged on the value of the subject matter, and my own view of the matter, is that the court is not precluded from asking for evidence so as to determine what the value of the subject matter may be for purpose of taxing costs, or refer to the other documents provided in the course of the case, and which may point at the value of the subject matter. Such documents may include the sale agreement, valuation report, or the consideration noted in the transfer instrument or title.”

11. The appellant argued that the respondents also had a choice to file their own valuation report to rebutt the one filed by the appellant but failed and or neglected to do so. I have perused the claim as contained in the primary dispute before the chief magistrate’s court. The prayers in the plaint were;
- a. The outstanding loan balance and interest being Kshs 7,487,922.59
 - b. An order compelling the defendant to surrender the title deed for the property known as Bukhayo/Mundika/2842 to the plaintiffs for purposes of securitization of the charge
 - c. An order directing the county land registrar, Busia county to register a charge over the property known as Bukhayo/Mundika/2842 in favour of the county assembly of Busia.
12. The appellant argues that prayer (b) and (c) of the plaint was an additional prayer that referred to a prayer for land whose value was not disclosed. It is true prayer (b) and (c) referred to surrender of title for LR No Bukhayo/Mundika/2842. However, plain reading of the prayers gives you an understanding that the respondents requested for surrender of that title for purposes of securitisation of the charge and part (c) for the land registrar to effect the registration of that charge. The parties were aware of what the value of that charge is being the sum of Kshs 7,487,922 advanced to the appellant. It is therefore my opinion and I so hold that the value of the subject matter was discernible from the pleadings.



13. Further, in the *Masore Nyang'au case* supra, the learned observed that where the value is not discernible from the pleadings, the same can be discerned from the judgment or settlement of the claim. The costs taxed arose from the costs awarded to the appellant in his appeal against the chief magistrate's court dismissing the preliminary objection that she had jurisdiction to entertain the matter before her. After hearing the appeal, this court determined that indeed the primary suit was filed was an employer/employee dispute and not a land case. The appellant's preliminary objection that the suit was not a land dispute was allowed. Once this court in its appellate jurisdiction determined that the matter was not a land dispute, the Deputy Registrar was in error to consider the valuation report filed. Thus the issue of value of the subject matter was still discernible from the judgment that title LR No Bukhayo/Mundika/2842 did not constitute.
14. The deputy registrar did not exercise her discretion judiciously in holding that the value of the subject matter consisted the value of the land plus the prayers of specific performance of Kshs 7,487,922. This court will interfere with this discretion as I hereby do and state that the value of the subject matter as gleaned from the pleadings was Kshs 7,487,922 and the instruction fee chargeable is Kshs 250,000. Consequently, in item one, the sum awarded of Kshs 1,800,000 is set aside and in its place amount of Kshs 250,000 is awarded.
15. The related issue is whether or not the appellant was entitled to getting up fee. The respondents referred the court to paragraph 3 of the *Advocates Remuneration Order* which provides thus;
- “In any appeal to the High Court in which a respondent appears as the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting-up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee.”
16. According to the respondents, since the appellant is an unqualified person, he is not entitled to getting up fee. The matter is already determined earlier in this judgement that the appellant was duly represented so the issue of unqualified is misplaced. The essence of getting up fee is preparation required for a trial. The respondent disposed that because the appeal was heard by way of written submissions. In the same replying affidavit at paragraph 4, Mr Mabuka listed the steps taken by appellant leading to the determination of the appeal including filing of submissions. It is these preparations – which included preparing and filing the record of appeal and preparation and filing of the submissions which constitutes the getting up. Filing of submissions ins also an acceptable mode of hearing since a party must conduct researchable and consider the pleadings filed before preparing the submission. I conclude on this limb that the appellant is entitled to be awarded the getting up fee at $\frac{1}{3}$ of the Kshs 250,000.
17. The fourthly question is whether or not the appellant ought to have included VAT on the instruction and getting up fee. Have considered the several authorities cited by both sides. For the respondent, they cited; *Pyramid Motors v Langata Gardens Limited* (2015) eKLR where Onguto J stated thus;
- “30. On the final issue of VAT, I hold the simple view that in allowing the same the master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was not taxable supply of either goods or services made to the applicant herein by the respondent herein. The bills herein concerned party and party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is



not the advocate who was being compensated herein. The master could only have awarded VAT if the bills were advocate-client bills or if there was tendered evidence before the master that the plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the plaintiff was a taxable person. I would vacate the award on VAT as the master erred.”

