



**Ola Energy Kenya Limited v Rashid Opondo Otieno t/a Kisumu  
Break Down Services (Environment & Land Case E014 of 2021)  
[2022] KEELC 14988 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14988 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E014 OF 2021  
A OMBWAYO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**OLA ENERGY KENYA LIMITED ..... PLAINTIFF**

**AND**

**RASHID OPONDO OTIENO T/A KISUMU BREAK DOWN  
SERVICES ..... DEFENDANT**

**RULING**

1. Ola Energy Kenya Limited the Plaintiff herein filed Chamber Summons Application dated May 18, 2022 under paragraph 11(1) & (2) of the *Advocates (Remuneration) Order 2014*, section 1 (A), 1 (B) & 3 (A) of the *Civil Procedure Act* (Cap 21) Laws of Kenya seeking orders that:
  1. Pending the hearing and determination of this reference there be stay of any further proceedings for recovery of or in execution of costs taxed in the sum of Kshs 749,600.00 on the May 12, 2022.
  2. The decision on May 12, 2022 of the Taxing Master assessing item 1 (a) of the Defendant's Advocate Bill of Costs dated January 12, 2022 at Kshs 712,500.00 be set aside.
  3. The Defendant's Advocate Bill of Costs aforesaid be remitted back for consideration and taxation of item 1 (a) thereof.
  4. The Costs of this Application be provided for.
2. The Application was based on grounds that the Taxing Master delivered a ruling taxing Party and Party costs in favour of the Defendant in the sum of Kshs 749,600.00. That the Taxing Master erred in principle by determining item 1 (a) on instruction fees with reference to the value of the suit property as disclosed in the Plaintiff, given that ownership of the suit property was not the subject matter of the



dispute between the parties to the suit and failing to appreciate that the subject matter of the suit was on the question of whether the Defendant was a tenant of the Plaintiff paying Kshs 20,000/= per month in rent for a portion of the suit property or was a trespasser in either case of which the suit property was irrelevant.

3. It was stated that the decision of the Taxing Master of May 12, 2022 ought to be set aside with the Defendant's Advocate Bill of Costs of January 12, 2022 remitted back to the taxing Master for taxation of item 1(a) thereof on the correct principles as to ascertainment of the subject matter of the suit. That unless an order of stay of further proceedings and of execution are granted there is likelihood that the Defendant will commence execution proceedings for the recovery of the sum of Kshs 749,600.00.
4. It was averred that if the Plaintiff is compelled to pay the Defendant the sum of Kshs 749,600.00 it is in grave danger of not being able to recover this sum or any part thereof in the likely event of the success of this reference and it is in the interest of justice that pending the hearing and determination of this reference there be no proceedings in furtherance of or execution for recovery from the Plaintiff of the sum of Kshs 749,600.00 or any part thereof.
5. The Application was supported by the Affidavit of Kelvin Gathara who relied on the grounds of the Application.
6. The Defendant herein filed grounds of opposition on June 16, 2022 in response to the Application where it was stated that the Application is fatally defective, is incompetent, unknown in law and otherwise an abuse of the court process. That the Application offends paragraph 11 of the Advocates Remuneration Order, the Applicant has not demonstrated any sufficient grounds to impugn exercise of judicial discretion by the Taxing Master to warrant the court's interference and the Applicant is not deserving of the orders sought.
7. The Application was canvassed by way of written submissions.

#### **Plaintiff's Submissions**

8. The Plaintiff herein filed its submissions on July 19, 2022 where it was stated that the assessment and taxation of instruction fees by the Taxing Master in the sum aforesaid is informed by paragraph 12 of the Plaintiff which stated the value of the suit property in the sum of Kshs 50 Million, a statement made for purposes of affirming the filing of the suit before this court. That the statement in paragraph 12 of the Plaintiff does not alter the fact that the subject matter of the suit was either the trespass over or tenancy of a portion of the suit property by the Defendant and not over the ownership of the entire suit property.
9. It was further stated that the suit was dismissed upon the court finding for the Defendant the existence of a controlled tenancy based on the evidence he produced of a tenancy in which he was paying the sum of Kshs 10,000/= per month and upon this finding, it was established without equivocation that the dispute between the parties was not over the ownership of the entire suit property for which the value thereof would be relevant but rather on the question of the Defendant's tenancy over a portion thereof worth Kshs 10,000/= per month.
10. The Plaintiff submitted that the assessment of instruction fees on the basis of the contents of paragraph 12 of the Plaintiff is an error in law. Reliance was placed in the case of *Joreth Ltd v Kigano & Associates [2002] eKLR*. It was stated that either the periodic tenancy of Kshs 10,000/= ought to have been the basis of determination of the instruction fees or on the application of the provisions of Schedule 6 (k) for 'other matters' for suing or defending in any case not provided for in the preceding provisions of schedule 6, the instruction fee should have been assessed at either Kshs 45,000/= for undefended matter



or Kshs 75,000/= for a defended matter and therefore a determination that the dispute concerned the entire suit property valued at Kshs 50 Million is an error both in fact and law.

