



Hezekiah v Gor Construction and Hardware Limited (Environment and Land Miscellaneous Application E047 of 2024) [2025] KEELC 1107 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E047 OF 2024
SO OKONG'O, J
MARCH 6, 2025**

**IN THE MATTER OF A REFERENCE FROM THE RULING OF
THE TAXING OFFICER IN KISUMU MCELC NO. 25 OF 2017**

BETWEEN

ONG'UDI OKUMU HEZEKIAH APPLICANT

AND

GOR CONSTRUCTION AND HARDWARE LIMITED RESPONDENT

RULING

1. What is before this court for determination is the Applicant's Chamber Summons application dated 30th October 2024 in which the Applicant has sought the following orders; that the application be admitted as a reference against the taxation proceedings and ruling delivered on 4th September 2024 by the taxing officer in Kisumu MCELC No. 25 of 2017, and that the court be pleased to tax off and/or expunge Bill Nos. 2, 3 and 4 in the Respondent's bill of costs dated 1st July 2024 and revise the taxing officer's award accordingly. The Applicant has also sought the costs of the application.
2. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the Applicant sworn on 30th October 2024. The Applicant averred that on 4th September 2024, the taxing officer delivered a ruling in Kisumu MCELC No. 25 of 2017 (hereinafter referred to only as "the primary suit") on the Respondent's bill of costs dated 1st July 2024 in which he taxed the bill at Kshs. 39,005/-. The Applicant averred that there were errors of principle on the face of the ruling, given its inconsistencies with and contradictions of the earlier rulings made in the matter. The Applicant averred that the taxing officer awarded costs for services in respect to which a bill had already been raised, taxed, and fully settled. The Applicant averred that the taxing officer also awarded costs for an application, the costs of which had already been raised and taxed in a different file.



3. The Applicant averred that the errors of principle in the ruling dated 4th September 2024 included an award of Kshs. 3,000/- for an application dated 10th November 2022, which was the same as ELCMISC No. E034 of 2022, which was before Asati J. The Applicant averred that in ELCMISC No. E034 of 2022, he was a co-respondent of the Respondent herein who had attempted multiple times to tax the bill of costs relating to the application against him even though the costs of the application had already been taxed against the Applicant therein in its own file. The Applicant averred that taxing the costs of the said application in CMELC No. 25 of 2017 (the primary suit) and against the Applicant who was co-respondent in ELCMISC No. E034 of 2022 amounted to double taxation against a wrong party.
4. The Applicant averred that he made an application dated 21st March 2023 to have warrants of arrest that had been issued against him on account of the costs of an application dated 11th September 2019 in the primary suit set aside. The Applicant averred that on 26th June 2024, the court delivered a ruling that the costs sought had been fully settled in 2020 within the party and party costs. The Applicant averred that notwithstanding the said ruling of 26th June 2024, the Respondent's advocate recycled the costs of the same application in the bill of costs dated 1st July 2024 filed in the primary suit in an attempt to tax it for the third time.
5. The Applicant averred that the ruling delivered by the taxing officer on 4th September 2024 indicated that the costs for that application were taxed off, noting that they had been catered for in the party and party costs. The Applicant averred that in paragraph 7 of the said ruling, Kshs. 1,400/- each was awarded for 16 items under Bill No. 4 in the Respondent's bill of costs, which items in the bill were seeking costs for the application dated 11th September 2019. The Applicant contended that paragraphs 5 and 7 of the ruling of the taxing officer contradicted each other; while in paragraph 5, the costs relating to the application dated 11th September 2019 were taxed off, in paragraph 7, the taxing officer awarded a total of Kshs. 22,400/- for the application.
6. The Applicant averred that the inconsistencies and contradiction in the ruling delivered on 4th September 2024 meant that it contradicted the ruling of 26th June 2024 which had addressed the issue of the costs of the application dated 11th September 2019. The Applicant averred that in addition to the inconsistencies in the ruling, the calculation of the total awarded costs was also grossly inflated by Kshs. 7,307/-. The Applicant averred that the total awarded costs should be Kshs. 31,700/- and not Kshs. 39,005/- as indicated in the ruling. The Applicant averred that he had been greatly prejudiced as he was being compelled to pay costs for an application whose costs had been fully settled, as confirmed by the ruling dated 26th June 2024.
7. The Applicant's application was opposed by the Respondent through a Notice of Preliminary Objection dated 27th November 2024 and grounds of opposition of the same date. In its preliminary objection, the Respondent contended that the application offended paragraph 11(1) of the *Advocates Remuneration Order*, having been brought to court after 14 days from the date of taxation. In its grounds of opposition, the Respondent contended that the monies the applicant had paid were costs for the main suit. The Respondent averred that the taxed costs of Kshs. 39,005/- disputed by the Applicant were costs that the Applicant was condemned to pay for the applications that he filed after judgment had been delivered in the primary suit.
8. The application was argued by way of written submissions. The Respondent filed submissions dated 4th December 2024. I have not seen the Applicant's submissions on record at the time of writing this ruling although the Applicant had mentioned to the court on 4th February 2025 that he had filed his submissions.