James Nyangiye & Others v AG (2020) eKLR where Maureen Onyango J held thus;

“Similarly the claimants did not provide any evidence indicating that they had paid VAT on the legal fees they had paid to their advocates hence are not entitled to an indemnity. The court in Kenya Commercial Bank Limited Stagecoach Management Limited (2017) eKLR cited by the claimants held that a winning party should be allowed to recoup VAT on the party to party bill of costs where they paid out VAT to an advocate. As such, the taxing officer’s decision to tax off VAT on instruction fee was sound in law and in principle.”

And Shreeji Limited v John Munga Chai (2022) eKLR Githinji J stating thus;

“Having stated the above and noting a proper reading of section 6(1) of the VAT Act, I am persuaded that a party and party bill of costs does not attract an aspect of taxable supply as an advocate client bills of costs would.”

18. The appellant also cited the *Pyramid Motors’ case* in addition to [*Four Farms Ltd v Agricultural Finance Corporation*](#) (2015) eKLR where Emukule J held thus;

“To answer this question it is necessary to ask another question namely, what is the basis of a party and party bill of costs. This question was answered by the learned taxing officer when she cited the decision of the court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* (2014) eKLR where the court said:

“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses which he has been put in fighting the case.”

The fight referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts VAT under section 5 of the [*Value Added Tax Act*](#), 2013 (No 35 of 2013). It was properly charged on the basic instruction fee of Kshs 332,675/=. The contention to the contrary has no basis, and this leg of the reference also fails.”

19. As observed by my colleagues in the cases cited which are persuasive there are divergent views on whether VAT should be recouped in party and party costs. In the *Pyramid Motors* case cited by both parties Onguto J (may his soul RIP) noted that it is true legal services were rendered but it is not the advocate who was being compensated. That the taxing master could only be awarded in advocate-client bill if there was tendered in evidence before the master that the plaintiff had paid VAT and was consequently entitled to indemnity. I find the position taken by Onguto J to be in one accord with the finding in the case of *Jasbir Singh Rai & 3 others* that costs are means by which a successful litigant recoups for expenses used in fighting the case.
20. Moving forward, I take the position that VAT is chargeable on party and party costs but only where there is proof that the same was expended by way of production of a receipt or confirmation of the person receiving. In this instant, the appellant’s concede that it was not paid but it will be included as a charge in the advocate-client bill. For the reason that the appellant will not have the opportunity to



seek compensation by providing the receipt which says now I have paid, it is pragmatic to make the award at this stage. My finding therefore is that VAT is allowed to be charged on the instruction and getting up fee.

21. The appellant prayed to be awarded costs incurred in preparing the valuation report which was included at 38 in the bill. The respondent contested this item stating the same was filed after judgement without leave of the court. Without saying much, the report was indeed filed after judgement so it does not constitute part of the proceedings both while arguing the preliminary objection in the primary suit and the appeal. Secondly, the report was filed to help the appellant prove the basis to be awarded instructions fee at Kshs 1,800,000. It is a cost that was used to defend the claim thus I do not see any basis to condemn the respondent to compensate the appellant.
22. The appellant also raised the issue with item Nos 26 and 39 that were taxed off by the deputy registrar. Item 26 and 39 reads “costs of the application for taxation of the bill.” I have perused the file and did not file any application filed of purposes of taxing the bill. The bill was filed as it is plus a notice of taxation taken serving the date when the bill was to be taxed. The appellant submitted that they are entitled to the sum of Kshs 25,000 because the bill was drawn to scale. Probably the appellant was seeking the costs of prosecuting the bill which in my view should be attendance costs and not application. Under item 26, i award the appellant attendance for two days to include the preparation of submissions at Kshs 14,200. Since item 39 is a repeat of item 26, the same is taxed off.
23. In summary, both parties’ references are partially successful. The ruling of the honourable deputy registrar made on April 8, 2022 is set aside in so far as it relates to;
 - a. Item 1, which is taxed at Kshs 250,000.
 - b. Item 2 now taxed at Kshs 84,000.
 - c. Item 26 at Kshs 14,200.
 - d. Item 27 now taxed at Kshs 53,440.
 - e. Item 38 taxed off completely.
 - f. Item 39 taxed off completely.

The rest of the items are left as earlier taxed by the honourable deputy registrar. The total party to party costs is therefore Kshs 529,390/=.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

