



REPUBLIC OF KENYA



Gituthi & 2 others v National Land Commission & another (Petition 5 of 2018) [2022] KEELC 15377 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
PETITION 5 OF 2018
LN GACHERU, J
DECEMBER 8, 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. Through a ruling dated March 14, 2022, in relation to the party-to-party bill of costs dated November 4, 2021, the taxing officer (Deputy Registrar) at the Murang'a ELC taxed the bill of costs at Ksh 8,314,364/=, down from the total in the Bill of Costs of Kshs 27,174,242 thereby taxing off Kshs 18,859,878/=.
2. The applicants dissatisfied with the taxing officer's decision filed the present application dated April 6, 2022, seeking to set-aside the said ruling. The application was made on the grounds that the taxing officer misdirected herself in taxing off item No 1 and 2 on the bill of costs relating to instructions and getting up fees, without taking into consideration the nature and importance of the petition, value of the subject matter being Kshs 23,400,000,000/=, the complexity of the matter, time spent by the advocates and the minimum fees for party-to-party costs as prescribed under paragraph 1(j) of schedule 6A of the *Advocates Remuneration Order* (2014).

Furthermore, that the taxing officer failed to consider that the advocates having care of the matter were based in Nairobi, while the matter proceeded in Murang'a, ELC and misdirected herself by failing to tax certain items as the same were not dated or listed in the Act.



3. The application was supported by the affidavit of Eric Thige Advocate from the law firm of Muri Mwaniki, Thige & Kageni LLP Advocates. He prayed that this court set aside the ruling of March 14, 2021, on the grounds provided.

The application was opposed by Ms Martha Wanjiku, the Principal Legal Officer of the 2nd respondent through a replying affidavit dated April 27, 2022. In it, she averred that the petitioners were awarded costs vide a judgement issued on July 31, 2019, and proceeded to file a party and party bill of costs, which was taxed on March 14, 2022, by the Deputy Registrar awarding the petitioners a sum of Kshs 8,314,364.00/=.

4. The 2nd respondent averred that the taxing officer misdirected himself in law in arriving at that amount considering that in the judgement of July 31, 2019, the judge held that the subject matter was not the valuation or compensation for interest that the respondents would acquire in the petitioner's land, but was a determination of whether the process adopted by the 2nd respondents in acquisition of wayleaves in the petitioner's land was in tandem with the *Constitution*.
5. The 2nd respondent avers that the petitioners were mistaken to quote a global figure of Kshs 23,400,000,000/= as the subject matter of the petition which they did not object to in the suit, but only the issue with the process the 2nd respondent's used to acquire wayleaves. They also opposed the instructions and getting up fees of Kshs 3,000,000/= and Kshs 1,000,000/= respectively as the matter was neither complex nor novel as to justify the excessive figures. That the suit being a constitutional petition sought prerogative orders to ensure the respondents complied with the *Land Act 2012*, while acquiring the Wayleaves in their parcel of land. They further contended that the matter was determined within a year.
6. The matter was canvassed by way of written submissions.
7. The petitioners/applicants 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/applicants referred directed 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. The petitioners/applicants submitted that the matter proceeded for trial and was opposed. They thereafter relied on the case of *Nguruman Ltd v Kenya 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 Vs 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.”

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

a. 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”

b. 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.

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

d. 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.

- e. On the issue of disbursements in relation to the valuation fee, the 2nd respondent relied on the case of *Gathinga 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”

- f. 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.

- g. 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.
- h. 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 officers 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.”
9. 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?
- The circumstances under which a court may interfere with the Taxing Officer’s exercise of discretion are where either the decision was based on erroneous principles, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. Some of the relevant factors to be taken into account under the Advocates Remuneration Order include the nature and the importance of the 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. The principles for consideration were outlined in *First American Bank of Kenya vs Shah and others* [2002] 1 EA 64.
10. The matter before this court is a reference filed by the petitioners/applicants against the ruling of the Deputy Registrar who taxed the petitioners’ bill of costs at Kshs 8,314,364/=, down from the total in the Bill of Costs of Kshs 27,174,242/= thereby taxing off Kshs 18,859,878/=. They filed the Reference on the grounds that the taxing officer misdirected herself to tax off items, that the items taxed were unreasonably excessive and that the said items ought to be remitted for re-taxation. They submitted that the matter was complex and novel, involved a subject matter valued at approximately Kshs 23.4 Billion, and that the matter stemmed from an acquisition of properties done ultra vires by the Respondents, involved a large number of claimants, over sixty, and their respective land parcels and involved contempt proceedings, all amounting to a voluminous amounts of research and work.
11. The 2nd Respondent opposed the application on the main ground that the Petitioners’ Bill of Costs had valued the subject matter at approximately Kshs 23.4 billion for the Construction of the Northern Collector Tunnel being a Vision 2030 Flagship Project by the National Government. They averred that the Petition was about whether the Respondents had followed due process in acquisition of wayleaves in the Petitioner’ parcels of land. That the whole project included laying of pipelines, construction of two 50-meter shafts, construction of 3 river diversions weirs, expansion of the Gigiri and Kigoro Water Reservoirs and the construction of Githika concrete outfall channel amongst other works across Murang’a, Kiambu and Nairobi Counties.

