



Kenya Agricultural & Livestock Research Organization v Attorney General & 3 others (Environment & Land Petition 1012 of 2013) [2022] KEELC 13587 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 1012 OF 2013
SO OKONG'O, J
OCTOBER 12, 2022**

BETWEEN

KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

TROJAN NOMINEES LIMITED 3RD RESPONDENT

PINEAPPLES EDGE LIMITED 4TH RESPONDENT

JUDGMENT

Background

1. The Petitioner brought this petition against the Respondents on 29th September 2015 contending that the Constitution of Kenya and its fundamental rights and freedoms had been violated by the Respondents in relation to all those parcels of land known as L.R No. Naivasha Block 5 Parcels 230 -233(hereinafter referred to as “the suit properties”) that were owned by the Petitioner. The Petitioner contended that the suit properties were converted from public land to private land and allocated to the 3rd and 4th Respondents illegally in violation of several provisions of the Constitution of Kenya. The Petitioner sought several reliefs against the Respondents including a declaration that the suit properties were public land and that the purported allocation of the same to the 3rd and 4th Respondents was unconstitutional, illegal, irregular, null and void, an injunction restraining the Respondents from interfering in any manner with the Petitioner’s peaceful possession and use of the suit properties and an order for possession of the properties.



2. The petition was opposed by the 1st, 2nd and 3rd Respondents. On 14th June 2017, the court directed that the petition shall be heard by way of viva voce evidence. On 18th November 2019, the court dismissed the petition with costs to the 1st, 2nd and 3rd Respondents for failure on the part of the Petitioner to tender evidence in proof of the petition.

The 3rd Respondent thereafter filed Party and Party Bill of Costs dated 14th July 2020 in the sum of Kshs. 284,321,570/- for taxation against the Petitioner. The 3rd Respondent's Bill of Costs (hereinafter referred to only as "the Bill") was opposed by the Petitioner. In a ruling that was delivered on 3rd November 2021, the taxing officer Hon. I.N.Barasa taxed the 3rd Respondent's Bill at Kshs. 22,093,774/-.

The Reference by the Petitioner:

3. The Petitioner was aggrieved with the said decision by the taxing officer. Under Paragraph 11 of the [Advocates Remuneration Order](#) (ARO), the Petitioner was supposed to file a Notice of Objection to taxation setting out the items in the Bill in respect of whose taxation, the Petitioner was contesting. I have not seen on record a copy (hard or soft) of the Petitioner's Notice of Objection to taxation by the taxing officer. It is therefore not clear to me as to the items in the 3rd Respondent's Bill whose taxation are being contested.

What is before me is a reference by the Petitioner brought by way of Chamber Summons dated 15th November 2021. The Chamber Summons is brought under Rule(sic) 11 of the [Advocates Remuneration Rules](#) (sic) 2009, Section 1A and 3A of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010. In the application, the Petitioner has sought the following orders;

1. That the court be pleased to set aside and/or review the Deputy Registrar's ruling on taxation of Party and Party Bill of costs dated 19th August 2021 at Kshs. 22,093,774/- delivered on 3rd November 2021.
2. That the court be pleased to tax or refer the said Party and Party Bill of costs to another Deputy Registrar for taxation in accordance with the law.
3. That the costs of the reference be awarded to the Applicant.
4. The application is brought on the grounds on the face thereof and on the supporting affidavit of Dr. Evans Ilatsia sworn on 15th November 2021. The Petitioner has contended that the taxing officer erred in her taxation of the 3rd Respondent's Bill in that in assessing the instruction fees, she relied on Schedule 6(1)(b) of the [ARO](#) instead of Schedule 6(1)(j)(ii) of the 2014 [Advocates Remuneration Order](#) (ARO). The Petitioner has contended further that the taxing officer erred in enhancing the basic instruction fees from which the getting up fees was assessed from Kshs. 100,000/- to Kshs. 16,500,000/-. The Petitioner has averred that the taxing officer did not provide reasonable justification for this substantial increase in the instruction fees.
5. The application was opposed by the 3rd Respondent through a replying affidavit of John Wacira Wambugu sworn on 15th February 2022. The 3rd Respondent has averred that this matter was filed in the High Court where it was assigned Constitutional Petition No. 413 of 2015. The 3rd Respondent has averred that the matter was transferred by the High Court to this court for want of jurisdiction and was assigned ELC Case No. 1012 of 2015. The 3rd Respondent has contended that upon transfer of the suit to this court, it ceased to be a Constitutional Petition and became an ELC suit. The 3rd Respondent has contended that the taxing officer was in the circumstances correct in assessing the instruction fees under Schedule 6(1)(b) of the 2014 [ARO](#) since Schedule 6(1)(j)(ii) was not applicable. The 3rd Respondent



