Bos Shipping (East Africa) Limited v Rehman & another (Environment & Land Case 121 of 2019) [2025] KEELC 4918 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4918 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 121 OF 2019

SM KIBUNJA, J

JULY 2, 2025

BETWEEN

BOS SHIPPING (EAST AFRICA) LIMITED ..... PLAINTIFF

AND

ABDALLAH ABDUL REHMAN ..... 1ST DEFENDANT

TEXAS ALARMS (K) LIMITED ..... 2ND DEFENDANT

RULING

Amended Chamber Summons Dated 25th June 2024 & Notice Of Motion Dated 17th July 2024

1. In the first application dated 25th June 2024, the 2nd defendant seeks for the following:

    1. Spent

    2. That the certificate of costs issued in this matter on the 21st June 2024 by the Taxing officer be nullified, set aside and expunged from the record herein forthwith.

    3. That this Honourable Court be pleased to issue an Order of stay of the approval of the Decree as drawn by the Plaintiff, signing of the Warrants of attachment and sale of the 2' Defendant's movable properties as well as stay of execution of the purported Decree herein pending the hearing and determination of the Reference herein with regard to the 2" Defendant's Objection to the Taxation of the Bill of Costs herein.

    3A. THAT this Honourable Court be pleased to forthwith issue an order of stay of execution of the Decree herein as well as the Certificate of Costs issued herein dated drawn by the Plaintiff, and/or enforcement of the Warrants of attachment and sale of the 2" Defendant's movable properties issued herein pending the inter-partes hearing of this Application and further pending the hearing and determination of the Reference herein with regard to the 2' Defendant's Objection to the Taxation of the Bill of Costs herein.

4. That this Honourable Court do hear and determine the 2' Defendant's Objection to the Decision and Ruling of the Taxing Officer on the Taxation of the Plaintiff's Party & Party Bill of Costs dated the 24th April, 2024, that is to say:-

   (a) The Learned Taxing Officer erred in law and in fact in taxing Items 1,2,4, 18, 36, 37, 3941, 42, 44, 46, 47 and 48, and of the said Bill of costs, as well as the disbursements allowed therein of the Plaintiff's Party and Party Bill of Costs dated 24th April, 2024 and on the amounts awarded under all the said Items.

   (b) The Learned Taxing Officer erred in law and in fact in using the sum of Kshs. 200,000,000.00 as the basis of calculating the Instruction fees and fees for getting up for trial, despite the fact that the said amount was never pleaded, evidence led on nor was it part of the Judgment of the Honourable judge herein.

   (c) The Learned Taxing Officer erred in law and in fact in relying on a Valuation Report which was never produced in the Pleadings or Proceedings herein and which was never utilized nor referred to in the Judgment of the Honourable Judge herein, and which Valuation Report was illegally, unlawfully, irregularly and wrongfully introduced at the Taxation stage.

   (d) The Learned Taxing Officer erred in law and in fact in failing to be guided by the Judgment on record wherein the Honourable Judge awarded the sum of Kshs. 1,00,000.00, which should be the only basis of taxing the Instruction fees and fees for getting up for the trial.

   (e) The Learned Taxing Officer erred in law and in fact in taking an obvious biased position and in wholly ignoring the 2nd Defendant's Advocate's Submissions as well as the Submissions in rejoinder.

   (f) The Learned Taxing Officer erred in law and in fact in failing to be guided by the Decision of the Court of Appeal in the case of Peter Muthoka & another v Ochieng & 3 others, Civil Appeal No. 328 Of 2017 [20191 eKLR to the effect that once judgment, assessment of Instruction fees can only be based on the value stated in the Judgment and thus in failing to use the sum of Kshs. 1,000,000.00 as the value of the subject matter as a claim, in line with the Judgment of the Court.

   (g) There was no claim whatsoever to the Plaintiff's property herein but pleadings, and proceedings, issue for determination was the physical location of Plot Number 929/1 in relation to Plot Number MN/1/9779, belonging to the 1st Defendant and damages for trespass and over a specific period of time, and thus the value of the Plaintiff's property was not an issue for determination nor resolution.