11. It was submitted that the decision of the Taxing Master is a gross inflation of the Defendant's Advocates costs out of all proportion of what ought to be reasonable resulting in a fee that is manifestly excessive arising from an erroneous application of principle. Reliance was placed in the case of *First American Bank of Kenya vs Shah & Other (2002) 1 EA 64*. The Plaintiff therefore prayed that the application be allowed, the ruling of the Taxing Master on item 1 (a) of the Defendant's Advocates Bill of Costs be set aside and to refer the matter back for fresh taxation of the said item.
12. The Plaintiff filed further submissions on July 27, 2022 in response to the Defendant's submission where it was stated that the Defendant's objection to the reference application on the basis that it offends Rule 11 of the Advocates Remuneration Order are founded on a pedantic interpretation of Rule 11 which offends Article 159 (2) (d) of the [Constitution](#) that requires justice to be administered without undue regard to technicalities. Reliance was placed in the case of [Postal Corporation of Kenya vs Donald Kipkorir & 3 Others \(2005\) eKLR](#) which case represents interpretation of the provisions of Rule 11 that accord with Article 159 (2) (d) of the [Constitution](#).
13. It was submitted that the Ruling of the Taxing Master sets out the reasons by which she determined the quantum of instruction fees, making a notice of objection requiring that she furnishes reasons is completely superfluous. That to reject the reference application for want of a notice seeking reasons which are apparent would be to apply against the Plaintiff the provisions of Rule 11 in a manner offensive to Article 159 (2) (d) of the [Constitution](#). The Plaintiff relied in the case of [Wambugu Kariuki & Associates v Invesco Assurance Company Ltd \[2018\] eKLR](#) and [Machira & Co Advocates v Arthur K Magugu & Another \[2012\] eKLR](#).

### **Defendant's Submissions**

15. The Respondent herein filed its submissions on July 26, 2022 where two issues were raised for determination. The first issue was whether the Application offends paragraph 11 of the Advocates Remuneration Order and it was submitted that the Plaintiff filed this reference on May 19, 2022 being 7 days after the Taxing Officer made a Ruling on the Defendant's Party and Party Bill of Costs.
16. That pursuant to paragraph 11 (1) and (2) of the Advocates Remuneration Order, the Applicant was supposed to give a Notice in writing stating the items which it objects and request for reasons for the said decisions which reasons were to be given to it by the Taxing Officer yet the reference does not have a copy of the said notice and reasons given by the Taxing Officer. Reliance was placed in the case of *Machira & Co Advocates v Arthur K Magugu & Another (2012) eKLR*. And [Wambugu Kariuki & Associates v Invesco Assurance Company Limited \(2018\) e KLR](#).
17. It was submitted that a Reference flows from the decision of a Taxing Mater and without the same, the Applicant's grounds will be based on guess work and speculations as to what the reasons were and therefore the Application is incompetent and offends the provisions of paragraph 11 of the Advocates Remuneration Order.
18. The second issue is whether sufficient grounds have been advanced to warrant the setting aside the decision of the Taxing Master. It was submitted that the present Application is incompetent and ought to be struck out however should the court deem that the said Application is properly on record, then the Taxing Master applied the correct principle in assessing the instruction fees at Kshs 712,500/= being 75% of the charged amount of Kshs 950,000/= since the suit was determined summarily when the court upheld the Notice of Preliminary Objection.



19. It was stated that schedule 6 paragraph 1 (b) provides that when a matter has been determined in a summary manner, the instruction fees shall be 75% of fees chargeable under item 1 (b) and in this case the fees charge under item 1 (b) was to be determined from the subject matter in this suit being land parcel number Kisumu Municipality Block 9/263 which was valued at Kshs 50 Million. Reliance was placed in the case of *Joreth Limited v Kigano & Associates* [2002] eKLR and *Kagwini Kang'ethe & Company Advocates vs Penelope Combos & Another Nairobi HCCC Misc Number 394 of 2008*.
20. It was the Defendant's submission that the Taxing Master considered relevant factors and clearly applied the law and relevant principles in assessing the instruction fees and therefore prayed that the suit be dismissed with costs.

