



REPUBLIC OF KENYA



Gituthi & 2 others v National Land Commission & another (Petition 5 of 2018) [2022] KEELC 15530 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
PETITION 5 OF 2018
LN GACHERU, J
DECEMBER 20, 2022**

BETWEEN

**STEPHEN MBUGUA GITUTHI 1ST PETITIONER
EUNICE NJERI NYOIKE 2ND PETITIONER
ALLAN MWANGI MAINA 3RD PETITIONER**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
ATHI WATER SERVICES BOARD 2ND RESPONDENT**

RULING

1. The 2nd respondent/applicant filed an application dated March 28, 2022 for orders:
 - i. Spent
 - ii. Spent
 - iii. That the ruling of the Deputy Registrar/ Taxing Master issued on the March 14, 2022, in respect of items 1,2,185,270,346 and 347 in the petitioner's Party and Party Bill of Costs dated 4th November, 2021 be set aside.
 - iv. That this honourable court proceeds to re-tax item Number 1, 2,185,270,346 and 347 of the petitioner's Party and Party Bill of Costs dated November 4, 2021
 - v. That in the alternative to prayer (4) hereinabove, the Party and Party Bill of Costs dated November 4, 2021 be referred back for taxation of items Number 1, 2,185,270,346 and 347 of the Bill of Cost with proper directions thereof



2. The application is anchored on the grounds stated on the face of the same and the supporting affidavit of Martha Wanjiku, for the 2nd respondent. The 2nd respondent contends that the costs awarded in items Number 1, 2, 185, 270, 346 and 347 are unreasonably excessive, punitive and oppressive. She deponed that the taxing master erred in principle by failing to give due consideration to Schedule No. 6 of the *Advocates Remuneration Order*.
3. The application is opposed by the petitioners/respondents vide a replying affidavit sworn by Eric Thige Advocate for the petitioners. He deponed that the Bill of Costs was drawn based on the work put in and the value of the subject matter. He sets out in paragraph 8 the grounds upon which they objected to the Bill of Costs and urged this court to set aside the ruling aside. The applications were canvassed by way of written submissions.
4. The petitioners filed their submissions in support of the application on September 8, 2022. They relied on the following authorities:
 - a. Schedule 6A(1)(j)(ii) of the *Advocates Remuneration Order* which provides for Party-to-Party Costs for proceedings in the High Court for Constitutional Petitions and Prerogative orders. It states:

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the Petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than Kshs. 100,000/=.
 - b. On the issue that the taxing master failed to consider relevant factors in enhancing the instruction fees, the Petitioners relied on the case of *Catherine Njeri Angote v Lucy Wangari Ngugi & another* (2021) eKLR in which it was held:

“The circumstances under which this court can interfere with the taxing masters exercise of discretion and the principles are to be found in the case of *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and another* (1972) EA 162. These principles are:

 - i. That the court cannot interfere with the taxing masters 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.
 - ii. 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.
 - iii. If the court considers that the decision of the taxing master discloses error of principle, the normal practise is to remit it back to the taxing



master 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;

- iv. It is within the discretion of the taxing master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.
- c. The petitioners referred the court to comparable decisions on References that involved Constitutional and Prerogative Orders including *R. v. University of Nairobi & Another Ex parte Nasibwa Wakenya Moses*, in which an award of Kshs. 4,000,000/= being instruction fees in a Judicial Review case by a student against the University was upheld; *Rose Wangui Mambo & 2 others v. Limuru Country Club & 15 others* (2020) eKLR wherein the court allowed Kshs.4,800,000/= as instruction fees in a suit between *3 Golf Club members and the Golf Club; and Muriithi Wanjau & Caesar Ngige Wanjau t/a Wanjau Advocates v. Telkom Kenya Ltd* (2011) eKLR where instruction fees were set at Kshs.18,420,886.62/=.
- d. On the issue that the 2nd respondent challenged the Ruling on the ground that the taxing master's Ruling resulted in an unjustifiably high costs, the petitioners/applicants submitted that this challenge lacked basis. They relied on the case of *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and another* (1972) EA 162 in which it was held:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat was too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