has contended that taking into consideration the fact that the suit properties measured 52.9 Ha. and were valued at Kshs. 1,450,000,000/-, the instruction fees that was awarded by the taxing officer was fair and justified. The 3rd Respondent has denied that the Petitioner was not served with the Bill. The 3rd Respondent has contended that the Petitioner was served and participated in the taxation of the Bill through its advocates on record.

Submissions:

6. On 19th January 2022, the court directed that the Petitioner's application shall be heard by way of written submissions and gave timelines within which the parties were to file their submissions. The Petitioner filed its submissions dated 16th March 2022 on the same date while the 3rd Respondent filed its submissions dated 7th March 2022. The Petitioner framed only one issue for determination namely; whether the instruction fees and consequently the getting up fees awarded by the taxing officer was excessive. The Petitioner submitted that it was aggrieved with the award of Kshs. 16,500,000/- and Kshs. 5,500,000/- to the 3rd Respondent as instruction fees and getting up fees respectively. The Petitioner submitted that the relevant *Advocates Remuneration Order* (ARO) under which the 3rd Respondent's costs was to be assessed was the 2014 *ARO*. The Petitioner submitted that the instruction fees is supposed to be determined from the value of the subject matter of a suit where it can be ascertained from the pleadings, judgement or settlement. In support of this submission, the Petitioner cited *Joreth Limited v Kigano & Associates* [2002] eKLR. The Petitioner submitted that the value of the subject matter of the suit could not be ascertained from the pleadings in view of the nature of the claim and the reliefs sought. The Petitioner submitted that the Petitioner was a public institution and that the proceedings herein were brought to protect public land and as such the litigation was public law in nature. The Petitioner submitted that the taxing officer erred in assessing instruction fees based on Schedule 6(1)(b) of 2014 *ARO*. The Petitioner submitted that the assessment should have been based on Schedule 6(1)(j)(ii) of the 2014 *ARO*. The Petitioner submitted that under that schedule, the minimum scale fees was between Kshs. 45,000/- and Kshs. 100,000/- which the taxing officer could increase for good reason such as care and labour required by an advocate, the number and length of the papers to be perused, the nature and importance of the matter, the value of the subject matter where it can be ascertained, the interest of the parties, the complexity and novelty of the matter. The Petitioner submitted that the taxing officer had a duty to first ascertain the basic instruction fees payable before venturing to consider whether to increase it or reduce it. In support of this submission, the Petitioner cited *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd.* [2014] eKLR.
7. The Petitioner submitted that the taxing officer increased the minimum fees payable 165 times from Kshs. 100,000/- to 16,500,000/- without any valid justification. The Petitioner submitted that the reasons given by the taxing officer could not justify this substantial increase in the minimum instruction fees. The Petitioner submitted that the dispute between the parties was not complex and there was no novel issue of law or fact raised and as such the time spent, research done and the skill employed by the 3rd Respondent's advocates were that which are ordinarily undertaken by advocates within their normal call of duty.
8. The Petitioner urged the court to set aside and/or review the award of Kshs. 16,500,000/- to the 3rd Respondent as instruction fees. With regard to getting up fees, the Petitioner submitted that the same was not payable since the 3rd Respondent's advocates did not prepare witnesses or witness statements and the matter was not heard through viva voce evidence. The Petitioner submitted that since the suit was dismissed before hearing, the 3rd Respondent was not entitled to getting up fees.
9. On its part, the 3rd Respondent framed three issues for determination namely; whether the Petitioner's reference was filed out of time, whether there are sufficient grounds to warrant setting aside or review



