



**Mochama v Milgo (Environment and Land Miscellaneous Application
E001 of 2022) [2022] KEELC 15471 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

ISAAC MOCHAMA APPLICANT

AND

NELSON MILGO RESPONDENT

RULING

1. Before this court for determination is chamber summons dated 2nd February, 2022 expressed to be brought under Order 11 Rule 1, 2, & 4 of the [Advocates Remuneration Order](#) and Sections 3,3A and 63 (e) of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent.
 2. That this court be pleased to extend time within which the applicant should apply for grounds and or reasons from the trial court and or the executive officer of the court, the Chief Magistrate's court at Narok following the assessment of the respondent's certificate of costs dated the 6th of January in Narok ELC Case No. 109 of 2017 Isaac Mochama versus Nelson Milgo.
 3. That this honourable court be pleased to stipulate the time frame within which the applicant herein should file his reference to this court after the trial court and or the executive officer of the Chief Magistrates' court at Narok furnishes him with the reasons for the manner in which the costs awarded were arrived at.
 4. That pending the inter parties hearing of this application, this honourable court be pleased to issue an order of stay of execution of the decree herein in so far as it relates to recovery of the respondent's costs from the applicant herein in Narok CMCC ELC Case NO. 87 of 2012 Isaac Mochama versus Nelson Milgo.



5. That in the alternative, an order do issue for stay of further proceedings in Narok CMCC ELC Case No. 87 of 2012 Isaac Mochama versus Nelson Milgo subject to terms and or conditions that this honourable court may deem fit and just pending inter partes hearing and determination of this application.
6. That costs of this application be provided for.
2. The application is premised on the grounds *inter alia* that the applicant was not served with the respondent's bill of costs and the executive officer of the trial court did not assess the same and as such the costs of Kshs. 228,900/- was founded on orders that costs are assessed as drawn.
3. The application is supported by the affidavit of the applicant sworn on even date. In his affidavit, the applicant deposed that on January 17, 2022, he was served with a notice of execution giving him fourteen days to pay costs in the sum of Kshs. 228,900/=. He further deposed that he was not served with any bill of costs and neither was his advocate served and it was upon perusal of the court record that it was established that a bill of costs was assessed ex-parte and no date of assessment of the bill of costs was given to enable him attend court and participate in the same. He further deposed that after filing a bill of costs, the respondent's counsel ought to have served him or his counsel on record with a copy in order for him to participate in the exercise and as such together with his counsel, they have no notice of any bill of costs having been filed and or the date of assessment of the same.
4. The applicant further deposed that the trial court or the executive officer, in assessing the bill of costs is required by law to state why he arrived at the amount or figures assessed and awarded and that the bill of costs being assessed as drawn cannot amount to assessment. He further deposed that the awarded sum of Kshs. 228,900/- is quite colossal and on the higher side taking into consideration the nature of the suit and the claim and his property has been proclaimed pursuant to an application for execution by way of attachment of property. Further, that where a party is aggrieved by the amount awarded after assessment of costs, he should file a reference to the high court after writing to the taxing officer to be furnished with reasons explaining how the figures were arrived at within 14 days and that the affidavit of service on record purporting to service of the bill of costs, if any, is not true which is a good ground for allowing the prayers sought in this application.
5. The applicant further deposed that the assessment was done over a month ago and he cannot file a reference challenging the bill of costs at this stage until he has sought and obtained leave to file the same out of time once the prescribed period is enlarged.
6. The respondent filed a replying affidavit in opposition to the application sworn on March 16, 2022. The respondent deposed that the application is inept for the reasons that the grounds set out do not support the prayers sought, there is no provision in law permitting the applicant to challenge a certificate of costs issued by the court after assessment of costs and decree and which application seeks to curtail the respondent's fundamental right to be heard and enjoy the fruits of the decree and that the supporting affidavit violates Order 19 Rule 1 (3) of the *Civil Procedure Rules*.
7. The respondent further deposed that the applicant has not furnished this court with substantial evidence to show that he was not served with the notice of execution at all or in respect to a specific mode of service set out by the law. Further, that the plaintiff's costs are drawn to scale and in accordance with the *Advocates Remuneration Order*. Further that the applicant is not willing to settle the decree and this application has been made to cause delay and frustrate the efforts of the respondent to defeat justice and the respondent having obtained a decree against the applicant, he would be prejudiced if the application is allowed.



