



**Muriu v Nyongesa (Environment and Land Appeal 11 of 2019)  
[2022] KEELC 15303 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15303 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 11 OF 2019  
CA OCHIENG, J  
DECEMBER 5, 2022**

**BETWEEN**

**CHARLES MWANGI MURIU ..... APPELLANT**

**AND**

**BENJAMIN MAKOKHA NYONGESA ..... RESPONDENT**

**RULING**

1. What is before court for determination is the appellant's notice of motion application dated the April 5, 2022 where he seeks the following orders:
  - a. That the decision of the Deputy Registrar dated March 9, 2022 be set aside and the respondent's Party and Party Bill of Costs dated March 3, 2021 be taxed afresh.
  - b. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the supporting affidavit of Leonard Githua Advocate, who is in conduct of the matter on behalf of the Appellant. He deposes that the appellant filed the instant Appeal vide a Memorandum of Appeal on April 12, 2019 and later filed a Record of Appeal on December 3, 2019. He confirms that the Appellant later filed a Notice of Withdrawal of the Appeal and through a Ruling dated the February 19, 2021, this Appeal was marked as withdrawn with costs to the Respondent. He avers that the respondent filed a Party and Party Bill of Costs dated the March 3, 2021 seeking a total sum of Kshs.809,273.63. Further, that on March 9, 2022, the Taxing Officer delivered her Ruling and awarded the Respondent Kshs. 206,847.00. He confirms that the Appellant vide his letter dated the March 10, 2022 notified the Taxing Officer of his intention to object to the taxation of the Bill of Costs. He insists the Taxing Officer erred in principle in assessing costs and made serious errors. Further, that she erred by awarding getting up fees yet the Appeal did not



proceed; awarding VAT contrary to a High Court decision and Awarding fees for perusal of Record of Appeal. He reiterates that the taxation of the Bill of Costs was hence irregular.

3. In opposition to the instant Application, the respondent filed a replying affidavit where he deposes that the application is fatally defective and should be struck out. He avers that the instant Application is not a Reference but an Appeal against a taxation decision. Further, that it is not by way of Chamber Summons nor a miscellaneous application. He insists that this court lacks jurisdiction to determine an objection on the Taxing Officer's decision as filed or at all. He avers that the objection lacks merit and insists that the Taxing Officer did not err in principle. He contends that Schedule 6 (1) (j) (a) of the Remuneration Order, 2014 does not apply in this instance. Further, that the Taxing Officer was lenient to the applicant by awarding the minimum sum. He reiterates that the Taxing Officer is allowed to award Getting Up fees where the Appeal has only been filed. Further, that this Appeal severally came up in court and the respondent showed up at all occasions. He highlights that on September 17, 2019 the appellant filed an application seeking injunctive orders and he filed a Notice of Preliminary Objection dated the October 30, 2019 to oppose it. He states that he filed a Cross Appeal dated the February 19, 2020 and it is after that, when the appellant withdrew the instant Appeal. He explains that the appellant is selective on the High Court decisions on award of VAT on party and party Bill of Costs. Further, that a party that hires an advocate to represent him or her is entitled to VAT as properly awarded by the Taxing Officer. He reaffirms that Schedule 6 paragraph 8(a) of the Advocates Remuneration Order permits charging of perusal fees.
4. The Application was canvassed by written submissions, although it is only the appellant that filed his.

#### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application dated the April 5, 2022 including the respective affidavits and applicant's submissions, the only issue for determination is whether the decision of the Deputy Registrar dated the March 9, 2022 should be set aside and the respondent's party and party bill of costs dated the March 3, 2021 taxed afresh.
6. The respondent contends that the Application is incompetent since it was filed through a Notice of Motion instead of Chamber Summons hence it cannot be deemed as a reference.
7. In the case of Gori, Ombongi & Company Advocates V Mary Wangechi Kamara (2022) eKLR, the court observed that:

“One other thing I may comment on is whether the application should have been brought by way of chamber summons or by way of notice of motion. Nowadays, it is immaterial whether an application is brought by either way. This was explained by Emukule J. (as he then was) in the case *Susan K Baur v Shashikant Shamji Shah & another* [2011] eKLR where he stated that: “The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective.”

8. In associating myself with this decision, I opine that the mode of filing the instant Application does not touch on the substance of the dispute herein and the Respondent's argument is contrary to the



provisions of article 159 (2) (d) of the Constitution which requires courts' to dispense substantive justice and avoid relying on procedural technicalities. In the circumstance, I will dismiss this argument and proceed to determine the instant application on merit.