of the taxing officers ruling made on 3rd November 2021, whether the application is frivolous, vexatious and/or amounts to an abuse of the court process and what should be the order on costs? On the first issue, the 3rd Respondent submitted that under Paragraph 11(1) of the ARO, the Petitioner was supposed to give notice to the taxing officer of the items of taxation that it was objecting to within 14 days of the decision of the taxing officer. The 3rd Respondent submitted further that under Paragraph 11(2) of the ARO, the taxing officer upon receipt of the said notice was supposed to forward to the Petitioner the reasons for her decision on the items the subject of objection and on receipt of the said reasons, the Petitioner was supposed to file a reference by way Chamber Summons challenging the taxation of the items the subject of its objection. The 3rd Respondent submitted that the Petitioner did not adhere to the timelines set out in Paragraph 11 of the ARO and as such the application before the court is incompetent. On the second issue, the 3rd Respondent submitted that the Bill was taxed in accordance with Schedule 6 of the 2014 ARO and that the awards by the taxing officer were in accordance with the scale.

10. The 3rd Respondent submitted further that the instruction fees was properly taxed under Schedule 6(1) (b) of the 2014 ARO since the suit after being transferred to this court became a normal Environment and Land Court suit. The 3rd Respondent submitted that it produced before the taxing officer a valuation report in respect of the suit properties in which the value thereof was assessed at Kshs. 1,450,000,000/-. The 3rd Respondent submitted that the Petitioner raised no objection to the said valuation report. The 3rd Respondent submitted that in the circumstances, the value of the subject matter of the suit was ascertainable from the record. The 3rd Respondent submitted that considering the weight of the issues raised, the impact that the reliefs sought would have had on the 3rd Respondent, the value of the subject matter of the suit and the work done in defending the suit, the amount that was awarded by the taxing officer as instruction fees was reasonable. The 3rd Respondent submitted that it was immoral for the Petitioner to suggest that the instruction fees awarded to the 3rd Respondent should be reduced to Kshs. 100,000/-.
11. On the third issue, the 3rd Respondent submitted that the present application was an attempt by the Petitioner to delay the 3rd Respondent from enjoying the fruits of the judgment in its favour. The 3rd Respondent submitted that the application having been filed out of time without leave, the same was an abuse of the process of the court and should be dismissed with costs to the 3rd Respondent.

Determination:

12. I have considered the Petitioner's application together with the supporting affidavit and written submissions. I have also considered the replying affidavit and written submissions by the 3rd Respondent together with the authorities cited in support thereof. The principles that guide the court when dealing with a reference from a decision of a taxing officer are now well settled. The law is that a judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. In Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd. (*supra*), the court stated that:

“The circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are:

1. that the court cannot interfere with the taxing officer's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;



2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
 3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
13. In the South African case of, *Visser v Gubb* 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in [KTK Advocates v Baringo County Government](#) [2017] eKLR, the court stated as follows:
- “The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”
14. In [Republic v Kenyatta University & Another Ex parte Wellington Kihato Wamburu](#) [2018] eKLR the court cited with approval the Ugandan Supreme Court case of *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No. 23 of 1999, where the court stated that:
- “Save in exceptional circumstances, 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 that in assessing and 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 from an award of an amount which is manifestly excessive or manifestly low.
- Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”
15. The issue that arises for determination in the present application is whether the taxing officer made an error of principle in her assessment of the instruction fees and getting up fees payable to the 3rd Respondent to warrant interference with her exercise of discretion.



Before I delve into the merit of the application, I wish to dispose of a preliminary issue that was raised by the 3rd Respondent in its submissions that touches on the competency of the Petitioner's application. The 3rd Respondents submitted that the applicant's application was incompetent having been filed out of the time set out in paragraph 11 of the [Advocates Remuneration Order](#). The 3rd Respondent contended that the Petitioner did not file the reference within 14 days from the date of the ruling on taxation of the Bill.

From the record, the Petitioner's application was filed on 16th November 2021. Paragraph 11(1) of the [ARO](#) provides that a party dissatisfied with a decision of a taxing officer should file a notice of objection to taxation within 14 days of the ruling by the taxing officer. In the said notice of objection, the party should set out the items whose taxation he is objecting to and should request the taxing officer for the reasons for his decision on those items. Upon receipt of the notice of objection, the taxing officer is supposed to furnish the party with the reasons for the taxation of the items the subject of the objection and the objector is to file a reference within 14 days of receipt of the said reasons.