   (h) From the Judgment herein, the Court found that the 1st Defendant had entered the suit property, but also remained there for a specific period, which actions the Honourable Judge found constituted trespass for which he awarded damages of Kshs. 1,000,000.00 to the Plaintiff against the Defendants. The said amount of Kshs. 1,000,000.00 should thus have been utilized in calculating Items 1 and 2 of the Bill of Costs herein.

   (i) Taxation of 4, 18, 36, 37, 39, 41, 42, 44, 46, 47, and 48 was in contravention of the applicable provisions in the Advocates (Remuneration) (Amendment) Order, 2014.

(j) There were errors of principle in the Taxing Officer's Decision, Ruling and/or reasoning thereof.

(k). The Learned Taxing erred in failing to give any or any proper reasons for the taxation of the said items 1, 2, 4, 18, 36, 37, 39, 41, 42, 44, 46, 47, and 48, and of the said Bill of Costs, as well as the disbursements allowed therein of the Plaintiff's Party and Party Bill of Costs dated 24th April, 2024.

5. That this Honourable Court do consider/assess the Plaintiff's Party and Party Bill of Costs dated 24th April, 2024 and: -

(a) Set aside the Taxing Officer's Decision and Ruling on the taxation of items 1, 2, 4, 18, 36,37, 39, 41, 42, 44, 46, 47, and 48, and of the said Bill of Costs, as well as the disbursements allowed in the said Bill; and

(b) Assess the amount on the said Items 1, 2, 4, 18, 36, 37, 39, 41, 42, 44, 46, 47, and 48 at Kshs. 120,000.00; Kshs. Kshs. 33,334.00; and Kshs. 1,900.00 each for Items on the said items 1, 3, 34, 35 and 39 at such sums as justice of this case would require bearing in mind the value of subject matter herein and the work done by the Applicant.

6. That the Plaintiff be ordered to pay the costs of this Reference.

The said application is based on Rule 11 (2) of the Advocate's Remuneration Order (hereafter referred to as ARO) as objection to the taxation of the plaintiff's party and party bill of costs dated 24th April 2024. It is also based on Order 22 Rule 22 of Civil Procedure Rules, in respect to prayers for stay of approval of decree or stay of execution of any purported decree herein, signing warrants of attachment for the 2nd defendant's moveable property pending hearing and determination of the reference or the above mentioned objection. Consequently, it asks that the certificate of costs issued on 21st June 2024 be set aside. The ruling leading to the above mentioned certificate of costs is dated 19th June 2024 where the taxing officer ruled in favour of Kshs. 4,108,666.67 for the plaintiff. The application is supported by an affidavit sworn by Randolph Tindika, counsel for the 2nd defendant, on 24th June 2024 and a further supporting affidavit by one Bernard Odhiambo Aduda, the group human resource manager. The facts are that the said counsel wrote a letter giving notice of objection as per Rule 11 (1) of ARO and uploaded it in the e-filing platform and had gone to the registry on 21st June 2024 to file it physically where he learnt that on the same day the plaintiff had filed certificate of costs, decree, application for execution and warrants of attachment and sale of the 2nd defendant's goods. However, the said documents were yet to be signed. Counsel visited the taxing officer in chambers to inform him that he needed to urgently give reasons and that the certificate of costs should not be issued, but was informed that nothing stopped him from issuing the concerned certificate of costs. On the grounds of objection, he stated that the taxing master based his finding on the subject matter of Kshs. 200,000,000 which value was not in the pleadings or the concerned judgment of this court. Further that the court relied on the plaintiff's submissions only to arrive at the said subject matter. Despite filing the said letter of notice of objection, the plaintiff was able to obtain warrants of attachment and sale and served the same upon 2nd defendant. That counsel stated that the draft decree, which was lodged on 21st June 2024, was approved and issued on 24th June 2024, which was before seven days lapsed, and that it was a move meant to perfect execution before seven days. Mr. Bernard reiterated counsel's depositions and added that it is inconceivable that a judgment

award of Kshs. 1,000,000 attracted costs of Kshs. 4,108,666.67 and that the 2nd defendant's constitutional right to fair hearing has been grossly violated.