9. The Appellant has challenged the taxed amount on Getting Up fees, VAT Charges and Perusal Fees.
10. On the Getting Up fees, the Appellant argues that the award of Kshs. 25,000 was not merited as the appeal did not proceed for hearing and there was no certificate by the court to the effect. The Respondent insists that the case is a proper one for award of Getting Up fees in view of the extent of the difficulty of work done as provided for under schedule 6 of the Advocates Remuneration Order 2014. I note the appellant has not denied that he only withdrew his Appeal after the Cross Appeal had been filed. On Getting Up fees, Advocates Remuneration Order (2014) stipulates thus:

“In any appeal to the High Court in which a respondent appears

at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee...”

11. Since the Respondent participated in the interlocutory Application dated the September 17, 2019 and filed a Notice of Preliminary Objection dated the October 30, 2019 to oppose it as well as a Cross Appeal dated the 1 February 9, 2020, after which the Appeal was withdrawn; while relying on the legal provisions I have cited, I opine that he is indeed entitled to Getting Up Fees and will not interfere with the Taxing Officer's decision on the same.
12. On award of VAT, the Applicant argued that there are binding decisions by the High Court that VAT is not payable in respect of a party and party bill of costs and relied on the case of Paramount Bank Limited vs Naqvi Syed Qamar (2021) eKLR. I however wish to point out that decisions of the High Court are not binding on this court but are merely persuasive in nature. In the case of Kenya Commercial Bank Limited v Stagecoach Management Limited [2017] eKLR, Judge Francis Tuiyott (as he then was) while dealing with a dispute in respect to an award of VAT in relation to Party and Party Bill of Costs, aptly observed that:

“The fight referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts VAT under section 5 of the Value Added Tax Act, 2013 (No. 35 of 2013). It was properly charged on the basic instruction fee of Kshs.332,675. The contention to the contrary has no basis, and this leg of the reference also fails”. 15. Both decisions are of persuasive value and at the “T”- junction I turn with Emukule J, but add as follows. As held by the Supreme Court in Jasbir Singh Rai (supra) costs are a means by which a successful litigant recoups amounts expended in fighting a case. If the successful Litigant has hired the services of an Advocate and has had to pay out VAT to the Advocate then that ought to be recouped by including a charge of VAT on the Party to Party Costs. That, however, cannot arise if the Litigant acts in person. 16. In the matter at hand, the successful party was represented by Counsel and since there is no argument that the said Counsel is not registered to pay VAT, I cannot fault the Taxing Officer's decision to allow VAT.”

13. Based on the facts as presented while associating myself with the decision cited above, noting that the Respondent who was the successful litigant in this instance, had to recoup the fees he had paid in



dealing with his case as he even hired an Advocate to represent him, it is my considered view that VAT is chargeable. Hence, I will not interfere with the Taxing Officer's decision on this point.

14. On perusal fees, the Applicant argued that the same is not recoverable as it is covered under instruction fees. On perusal of documents, Schedule 6 Paragraph 8(a) of the *Advocates Remuneration Order* (2014) provides as follows:

“Of pleadings, memorandum of appeal, record of appeal, affidavits, interrogatives and answers thereto, notices to admit, petition to wind up company, petition in insolvency, notice of motion in court, originating summons or other necessary documents not specifically provided for per folio Kshs 50.”

15. In relying on these provisions and applying them to the circumstances at hand, I find that the Respondent was indeed entitled to perusal fees and I do not find that the Taxing Officer erred in awarding the said amount.

16. The Appellant has insisted that the Taxing Officer erred in principle by taxing the Bill of Costs as she did. In the case of *Republic v Ministry of Agriculture and 2 others: Ex parte Muchiri W'Njuguna & others* (2006) eKLR it was held as follows:

“The court cannot interfere with the taxing officer's decision 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 inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts.”

17. In the current scenario, it is my considered view that the Taxing Officer did not err in taxing the costs as she did as they were as per the scale. Based on the facts as presented while associating myself with the quoted decision, I find that the Appellant has failed to demonstrate the errors committed and to my mind he seems to have an issue on how the Taxing Officer exercised her discretion. In the circumstances, I will proceed to uphold the determination of the Taxing Officer dated the March 9, 2022 as regards the Award on Getting Up fees, VAT and perusal fees as per the Bill of Costs dated the March 3, 2021.

18. It is against the foregoing that I find the appellant's notice of motion Application dated the April 5, 2022 unmerited and will proceed to dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF DECEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