8. The application was disposed off by way of written submissions. The applicant filed written submissions dated October 14, 2022. The applicant submitted that in granting the application, the respondent will not be prejudiced as he will receive his rightful deserving decretal amount under the *Advocates Remuneration Order* and that the applicant should not be compelled to pay more than he should. The applicant submitted that he has a higher chance of success owing to the fact that the bill of costs was assessed ex-parte and that no bill of costs was served on him. The applicant relied on the cases of *Paul Wanjobi Mathenge versus Duncan Gichane Mathenge* [2013] eKLR and *Leo Sila Mutiso versus Rose Hellen Wangari Mwangi* Civil Application No. 225 of 1997.
9. The applicant further submitted that he wishes to file a reference against the decision of the taxing master awarding the sum of Kshs. 228,900/= which is manifestly excessive and contrary to the law and the principle under Schedule 7 of the *Advocates Remuneration Order*.
10. On stay of execution, the applicant submitted that the application raises arguable issues with higher chances of success and if stay of execution is denied the applicant will suffer irreparable loss as he will be forced to pay the decretal sum in the bill of costs and if the decretal sum is paid, the applicant may not recover the same since he does not know whether the respondent is in a financial position to refund if the objection succeeds. The applicant relied on the cases of *Mombasa Maize Millers Company Limited & Another versus Western Cross Express Company Limited* [2016] eKLR and *Re Global Tours & Travel Limited* HCWS No. 43 of 2000.
11. The respondent filed written submissions dated July 1, 2022. The respondent raised two issues for determination as below: -
 - a. Whether the trial court and or executive officer of the court can assess the costs.
 - b. Whether the trial court and or the executive officer of the court have to invite parties to attend to the costs assessment.
12. On the first issue, the respondent submitted that the respondent's counsel served the applicant with a copy of the costs and the court for assessment and that Section 27 of the *Civil Procedure Act* gives both the subordinate court and the high court discretion and jurisdiction to not only award costs but determine the extent at which those costs are to be paid and by which party and that taxation of costs and assessment of costs mean one and the same thing. The respondent relied on the case of *Benard Gichobi Njira versus Kanini Njira Kathendu & Another* [2015] eKLR.
13. On the second issue, the respondent submitted that the trial court is at liberty to choose whether to invite the parties for assessment of costs and that it is not mandatory for the trial court to invite parties for assessment of costs. In this case the respondent prepared a bill of costs dated December 14, 2021 and the court issued a certificate of costs dated January 6, 2022. The respondent submitted that there is no provision in law permitting the applicant to challenge a certificate of costs issued by the court after assessment of bill of costs and decree.
14. I have carefully analysed and considered the application, the replying affidavit and the written submissions filed by both parties and the issue for determination is whether the applicant is entitled to the orders sought.
15. In this case, the applicant contended that he was not served with a bill of costs which was thereafter assessed at Kshs. 228,900/- and notice of execution issued on January 7, 2022 which is prejudicial to him as he did not participate in the assessment. I have perused the lower court file ELC Civil Case No. 87 of 2012 and the record indicates that judgment was delivered on June 23, 2015. In the said judgment, the trial court issued among other orders that costs of the suit shall be borne by the applicant with



a right of appeal of 30 days. Mr. Onduso who was counsel for the applicant in the trial court upon making an oral application, was granted 30 days stay of execution.

16. The record further shows that by a letter dated December 14, 2021 addressed to the Executive Officer, Narok Law Courts, counsel for the respondent applied for assessment of the respondent's costs which was drawn to a figure of Kshs. 319,985/-. The same was however assessed and a certificate of costs issued at Kshs. 228,900/- on January 6, 2022. I however, do not agree with the applicant that costs were assessed as drawn as the trial court reviewed the same as per the corrections that can be seen against the items.

17. The legal position is that costs in the subordinate court matters are assessed under schedule V11 of the [Advocates Remuneration Order](#) which is specifically titled: "costs of proceedings in Subordinate courts." This position is further fortified by paragraph 51 of the [Advocates Remuneration Order](#) which provides:

"Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi's courts is that set out in Schedule V11)."

18. The applicant herein was a party to the suit in the lower court which judgment was in favour of the respondent. The successful parties before a subordinate court are not expected to draw an elaborate itemized bill of costs but in this case the respondent did so. A successful party is expected to write a letter to that court seeking for an assessment of costs as proposed or as drawn, upon which the sitting magistrate or Deputy Registrar of the subordinate court may assess/approve the costs as drawn or invite both parties to the bill to submit on the bill before a certificate of costs is given. Any party aggrieved by the decision thereof may file a reference before a judge in chambers under paragraph 11 of the [Advocates Remuneration Order](#).

19. Section 27 of the [Civil Procedure Act](#), provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

20. "Court" is defined, under Section 2 of the said [Civil Procedure Act](#), as "... the High Court or a Subordinate Court, acting in the exercise of its civil jurisdiction."

21. In my view, the taxing officer in the lower court may elect the mode of assessing the costs payable to a successful party. I place reliance in the case of [Supply Linkages versus Hudson Mangeni](#) [2020] eKLR where the court observed as follows; - "The subordinate court has a discretion either to assess costs *ex parte* and notify the parties or invite the parties and tax the same inter partes that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for



me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or the other.”

22. Rule 11 of the *Advocates Remuneration Order* provides;

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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 subsection (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) 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.”

23. Based on the above provision of the law, the applicant is indeed out of the timelines provided in law to write to the taxing officer requesting for an explanation on how the figures were arrived and for this reason I will allow the applicant leave to apply for grounds from the taxing officer on assessment of the respondent’s costs only.

24. Arising from the above, the chamber summons application dated February 2, 2022 is allowed only in terms of prayer 2 of the same. The applicant has 14 days from the date of this ruling to write to the taxing officer of the subordinate court. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 21ST DAY OF DECEMBER, 2022.

HON. MBOGO C.G.

JUDGE

21/12/2022.

In the presence of:-

CA:Chuma