The petitioners/applicants thereby submitted that Item 1 be drawn at Kshs. 15,000,000/=
- e. On the issue of the getting up fees the petitioner/applicants relied Schedule 6A Part 2 of the *Advocates Remuneration Order* which states:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation.”
- f. Thepetitioners/applicants submitted that the matter proceeded for trial and was opposed. They thereafter relied on the case of *Nguruman Ltd v Kenya Civil Aviation Authority & 3 others* (2014) eKLR in relation to getting up fees. Lenaola J (as he was then) held as follows:

“It is clear that the respondents are entitled to getting up fees. They contested the Petition. From the record before me, the respondents contested the Petition, filed responses to it, filed written submissions and attended the hearing of the Petition, which was argued before Mumbi, J on November 28, 2012. That to my mind makes the Respondents entitled to getting up fees as they clearly and separately denied liability for the actions complained of.”



The petitioners/applicants also submitted that they were entitled to getting up fees from the filing of various Replying Affidavits, which were omitted by the taxing officer.

- g. On the issue of the taxing off various items related to commissioning of Affidavits which was unopposed in the Bill of Costs, the petitioners/applicants relied on the case of *Muri Mwaniki & Wamiti Advocates v Berben Co. Ltd & another* (2017) eKLR, where it was held that should the taxing master required prove of items under disbursements, then she will be at liberty to ask the parties concerned to avail them. This was also held in *Luka Wagana & 2 others v Charles Alexander Kiai & another* (2020) eKLR.
- h. On the issue of the taxing off fees for attendance at various meetings the Petitioners/Applicants relied on the Paragraph 7(g) of Schedule 6A of the *Remuneration Order* which states:
- “All necessary attendance (including attendances to take minutes of evidence of witnesses other than the party for whom the advocate is appearing) of any nature whatsoever not otherwise provided for per quarter-hour Kshs. 600/=).
- i. In the case of *Mwangi Keng'ara & Co. Advocates v Invesco Assurance Co. Ltd* (2021) eKLR Justice Mabeya held as follows:
- “The attendance where for meetings, service of pleadings, deliveries amongst others. The taxi officer held in the impugned ruling that attendance is envisaged under paragraph three of schedule 5 waffle court attendances and not otherwise....
- In view of the foregoing, the term attendance under this paragraph may mean attendance in court, attending meetings, attending to service or any other similar action the part of an advocate that facilitated the execution of the client's instructions. It does not restrict their attendances to court only.”
- j. On the issue of the fees for contempt proceedings, the petitioners/applicants relied on the case of *R v Kenya Medical Supplies Authority & another* (2019) eKLR, wherein the Court held as follows:
- “As regards the taxation of item on getting up fees and an award of Kshs. 166,000/= taxing master for this item, paragraph two of Schedule 6A of the *Advocates Remuneration Order* only requires denial of liability in our case for getting up these to be payable. In addition, a close reading of the paragraph shows that contrary to the exparte applicant's arguments, the matter need not proceed to full hearing, and it is sufficient that it is ready for and has been confirmed for hearing. It is not disputed that the present application was contested and proceeded to hearing.... A trial in this regard need not be only by way of viva voce evidence, and a trial is conducted pursuant to the directions of a court, including by way of affidavits, evidence, and submissions, which is allowed in Judicial Review Applications.”
- k. With regard to getting up fees for the contempt proceedings, the petitioners/applicants further relied on the case of *Hellen Waitbita Kabugi(suing as the Personal Representative of the Estate of John Paul Shikuta v Leonard Kamau Njuguna & another* (2018) eKLR in which the court held that such an application is sui generis for it in a way is unrelated to the primary suit and that the award of a sum for getting up was warranted.



- l. On the issue of unstamped receipts not being viable evidence, the petitioners/applicants submitted that they only paid the monies and that Zamconsult Valuers & Management Co. Ltd were the ones supposed to affix the revenue stamps as required by the Act. They relied on the case of *Swalleh C Kariuki & another v Violet Owiso Okuyu* (2021) eKLR, wherein it was held:

“On the Appellants contention that the court should not attach any probative value to receipts without revenue stamps are affixed on them, the court is of the view that it is a duty of the receiver of monies who has a duty to affix revenue stamps and not the payee who cannot be penalised for the omissions of the receiver.”