### **Analysis and Determination**

21. This court has carefully looked into the application and the evidence adduced by parties together with the submissions and the following issues need to be determined:

#### **1. Whether the Application is defective**

22. The Plaintiff instituted this suit vide a Plaint dated January 28, 2021 seeking for injunctive and eviction orders with respect to land parcel number Kisumu Municipality Block 9/263. That the Defendant upon being served with the Plaint, he filed a Notice of Preliminary Objection dated February 26, 2021 challenging the jurisdiction of this court on grounds that the Defendant was a controlled tenant under section 2 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act and this court upheld the Defendant's Preliminary Objection and struck out his suit with costs.
23. The Defendant prepared and filed his Party and Party Bill of costs and on May 12, 2022, the Taxing Master taxed the said Bill at Kshs 749,600/= and the Plaintiff being aggrieved by the decision of the Taxing Master, it filed this instant application challenging the said decision. The Defendant herein filed grounds of opposition to the said Application and stated that the Application is fatally defective, incompetent, unknown in law and an abuse of the court process as it offends paragraph 11 of the Advocates Remuneration Order.

Paragraph 11 of the Advocates Remuneration Order which states as follows:

- ' (1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.'
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.



- (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.'

24. In the case of *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR* the court stated thus:

' This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

25. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the *Constitution*, which proclaims that, 'courts and tribunals shall be guided by [the principle that] justice shall be administered without undue regard to procedural technicalities'. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.'

26. In the case of *National Oil Corporation Ltd v Real Energy Ltd & Another [2016] eKLR* Hon Justice GV Odunga observed that: -

' In my view there is no magic in requiring the Taxing Officer to furnish reasons before making a Reference. Where reasons are contained in the decision a party ought not to seek the same simply because it is fashionable to do so.'

27. The Defendant in his submissions stated that the Plaintiff filed this Reference on May 19, 2022 that is 7 days after the Taxing Master had made a Ruling on the Party and Party Bill of Costs. It was further stated that the Plaintiff was supposed to give a notice in writing stating the items it objects and request for reasons of the decision and therefore the Refence herein does not have the said notice and reasons given by the Taxing Master. It is this court's finding that the Applicant ought to have complied with the rules of procedure as required. The Plaintiff filed this Reference within the statutory period but failed to request for reasons of the decision of the Taxing Master.

## **2. Whether sufficient grounds have been advanced to warrant the setting aside of the decision of the Taxing Master.**

28. The Taxing Master in her Ruling stated that parties are bound by their pleadings and relied in the case of *Joreth Limited v Kigano & Associates Advocates [2002] EA 92* since as per the Plaint dated January 28, 2021, the Plaintiff at paragraph 12 stated that the value of the suit property and the developments thereon are valued at approximately Kshs 50 Million hence this court has pecuniary jurisdiction to hear and determine the matter.

29. It is the Plaintiff's case that the Taxing Master erred in principle by determining item 1 (a) on instruction fees with reference to the value of the suit property as disclosed in the Plaint, given that



- ownership of the suit property was not the subject matter of the dispute between the parties to the suit and failing to appreciate that the subject matter of the suit was on the question of whether the Defendant was a tenant of the Plaintiff paying Kshs 20,000/= per month in rent for a portion of the suit property or was a trespasser in either case of which the suit property was irrelevant.
30. The Defendant on the other hand stated that the Taxing Master applied the correct principle in assessing the instruction fees on item 1 (a) at Kshs 712,500/= being 75% of the charged amount of Kshs 950,000/= as the suit was determined summarily when the court upheld the Preliminary Objection. That the fees chargeable under item 1 (b) was to be determined from the subject from matter of the suit property which was valued at Kshs 50 Million.
  31. The term error of principle was defined in the case of *Kagwimi Kang'ethe & Company Advocates v Olerai Nurseries Limited [2009] eKLR* as follows;
 

' An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles-

Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] eKLR, the Court of Appeal held as follows: -

On 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.'
  32. Schedule 6 Paragraph 1 (b) of the Advocates Remuneration Order provides that when a matter has been determined in a summary manner, the instruction fees shall be 75% of fees chargeable under item 1 (b).
  33. In the case of *Eastland Hotel Limited v Wafula Simiyu & Co Advocates [2014] eKLR* the Court of Appeal stated that:
 

' This Court's decision in *Joreth Limited v Kigano & Associates Advocates [2002] EA 92* which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.'
  34. The Court of Appeal in *Peter Muthoka & Another v Ochieng & 3 others NRB CA Civil Appeal No 328 of 2017 [2019] eKLR* expounded on the principles in *Joreth Ltd v Kigano & Associates* (Supra) and set down the proper basis of taxing the instruction fees as follows;
  35. It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.



36. It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.
37. I am guided by the above case law and therefore I do not find any fault in the Taxing Master relying on the sum of Kshs 50 Million as the value of the suit property since the said value was clearly ascertained from the pleadings. This court finds that the Chamber Summons Application dated May 18, 2022 lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**A.O OMBWAYO**

**JUDGE**