The Respondent's submissions

9. The Respondent submitted that the Applicant's reference offended paragraph 11 (1) of the Advocates Remuneration Order in that it was filed after 14 days from the date of taxation, and the reason for the delay had not been explained. In support of this submission, the Respondent cited *Abmednasir Abdikadir & Co. Advocates v. National Bank of Kenya Limited* [2006] 1 EA 5 and *KCB Bank Limited v. Yekwa Antony Joseph* [2022] eKLR. The Respondent submitted that the court should take notice that the Applicant was a vexatious litigant who files applications only to deny the Respondent justice and to waste the court's time.

Analysis and Determination

10. I have considered the Applicant's application together with the supporting affidavits, the Respondent's grounds of opposition and Notice of Preliminary Objection, and the submissions by the Respondent.
11. Paragraph 11 of the *Advocates Remuneration Order (ARO)* provides as follows:

- “ 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.”

12. In *Moses Mwicigi & 14 Others v. Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR, the court stated thus:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”



13. The ruling of the taxing officer on the Respondent's bill of costs dated 1st July 2024 in the primary suit was delivered on 4th September 2024. The Applicant filed the present application on 30th October 2024, which is 55 days after the ruling of the taxing officer. The Applicant was aware that he had filed the reference out time. That explains why he prayed that his application be admitted as a reference. Under Paragraph 11(4) of the Advocates Remuneration Order reproduced above, this court has the discretion to extend the time within which the Applicant should have brought the reference. The Applicant filed a supplementary affidavit sworn on 20th December 2024 in which he explained the delay in filing the reference. In summary, the Applicant, who at all material times was and is still acting in person, was of the mistaken view that the taxing officer had the power to correct the errors that the Applicant had noted in the ruling dated 4th September 2024. The Applicant wrote to the taxing officer soon after the ruling on 18th September 2024, pointing out the said errors in the ruling and requesting the taxing officer to correct the same. The Applicant did not receive a response immediately. The Applicant did a reminder on 30th September 2024 before the taxing officer wrote to him on 2nd October 2024 telling him that he was *functus officio* and advising him to file a reference. The taxing officer's letter was received by the Applicant on 16th October 2024, and he lodged the present application on 30th October 2024. From the conduct of the Applicant, it is clear that he was keen on having the errors that he had noted in the ruling of the taxing officer corrected. That explains why he brought the present application soon after he learnt that the taxing officer had no power to correct errors in his ruling. For the foregoing reasons, I will exercise my discretion in favour of extending the time within which the Applicant should have filed the reference up to 30th October 2024. The reference is accordingly deemed as having been filed within time.
14. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows:
- “On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”
15. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited* Civil Appeal No. 206 of 2006[2015]eKLR_, the court stated as follows:
- “.. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside”
16. The Applicant has averred that there is an error of principle on the face of the ruling of the taxing officer dated 4th September 2024. The court has noted that the Applicant had filed numerous applications in the primary suit after the delivery of the judgment in that suit, most of which applications were dismissed with costs. The bill of costs the subject of the reference herein related to the applications dated 25th May 2021, 10th November 2022, 21st March 2024 and 11th September 2019. From the ruling of the taxing officer, the costs in respect of the applications dated 21st March 2024 and 11th September 2019 were taxed off in their entirety. That left the costs relating to the applications dated 25th May 2021 and 10th November 2022 and items 21 to 36 of the bill of costs dated 1st July 2024. The costs relating