- m. This was similarly held in the case of *Joseph Kimani & another v James Kangara Kabanya* (2017) eKLR as follows:

“It is also trite that the receipt ought to be stamped by the receiver of the payment, and not the giver or the payee. Section 88 of the Act places a duty upon the receiver, not the payee to affix revenue stamps on a receipt.”

The 2nd Respondent through Mulekyo & Company Advocates filed their written submissions on the September 6, 2022, the application. They relied on the following authorities:

- n. On the issue of the subject matter of the suit, the 2nd respondent relied on the case of *Elijah Sikona & another v Mara Conservancy & 5 others* Civil Case No 37 of 2013 (2014) eKLR, wherein the Court defined a cause of action as follows:

“A cause of action is a factual situation, the existence of which entitles one person to obtain a remedy against another person.

The cause of action in this suit is found in paragraph 77 of the Petition dated August 29, 2018, in which the Petitioners stated the various ways the Respondents flouted the procedure of acquiring wayleaves, hence necessitating the filing of the Constitutional Petition before court”

- o. The 2nd respondent submitted that this suit is a Constitutional Petition seeking Prerogative Orders. That the provisions of Schedule 6(j)(ii) of the *Advocates Remuneration Order* 2014 therefore apply.

- p. The 2nd respondent further relied on the principles set out in the *Premchand Case* (*supra*).

- q. On the issue of the value of the subject matter, the 2nd respondent relied on the case of *Joreth Ltd v Kigano & Associates*, Civil Appeal No 66 of 1999 (2002) 1 EA 92, wherein it was held that the subject value for the purposes of taxation of the bill of costs ought to be determined from the pleadings, judgement or settlement, but if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instructions fees as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matters, the interests of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.



- r. On the issue of disbursements in relation to the valuation fee, the 2nd respondent relied on the case of *Gathingwa Mwangi & Company Advocates v Jane Mumbi Kiano* (Nyeri HC Misc App No 318 of 2013) where it was held:

“It is upon the party seeking the costs to really justify them. It was the duty of the Applicants to specify cogently and with conviction the complex elements in their proceedings, to specify their responsibilities he had in dealing with the matter to demonstrate the industry and time involved, the weight of documentation. There is nothing to stop the applicant from placing every available piece of evidence in support of the bill of costs. No such submissions are on the record from the applicant. It is not enough to file, a bill of costs and expect the taxing officer to find all the supporting evidence by themselves from their record system”

- s. On the issue of unstamped receipts provided by the Petitioners/Applicants, the 2nd Respondent relied on section 19(1) of the *Stamp Duty Act* which provides:

“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

- a. in criminal proceedings; and
- b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

- t. On the principles for guiding review of taxation, the 2nd respondent relied on the case of *President of Republic of South Africa & others v Gauteng Lions Rugby Union & another* where it was held:

- a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation;
- b. A moderating balance must be struck which affords the innocent party adequate indemnification but within reasonable grounds;
- c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case;
- d. An overall balance between the interests of the parties should be maintained
- e. The taxing master should be guided by the general precepts that the fees allowed constitute reasonable remuneration for necessary work properly done;
- f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing masters views differ so materially from its own that it should be held to vitiate the ruling.

- u. Lastly, the 2nd respondent relied on the case of *Republic v Minister of Agriculture ex parte W'njuguna & others* on the importance to taxation of costs by the taxing master. It was held:

“Since costs are the ultimate expression of essential liability attendant on the litigation event, they cannot be served without either a specific statement of the authorising



clause in their law common or are a particularized justification of the mode of exercise of any discretion provided for. The complex elements in the proceedings that guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of forensic responsibility placed upon council when they prosecute the substantive proceeding must be described with specificity."