16. In this case, I have not seen the Petitioner's notice of objection on record. I doubt if any was filed. What I have seen is a letter dated 5th November 2021 by the Petitioner's advocates to the taxing officer requesting for the reasons for the taxation for the purposes of a reference. I have also not seen any response by the taxing officer to that letter. I presume that since the taxing officer gave a detailed ruling which contained the reasons for her taxation of the various items in the Bill that were contested by the Petitioner, it was not necessary for the taxing officer to supply the Petitioner with any other reasons for taxation. What this means is that the time within which the Petitioner was to file its reference was to run from the date of the ruling which was 3rd November 2021 or as soon as it had a copy of the said ruling. It follows therefore that since the ruling was delivered on 3rd November 2021 and the reference was filed on 16th November 2021, the reference was filed within the 14 days period set out in Paragraph 11(2) of the [ARO](#). The 3rd Respondent's objection to the Petitioner's application on the ground that it was filed out of time does not have merit in the circumstances.
17. I would have found merit in the objection if it was directed at the Petitioner's failure to file a notice of objection pursuant to Paragraph 11(1) of the [ARO](#). I am of the view that failure on the part of the Petitioner to file a notice of objection to taxation under Paragraph 11(1) of the [ARO](#) prior to filing of a reference was fatal to the application. This is because it is through a notice of objection that both the court and the respondent get to know the items in the bill of costs which are the subject of the reference. In its application, the Petitioner has sought to set aside the entire decision of the taxing officer which includes the items that were not contested and those that were taxed as proposed by the Petitioner during the taxation. This situation would have been avoided if the applicant had filed a notice of objection to taxation setting out the items in the bill of costs whose taxation it was challenging. The reference would have been directed only at the said items. Although the Petitioner has in its grounds in support of the application and the supporting affidavit appears to be attacking mainly the instruction fees and getting up fees, this is inconsistent with the reliefs sought in its application. The Petitioner as I have stated earlier is challenging the taxation of the entire bill of costs at Kshs. 22, 093,774/- and has sought the setting aside of the entire award. If the 3rd Respondent had objected to the application on the ground of failure on the part of the Petitioner to file a notice of taxation, I would have held that the application is not properly before the court.
18. Since the 3rd Respondent did not raise the objection, the court would be determining the application on the basis of matters which are not before it if it attempts to base its decision on the issue of the Petitioner's failure to file a notice of objection. I will therefore do the best I can for the parties by determining the merit of the application on the basis of the material and arguments before me.



It is common ground that the Petitioner is challenging the decision of the taxing officer in respect of taxation of only two items in the Bill namely, the instruction fees and getting up fees. It is also common ground that the Advocates Remuneration Order(ARO) that was in force during the period in which the fees and costs were incurred was the 2014 ARO. The parties did not agree before the taxing officer and before this court as to the Schedule of the 2014 ARO that was applicable to the 3rd Respondent's Bill. Whereas the 3rd Respondent contended that the applicable schedule was Schedule 6(1)(b) of the ARO, the Petitioner contended that the correct schedule was Schedule 6(1)(j)(ii) of the ARO. Schedule 6 1(a) and (b) of the ARO applies to ordinary civil suits originated by either a plaint, petition, Originating Summons or a Notice of Motion. Schedule 6 (1) (j)(i) and (ii) of the ARO on the other hand applies to Constitutional Petitions and applications for prerogative orders.