The main issue for determination in this Reference is whether the value of the subject matter is indeed Kshs 23,400,000,000/=. The matter is indeed a Constitutional matter involving the legal means for compulsory acquisition of land, for wayleaves, by the government for use in a project of national



significance. This puts the matter squarely under Schedule 6A (j)(ii) of the [Advocates Remuneration Order](#) which places the minimum fees at Kshs. 100,000/=.

12. The [Advocates Remuneration Order](#) under Rule 21 provides for Scale fees and how they are calculated including the value of the subject matter. It states:

"In the calculation of scale charges the basis of charge shall unless otherwise provided in the Schedules, and irrespective of the number of titles involved or documents required to be prepared or approved, be the sum set forth in the deed or document as the price or consideration or, if no price or consideration or only a nominal price or consideration is set forth, the value of the subject matter affected by the deed, which shall be deemed to be—

- a. the value fixed for the purpose of stamp duty; which failing
- b. the sum at which the property affected has last been passed for estate duty; which failing
- c. the last price at which a sale has taken place within ten years from the date of the transaction; which failing
- d. the estimated average market value during the preceding three years."

13. The Court of Appeal in the case of [Joreth Ltd v Kigano & Associates](#) NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR in determining the issue of instructions fees stated that;

"We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

14. This Court persuaded by the 2nd Respondent's position that despite the scale of the project to be undertaken being Kshs 23.4 Billion, the matter for determination by the court revolved on the creation of Wayleaves on the Petitioners property. In the case of [Machareus Obaga Anunda v Kenya Electricity Transmission Co Ltd](#) [2015] eKLR, Justice Okong'o set down the procedure for acquisition of a wayleave as follows:

"Section 144 (4) of the Land Act provides that an Applicant for a wayleave shall serve a notice of its application for the creation of a wayleave to all persons occupying the land over which the wayleave is sought, the County Government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed wayleave. Section 146 of the Act requires the commission to consider all representations and objections received pursuant to the said notices and recommend to the Cabinet Secretary whether to carry out a public inquiry into the representations and objections or refer the application for the wayleave to the county government or to initiate and facilitate negotiations with the persons who have made representations on the application with the Applicant with a view of reaching a consensus on the application. The Cabinet Secretary is supposed to determine whether or not to create a wayleave after considering as the case may be, the recommendation of the commission, or the advice of the County Government or the



outcome of any negotiations that may have been reached between the Applicant for the right of way and those who had made representations or objections. If the Cabinet Secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya Gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the Cabinet Secretary to the Court on a point of law."

15. From the above quoted case, it is noted that the procedure for creation of Wayleaves is defined in law and the procedure clearly provided for acquisition of property for such purpose. It is therefore not a novel or complex matter in the considered opinion of this Court. The project involves various Petitioners which has been considered.
16. Taking into account that the 2nd Respondent failed to adhere to the provisions set out for the purposes of Wayleaves, the present suit was filed and costs were awarded to the successful party.
17. This court is swayed by the case of *Muriu Mungai & Company Advocates v China Civil Engineering Construction Corporation (K) Ltd* [2019] eKLR which involved creation of way leaves on an entire project that was in excess of Kshs.8 billion by the Kenya AirPort Authority. The injunction sought was to stop the construction works within the way leave and a declaration that the Respondent was entitled to exclusive use of the Wayleave. This resonates with the holding in the *Kipkorir, Titoo & Kiara Case (supra)*, where the Court observed that the subject matter of the suit should be the property that a party seeks to save and or protect.
18. It was further held in the *Kipkorir, Titoo & Kiara Case (supra)* as follows:

“My finding on the subject matter in dispute in HCCC No 2 of 2016 is that it did not concern the investment of some USD80,000,000 but the extent to which the defendant would access and deal with the wayleave granted to the plaintiff by the Kenya Airports Authority.

Therefore, when the taxing officer held that “the value of the subject matter could be determined from the pleadings and the same is USD80,000,000/=”, she fell into error and that error ought to be corrected by this court upon the reference filed by the client. If find that there was an outright error in principles and therefore I set aside the taxation and direct that the file be remitted back for taxation by a taxing officer at Mombasa High Court other than Hon D Wasike, Deputy Registrar.”

19. This Court is persuaded by the above Ruling for the reasons that in a taxation matter, one has to be able to identify the subject matter amidst other considerations which may or may not be taken into account. The argument presented in the *Kipkorir, Titoo & Kiara Case* is persuasive in this regard.
20. The taxing officer considers inter alia, the value of the subject matter from the pleadings, the complexity of the matter and the time taken. In this case, it is discernible that it was not the Respondent’s entire investment that was in dispute even though if the dispute was not solved, it was possible the damage could have affected the investment and also endangered the members of public. The width and breath of the dispute was the Wayleave granted by the Respondents. (See the Court of Appeal case of *Muriu Mungai & Company Advocates v China Civil Engineering Construction Corporation (K) Ltd* [2019] eKLR).
21. Therefore, this Court finds that the taxing master correctly applied her mind to the issues for consideration. The Respondents defended a claim in regard to the trespass or encroachment consisting of the Wayleave, as the entire investment of the 2nd Respondent was not in dispute. Consequently,



this Court finds the instant Reference is not merited and the same is dismissed entirely and the taxing officer's decision is upheld and it stands.

22. For the above reasons, the court proceeds to dismiss the instant notice of motion application dated April 6, 2022, with costs to the 2nd respondent.

It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr Kariuki H/B Thige for the Petitioners/Applicants

1st Respondent – N/A

Mr Muuo H/B Mulekyo for the 2nd Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

8/12/2022