5. The court has considered the instant Reference, the affidavits, and the rival written submissions together with the authorities cited. The singular issue for determination is, whether there are sufficient grounds to warrant this Court to interfere with the taxing officer's Ruling dated March 14, 2022?
6. The question whether the amount was unreasonably excessive, punitive and oppressive can best be answered by the Court in *Rogan-Kamper v Grosvenor* [1978] eKLR where the court drew an inference of what constituted "reasonable" and "manifestly excessive". The court held:

"Are there two tests of reasonableness which the taxing officer must work under, and the test of manifestly excessive or manifestly inadequate which the judge must perceive, synonymous. Do they bear the same, concept for if they do then these two judicial officers are to work with a similar approach when, taxing and reviewing a bill of costs respectively, and in deciding that a bill is either not excessive or not insufficient. I think the meaning of the expressions "manifestly excessive" and "manifestly inadequate" used in rule 109(2) is intended to convey the concept of reasonableness in paragraph 9(2). That which is manifestly excessive or inadequate cannot be reasonable. That which is reasonable cannot be manifestly excessive or inadequate. I think these expressions connote the same datum point.

It is fairly easy to, understand the meaning of the word "reasonable". The dictionary meaning (Cassels p.951) is - "endowed with reason; rational, reasoning, governed by reason; conformable to reason, sensible, proper."

7. It must mean that which does not outrage or jolt the mind, that which does not give rise to confrontation. But what it meant by "manifestly excessive" or "manifestly inadequate". I consider to experience such a feeling of visible excess or inadequacy there must be a reactive impact which jars the mind with its apparent immensity or with its apparent insufficiency, a reactive impact that there is obviously to, much or too little, which requires to be set right because it is outside the ordinary proper measure, and both unfair and unequal.
8. The court held further

"If, after such a reaction, and upon a study in all the circumstances, the sum allowed falls outside the bracket of reasonableness, it is manifestly excessive or inadequate as the case may be and a judge may regulate it on a reference to him. In some cases the changing economic circumstances due to evolutionary processes may require the circumference of the bracket of reasonableness to be widened to allow a larger sum for instructions fee than that allowed in comparable cases in the past. But caution has to be exercised in increasing the fees for instructions so that legitimate litigation does not become inaccessible to common citizens on account of its expensiveness."

9. This court has already found hereinabove that the costs awarded based the subject matter was proper and justified. It takes cue of the voluminous nature of the pleadings and documents involved and the nature of work put in. As laid out hereinabove, this court has the power to set aside the discretionary powers of the trial master if it is evident the award was unreasonably excessive. The 2nd respondent has not demonstrated that the taxing master capriciously applied her discretion and arrived at an



unreasonable, unjustified or excessive cost. This court finds no reasons to disturb the award in items No. 1 & 2.

10. On item No 185 & 270, this court notes and appreciates that they were as a result of the application filed in the suit. No substantial basis has been laid out before this court to warrant interference with the award. While the court agrees with the 2nd Respondent that the process of taxation is not a mathematical error, it is imperative to note the principles for interference with the discretionary powers of the taxing master. As noted above, the value of the subject matter and the work put in, it is just to conclude that the same was reasonable. Thus this court finds no basis for interfering with the award.
11. On item 346 & 347, which was on filing fees and disbursement. The 2nd respondent contends that the petitioners ought to have pleaded in the Petition. Respectfully, this court does not agree with the said contention and that was not the main issue in the Petition. This court notes the case of *Gibinga Mwangi & Company Advocates v Jane Mumbi*, supra, as quoted by the 2nd respondents and appreciates the sentiments of the court that nothing prevented the applicant therein from providing evidence to support his Bill of Costs.
12. There is no strand of evidence that the taxing master was not adequately guided. Whether additional evidence was availed or not is neither an issue that this court has been addressed on nor is an issue for determination by this court. While it is trite law that special damages must be specifically pleaded and proved this is in respect of the substance of a case and not on the Bill of Cost which requires prove in form of documentation. This court cannot therefore interfere with the discretion of the taxing master.
13. Having found as hereinabove, and having considered the rival written submissions in depth, this court finds and holds that the Notice of Motion Application dated March 28, 2022, by the 2nd respondent herein is not merited. The same is dismissed entirely with costs to the petitioners herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr. Kariuki holding brief for Petitioners/Respondents

Absent – 1st Respondent

Ms. Munyiva holding brief for Mulekyo 2nd Respondent/Applicant

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