to the application dated 25th May 2021 were taxed at a total of Kshs. 6,300/-. The costs relating to the application dated 10th November 2022 were taxed at a total of Kshs. 3000/-. The costs relating to items 21 to 36 of the bill of costs dated 1st July 2024 were taxed at a total of Kshs. 22, 400/-. What is the Applicant's problem with the taxation of these items? From paragraph 4 of his affidavit in support of the application, the Applicant seems to have no problem with the taxation relating to the application dated 25th May 2021. That leaves only the application dated 10th November 2022 and items 21 to 36 of the bill of costs dated 1st July 2024. What of them? The taxing officer awarded instruction fees on the application dated 10th November 2022 at Kshs.3000/- and disallowed costs on the other items relating to the application. The Applicant has opposed this award on the ground that the application dated 10th November 2022 was "the same as" ELCMISC No. E034 of 2022, which was handled by Asati J. The Applicant has contended that he was a co-respondent in ELCMISC No. E034 of 2022 together with the Respondent herein. The Applicant has contended that the costs of ELCMISC No. E034 of 2022 were taxed in that matter against the applicant who had brought the application and could not again be taxed in the primary suit, Kisumu MCELC No. 25 of 2017 against the Applicant herein who was just a respondent in ELCMISC No. E034 of 2022 as the Respondent herein. The Respondent did not file a replying affidavit in response to the Applicant's application. The Applicant's contention that the application dated 10th November 2022 was the application that was filed in ELCMISC No. E034 of 2022 and in respect of which a bill of costs had been drawn by the Respondent herein against the party who brought the application and taxed in ELCMISC No. E034 of 2022 was not rebutted by the Respondent. I, therefore, find merit in the Applicant's contention that the application dated 10th November 2022 should not have been made the subject of taxation in the primary suit, Kisumu MCELC No. 25 of 2017. The sum of Kshs. 3000/- awarded to the Respondent for this application was in the circumstances awarded in error.

17. What of items 21 – 36 in the bill of costs that were taxed at Kshs. 1,400/- each, bringing the total costs awarded to Kshs. 22,400/-? The Applicant has contended that although the court taxed off the costs relating to the application dated 11th September 2019, the court in a contradicting manner allowed the costs for that application in items 21-36! The Respondent did not rebut these allegations by the Applicant. I have considered the Applicant's argument on this issue. From the Respondent's bill of costs dated 1st July 2024, costs for the application dated 11th September 2019 were under Bill No. 4. Bill No. 4 had items 1 to 36. I agree with the Applicant that the taxing officer having made a finding that the costs for the application dated 11th September 2019 were raised in the Party and Party Bill of costs and taxed accordingly, the taxing officer could not award any costs for the application in the bill of costs dated 1st July 2024. It is my finding, therefore, that the award of a total of Kshs. 22,400/- for items 21-36 in the bill of costs dated 1st July 2024 was erroneous.
18. The Applicant had also taken issue with the computation error made by the taxing officer. I agree with the Applicant that, according to the costs awarded by the taxing officer, the bill should have been taxed at a total of Kshs. 31,700/- and not Kshs. 39,005/-. I am of the view that awarding costs which are not due and failure to correctly compute the costs awarded amount to an error of principle.
19. In *Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows:

“ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Sonza v Ferrao [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”



20. In *First American Bank of Kenya Ltd v. Gulab P Shab & Others* (2002)1 E.A. 61 the court stated that:

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

Conclusion

21. Given the nature of the objection that was raised by the Applicant to the taxation, I am of the view that it would serve no purpose remitting the Respondent’s bill of costs dated 1st July 2024 for taxation afresh by the taxing officer. I will accordingly proceed to correct the errors that were made by the said officer. I therefore make the following orders in the matter;

1. The ruling of the taxing officer dated 4th September 2024 is set aside in respect of the taxation of Bill No. 2 item 1 and Bill No. 4 items 21-36 of the bill of costs dated 1st July 2024. The said items are taxed off.
2. The taxation of the other items in the bill of costs dated 1st July 2024 shall remain undisturbed.
3. The bill of costs dated 1st July 2024 is taxed at a total of Kshs. 6,300/-.
4. Each party shall bear its costs of the reference.

DELIVERED AND DATED AT KISUMU ON THIS 6TH DAY OF MARCH 2025

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Applicant present in person

Ms. Awuor S. for the Respondent

Ms. J. Omondi-Court Assistant