2. The court granted a temporary stay of execution of decree and certificate of costs on 26th June 2024, which prompted the plaintiff to make it's afore said application. However, the plaintiff also filed an affidavit replying to the 2nd defendant's aforementioned application sworn by Willis Oluga, counsel for the plaintiff on 15th July 2024. He stated that the amended application was filed without leave of court and further that the claim that the award of Kshs. 1,000,000 was the only award is a misconception. Counsel stated that the court orders in the final judgment included an injunction over the suit property, and that the taxing officer had to ascertain the value of the suit property, and since he could not do it from the pleadings, he relied on a valuation report dated 4th May 2017, which was annexed to the afore mentioned party and party bill of costs. Mr Oluga also held that the taxed costs of Kshs. 4,108,666.67 was reasonable based on the spirited fight by the 2nd defendant, and that the suit property is prime property in Nyali, and that the plaintiff put a lot of effort in prosecuting this suit. Counsel further stated that the 2nd defendant should commend the taxing master for taxing off over Kshs. 20,000,000 from the plaintiff's party and party bill of costs. He also stated that the taxing officer gave reasons for the taxation in his ruling and that there was no order staying taxation proceedings and thus the taxing officer could issue the said certificate of taxation and warrants of attachment. Counsel was fervent that the manner in which the certificate of costs and warrant were obtained was not relevant in a reference. He also revealed that since the 2nd defendant had made an application to enlarge time to file an appeal out of time, and the fact that the plaintiff filed the objection did not stop the taxation process. He then highlighted how the decree was obtained procedurally, which is that he served the draft decree under Order 21 Rule 8 (2) CPR on 21st June 2024 that counsel for 2nd defendant rejected citing that he lodged a notice of objection, prompting him to write to the D.R the following day on 22nd June 2024 to inform him of the rejection and that it had no basis in law and that the D.R should sign the decree. He also stated that it was the 2nd defendant's counsel who requested the decree to be urgently signed sometime back on 14th November 2023 vide counsel's letter of the same date. Counsel also brought in question the demeanour of the 2nd defendant, which I do not find appropriate to restate herein.

3. On the second application dated the 17th July 2024, the plaintiff sought for orders that:

    1. This application be certified as urgent and heard exparte in the first instance.

    2. Pending hearing and determination of this application, there be and is hereby issued an order staying the operation, enforcement and/or execution of the order of this court made on 26th June 2024.

    3. This application be assigned an interpartes hearing date on priority basis.

    4. The order of this court made on 26th June 2024 be and is hereby set aside forthwith.

    5. The costs of this application be borne by the 2nd Defendant.

    The above was supported by an affidavit by Oluga Counsel sworn on 17th June 2024, inter alia deposing that the said stay of execution was restraining the plaintiff's right to enjoy the fruits of taxation. He also made other allegations on the conduct of the 2nd defendant which the court has afore stated is irrelevant as it is water under the bridge now. In response, the 2nd defendant filed grounds of opposition dated 3rd February 2025 and stated that its amended application herein was necessitated by this court's refusal to issue interim orders for stay of execution for the previous application dated 24th June 2024, despite it facing imminent execution, and subsequent execution on 25th June 2024. Further, that it did not require leave of court to

amend an application, and that the same is a reference in objection to the said taxation ruling. Counsel also stated that the defendants had left the suit property even before judgment was delivered and the allegation that the stay order gave leeway for the defendants to invade is misleading the court. That the plaintiff's application serves no purpose as the award of Kshs. 1,000,000 as damages has been duly paid.

4. Counsel for the plaintiff filed its submissions dated 31st March 2025, while that for the 2nd defendant filed two separate submissions, the first being undated on 2nd April 2025 in support of its application and another dated 3rd April 2025, in opposition to the plaintiff's application. There was also a third set of submissions dated 14th June 2025 in support of the reference and the plaintiff's submissions dated 25th June 2025, which was in response to the 2nd defendant's submissions dated 14th June 2025. The court has considered all the able submissions.