19. The 3rd Respondent contended and has maintained that upon transfer of this suit from the Constitutional and Human Rights Division of the High Court where it was initially filed to this court, the suit ceased to be a Constitutional Petition and became an ordinary environment and land court suit. The Petitioner on the other hand contended and has maintained that the suit even after the transfer to this court remained a Constitutional Petition. There is no evidence on record that the taxing officer resolved these conflicting positions that had been taken by the parties. It is not possible to say from the taxing officer's ruling as to which of the two schedules she adopted while assessing the instruction fees. There is also no evidence that the taxing officer determined the minimum instruction fees payable if any before she awarded Kshs. 16,500,000/- to the 3rd Respondent. The taxing officer simply stated that "Having considered all these, I am persuaded that an instruction fee of Kshs. 16,500,000/- is fair and reasonable."
20. I am in agreement with the Petitioner that this suit having been filed as a Constitutional Petition remained a Constitutional Petition even after being transferred to this court. Neither the transfer nor the directions given by the court that the Petition be heard by way of oral evidence changed the nature and character of the suit. The 3rd Respondent's Bill should therefore have been taxed under Schedule 6(1)(j)(ii) of the ARO. Under that schedule, the minimum instruction fees for a defended Constitutional Petition is Kshs. 100,000/-. It is common ground that the taxing officer had the discretion to increase this minimum fees upon considering several factors. As admitted by the Petitioner, in arriving at a decision to award Kshs. 16,500,000/- as instruction fees, the taxing officer did consider several factors such as, the nature of the dispute, the time the matter had taken in court, the size of the suit property and its location, care and labour employed by the 3rd Respondent's advocates, the number of documents that the said advocates had to peruse and the fact that the petition was to be heard by oral evidence. All these in my view were relevant factors to consider while assessing instruction fees. However, I am in agreement with the Petitioner that even when all these factors are considered, they do not warrant the increase of the basic instruction fees from Kshs. 100,000/- to Kshs. 16,500,000/-. I am in agreement with the Petitioner that there was nothing out of the ordinary in the suit that would justify increasing basic instruction fees 165 times. It is my finding that the sum of Kshs. 16,500,000/- that was awarded by the taxing officer to the 3rd Respondent as instruction fees in this suit that was dismissed without a hearing was manifestly excessive and as such a wrong exercise of discretion. Due to the foregoing, this is an appropriate case in which the court should interfere with the exercise of discretion by the taxing officer.
21. The Petitioner had urged the court to set aside the decision of the taxing officer and to either tax the Bill afresh or refer the Bill to another taxing officer for taxation. Having found that the taxing officer committed an error of principle by awarding instruction fees that was manifestly excessive, I have the discretion to either remit the Bill to the taxing officer with appropriate directions on how it should be



taxed or to proceed and tax the same. In *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board*[2005]1 KLR 528 the court stated as follows:

“ And 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 for the decision of taxing officer (see – *D’Sonza v Ferrao* [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel (No. 2)*[1978] KLR 243.”

22. Having regard to the time the dispute between the parties over fees has taken to be resolved and the fact that only the taxation of two items in the Bill was contested, the main one being the instruction fees, I am of the view that it would serve the interest of justice for the court to exercise its discretion in favour of taxing the contested items in Bill instead of remitting the bill to the taxing officer for the taxation of these items. In *First American Bank of Kenya Ltd v Gulab P Shah & Others* (2002)1 E.A. 61 the court stated that:

“ I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

23. I have considered the minimum instruction fees provided for in the *ARO*, the care and labour that was put into the matter by the advocates for the 3rd Respondent, the interest of the parties in the properties that were in dispute, the size of the suit properties, the issues that were in contention in the suit, the fact that the suit was brought to reclaim what was considered to be public land and the fact that the suit was dismissed summarily without a trial. Taking all these factors into account, I am of the view that an award of Kshs. 6,000,000/- as instruction fees would be fair and reasonable. I am not in agreement with the Petitioner that the 3rd Respondent was not entitled to getting up fees. The Petition was to be heard by way of oral evidence and the suit was dismissed when it came up for hearing. This means that the 3rd Respondent prepared for the hearing. The 3rd Respondent shall have getting up fees which shall be one-third (1/3) of the instruction fees.

Conclusion:

24. In conclusion, the Applicant’s Chamber Summons application dated 15th November 2021 is allowed on the following terms;
1. The ruling and orders made by the taxing officer Hon. I.N.Barasa on 3rd November 2021 in respect of the items relating to instruction fees and getting up fees in the Bill of costs dated 19th August 2021 is set aside and in place thereof, the said items are taxed as follows;
 - a. Item relating to instruction fees is taxed at Kshs. 6,000,000/-. A sum of Kshs. 30,000,000/- is taxed off.
 - b. Item relating to getting up fees is taxed at Kshs. 2,000,000/-. Kshs. 8,000,000/- is taxed off.
 2. The other items in the Bill of costs shall remain as taxed by the taxing officer.
 3. Each party shall bear its own costs of the reference.



DELIVERED AND DATED AT KISUMU THIS 12TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anyona h/b for Mr. Kanjama for the Petitioner

N/A for the Respondents

Ms. J. Omondi-Court Assistant

