



**Nganda & another v Makau & 3 others (Environment & Land Case
75 of 2017) [2022] KEELC 15268 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 75 OF 2017**

TW MURIGI, J

DECEMBER 7, 2022

BETWEEN

JOHN SILA NGANDA 1ST PLAINTIFF

JOHN KYALO MUTUA 2ND PLAINTIFF

AND

ALFRED MUEMA MAKAU 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

**DIRECTOR OF LAND ADJUDICATION AND AND SETTLEMENT 3RD
RESPONDENT**

**PERMANENT SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN
SETTLEMENT 4TH RESPONDENT**

RULING

1. By a notice of motion dated March 28, 2022 brought pursuant to the provisions of article 159 (2) (d) of the [Constitution](#), sections 3A and 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#) the applicant seeks the following orders:-
 1. That this honourable court be pleased to review and vacate the order entered by honourable Otieno J on March 7, 2022 taxing the bill at Kshs 90,375/=.
 2. That the honourable court be pleased to allow the submissions of the applicant be placed on record.
 3. That the cost of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Eric Musyoka advocate on the even date.



3. A summary of the grounds and the averments is that the court taxed this matter without hearing the 1st defendant/applicant. That the bill of costs was filed in court on December 10, 2021 and the applicant was served on February 7, 2022. That on February 28, 2022 the applicant's advocate was still seeking instructions when the matter was listed for hearing.
4. Counsel averred that on the said hearing date, the applicant's advocate tried to login to the proceedings through the court link but was unsuccessful. That after seeking to file its submissions, the applicant's advocate was informed that the court file was with the honourable magistrate. Counsel argued that it is in the interest of fairness that before taxation is done, the submissions of the applicant be considered.
5. Opposing the application, the plaintiff/respondent *vide* his replying affidavit filed in court on April 26, 2022, averred that the application is time-barred having been filed after an inordinate delay. The respondent argued that the applicant's advocate was fully aware of the hearing date but failed and or refused to participate in the hearing on February 28, 2022. He argued that no proof has been provided to support the assertion that the applicant's advocate tried to log in but was unsuccessful. That after being served with the ruling notice on March 4, 2022, the ruling was delivered on March 7, 2022. The respondent averred that the applicant waited a further 21 days to file the instant application.
6. He further averred that the application offends the mandatory provisions of the law and that the applicant is using dubious means to deprive the respondents the fruits of their judgment. He went on to state that the applicant has not demonstrated the threshold for grant of the orders sought.
7. The application was canvassed by way of written submissions.

THE applicant'S SUBMISSION

8. The applicant's submissions were filed in court on August 2, 2022. Counsel for the applicant reiterated the contents of the supporting affidavit to the application. It was submitted that the bill of costs herein was taxed without hearing the applicant which is in violation of the *Constitution*.

The Respondent's Submissions

9. The respondent's submissions were filed in court on July 18, 2022. Counsel for the respondent submitted that the application is an abuse of the court process as it offends the provisions of paragraph 11 of the *Advocates Remuneration Order*. Counsel argued that the applicant ought to have filed a reference as it is the proper legal procedure for challenging the decision of the taxation officer.
10. Counsel further submitted that under order 45 rule 1 of the *Civil Procedure Rules*, on which the instant application is premised, the law requires that a review application should be made before the court which delivered the decision. It was also submitted that there was nothing for this court to review because the applicant had not attached the decision he is challenging to his application.
11. The respondent relied on the following authorities to buttress his submissions: -
 1. *Republic v University of Nairobi & another ex parte Nasibwa Wakenya Moses [2018] eKLR*;
 2. *Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (Sued as the Management Committee of Chelimo Squatters Group) [2018]*.



ANALYSIS AND DETERMINATION

12. Having considered the application, affidavits and the rival submissions, I find that the only issue that arises for determination is whether the the taxing master committed any errors of principle while taxing the bill of costs.
13. The procedure to be followed when a party is dissatisfied with a decision of a taxing officer is anchored on paragraph 11 of the [*Advocates \(Remuneration\) Order, 1962*](#) which provides as follows: -
 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 sub paragraph (1) or sub paragraph (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.
14. In [*Machira & Co advocates v Arthur K Magugu & Another \[2012\] eKLR*](#), the Court of Appeal aptly held as follows;

“Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. appeals require the typing of proceedings, compiling records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in section 80 of the [*Civil Procedure Act*](#) of discovery of new and important matters, errors on the face of the record and so on. In our view the rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on advocates' bills of costs through references under rule 11 to a judge in chambers.”
15. Similarly, in [*Donholm Rabisi Stores \(suing as a firm\) v East Africa Portland Cement Limited \[2005\] eKLR*](#), HPG Waweru J held as follows;

“Taxation of costs, whether those costs be between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the [*Advocates \(Remuneration\) Order*](#). The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under rule 11 of the [*Advocates \(Remuneration\) Order*](#). The present application is not such reference. The application seeks an order that would



have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs.”

16. The said principles were also re-affirmed by the Court of Appeal in *Joreth Limited v Kigano and Associates [2002] 1 EA 92*. As follows:-
 - i. That the court cannot interfere with the taxing master’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;
 - 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 errors of principle, the normal practice 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.”
17. The 1st defendant is aggrieved by the decision of the taxing master on the grounds that the taxing master failed to consider the 1st defendant’s submission contrary. The 1st defendant argued that the taxing officer ought to have considered his submissions before taxing the bill of costs. He maintains that the failure to consider his submissions was contrary to the constitutional right to be heard.
18. Before the court interferes with the decision of the taxing master it must be satisfied that the taxing master’s ruling was clearly wrong. The court can interfere if it is proved that the amount taxed was manifestly excessive or low, or where there is proof that the taxing master followed a wrong principle in reaching her decision.
19. In the existing circumstances, what is before this court is not a proper reference for the court to interfere in with the jurisdiction of a taxation court. I find that an order by the taxing master concerning taxation of a bill of costs can only be challenged before a judge by way of a reference initiated by way of a chamber summons as required by the provisions of paragraph 11(2) of the *Advocates Remuneration Order* and not by way of a review under the provisions of order 45 rules 1 and 2 of the *Civil Procedure Rules*.
20. As it stands, the applicant herein has not invoked the proper legal provisions in challenging the Taxing officer’s decision under prayer 1 of the application.
21. The present application is premised under article 159(2) (d) of the *Constitution*, section 3A of the *Civil Procedure Act* amongst other provisions of the law.
22. In the case of *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Company advocates (2013) eKLR*, citing with approval the case and decision of *Kariuki Networks Ltd*



Ɖ Another v Dally Figgis advocates, Civil application No Nai 293 of 2009 the Court of appeal held that:

“The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.”

23. From the above findings which is binding to this court, it is clear that the oxygen principle and/or article 159(2) (d) of the *Constitution* does not oust the jurisdiction of this court to determine the application when there are clear procedures under the *Advocates Act*.
24. In the end, I find that the application dated March 28, 2022 is fatally defective and the same is dismissed with costs to the plaintiff/respondent.

HON T MURIGI

Judge

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr Kwemboi

Muthama holding brief for Mutua Makau for the respondent.