5. The issues for determinations by the court on the pending applications are as follows:

   a. Whether the 2nd defendant has met the threshold for stay of execution order to issue.

   b. Whether the 2nd defendant's reference/objection has merit.

   c. Who bears the costs of the applications?

6. The court has carefully considered the grounds on both applications, grounds of opposition, the affidavit evidence, submissions by the two learned counsel and come up with the following determinations:

   a. As early stated the stay of execution of decree application was brought under Order 22 Rule 22 Civil Procedure Rules which states as follows:

> " 1. The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
>
> (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
>
> (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit."
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> This provision should not be confused with the stay of execution pending appeal under Order 42 Rule 6 Civil Procedure Rules. Under Order 22 Rule 22 Civil Procedure Rules, the stay of execution order if granted would allow judgment debtor to seek for stay of execution in either this court or the Court of Appeal where the execution has

already been issued. In this case, the judgment debtor would have to seek orders for stay of execution in the Court of Appeal as the decree was issued on 24th June 2024. It is prudent to note that the 2nd defendant made its application on 24th June 2024, and also that has started the process of appeal as evidenced by a Notice of Appeal dated 8th October 2024 which though was not annexed, is part of record in the file.

b. The counsel for the plaintiff argued that no appeal reference number has been given by the 2nd defendant, as proof of existence of an appeal. Apart from the notice of appeal having been filed, the rule of thumb is that he who alleges must prove, which the 2nd defendant has not done. However, under Order 42 Rule 6 (4) of the Civil Procedure Rules, there is a presumption that filing a notice of appeal is sufficient proof that an appeal has been preferred to the Court of Appeal. Although the provision states that the rule is for the purpose of Order 42 Rule 6, it is only logical that the same should apply in Order 22 Rule 22. Of Civil Procedure Rules.

c. The second condition for the stay relating to restitution of the property is irrelevant in this instance, as it has not been shown that any of the 2nd defendant's moveable properties have been seized. The third condition is that of security be provided, which the court had already dealt with through the order of 26th June 2024, to deposit the whole decretal sum in a joint interest earning account, pending the hearing and determination of the application including the reference. Although the 2nd defendant claims to have deposited the same, there was no documentary evidence attached. As all the pending applications, including the reference, are being determined through this ruling, the stay of execution order will thus lapse upon its delivery. This definitive occurrence will also settle the plaintiff's application, without any specific pronouncement being made.

d. In the case of David Anunda versus John Karu (Sued in His Own Capacity and as the Chairman of Kileleshwa Githunguri Road Residents Association) & 2 Others [2021] KEELC 1785 (KLR) the court relied on the cases of Co-operative Bank of Kenya Limited versus Banking Insurance & Finance Union (Kenya) [2015] eKLR, Western College of Arts, Applied Sciences versus Oranga & Others (1976-80) 1 KLR and Kenya Shell Limited versus Benjamin Karuga Kibiru & Anorther [1986] eKLR and held that substantial loss must be shown by an applicant for stay of execution to succeed. The plaintiff's counsel submitted that the only attempt made by the 2nd defendant towards establishing substantial loss was through Bernard Odhiambo deposition that the 2nd defendant would suffer irredeemable loss and damage.

e. On the issue of contested taxation items, the decision in the case of Joreth Limited Muturi Versus Kigano & Associates Advocates (2002) eKLR, where the court adopted the principle stated in the case of Steel Construction & Petroleum Engineering E A Limited Versus Uganda Sugar Factory Limited as hereunder, is relevant;

> " counsel for the appellant submitted, relying on D'souza V Ferao (1960) E A 602 & Arthur V Nyeri Electricity Undertaking (1961) E A 492 that although a Judge undoubtedly has a jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follows from the said decision and that the general rule is that where fee is to be re-assessed on different principals, the proper cause is to remit same to another taxing officer. I would agree that, as a general statement, that is correct, adding only that is a matter of judicial discretion".

The Supreme Court further held:

> " In exercising such unfettered discretion, the Taxing Officer is required to do so judiciously and not whimsically. Ojwang, J., (as he then was) aptly set out the manner in which such discretion should be exercised by a Taxing Officer in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'njuguna & 6 Others, HC Misc 621 of 2000; [2006] eKLR, in the following terms:
>
> "Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for...The complex elements in the proceedings which guide the exercise of the Taxing Officer's discretion, must be specified cogently and with conviction....It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs."

f. The items objected to are; 1, 2, 4, 18, 36, 37, 39, 41, 42, 44, 46, 47, and 48. For item 1, which is the instruction fees, the court refers to the famous case Kenya Airports Authority versus Otieno Ragot and Company Advocates [2024] KESC 44 (KLR) where the Supreme court held:

> " Schedule VIA provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit. See Outa vs. Odoyo & 3 Others, SC Petition No 6 of 2014; [2023] KESC 75 (KLR)."
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> "The instruction fees flow from the value of the subject matter as per Schedule VI (A) (1) ARO and the said value should be determined from the pleadings or judgment or any settlement. The supreme court expounded the above in Kenya Airport case and held:
>
> "This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd. vs. Kigano & Associates [2002] 1 E.A. 92 expressed that-
>
> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) ..."
>
> The valuation report afore stated formed the basis of calculating instruction fees, and both counsel advanced case laws supporting their respective positions. The 2nd defendant's counsel cited a plethora of cases where the use of valuation reports was discouraged by the courts, while the plaintiff cited cases where valuation reports can be admitted as basis of calculating instruction fees. The conundrum is that the

courts cited are of equal status. There was no other valuation report on the suit property that was presented by the 2nd defendant to challenge that proffered by the plaintiff.

g. It is important to appreciate the nature of the plaintiff's claim from the plaint dated the 26th June 2019 so as to arrive at a reasonable assessment of the value of the subject matter of the suit. Prayers (a) & (b) are declaratory orders, (c) & (d) are for eviction, mandatory and permanent injunctions, while (e) & (f) are for damages and costs. The judgement delivered on 22nd November 2023, confirms that declaratory prayers (a), (b), and mandatory injunction as per prayer (d), damages for trespass assessed at Kshs.one million under prayer (e), costs and interests were granted in favour of the plaintiff. It is therefore erroneous to challenge the taxation only on the basis of the Kshs.one million awarded as damages, as that amount was not the totality of the plaintiff's suit, but only one of the several prayers it sought and got. In the Joreth case [supra], cited by the Supreme Court in the Kenya Airport case [supra], the court stated:

> "We would at this stage point out that the value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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...."

In the absence of evidence challenging the suit property's value that the taxing officer relied upon, and there being nothing to suggest that the taxing officer failed to employ his judicial discretion judiciously and reasonably, I find no merit in the 2nd defendant's reference on the instruction and consequently, getting up items. The court will also not interfere with Items 18, 36, 37, 39, 41, 42, 44, 46, 47, and 48 as the taxing officer used the correct principle in taxing, as the amount of Kshs.3,000 for each attendance is provided in the ARO. Having found no merit in the reference, then all the other prayers in the 2nd defendant's application falls by the way, and there is no need to make any specific pronouncements on each of them.

h. That as the 2nd defendant has failed in its application, and the plaintiff has been successful in defending the same, it follows that under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, the plaintiff is entitled to costs to be borne by the 2nd defendant..

7. From the foregoing determinations on the two applications, the court finds and orders as follows:

a. The 2nd defendant's amended chamber summons dated June 25, 2024/reference is without merit and is dismissed with costs.

b. The plaintiff's application dated July 17, 2024 is hereby granted with costs by setting aside/vacating the stay of execution order of June 26, 2024 forthwith.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr. Makadina For Oluga

Defendants : Mr Tindika For 2Nd Defendant

Shitemi-court Assistant.