



REPUBLIC OF KENYA



**Mwangi v Kanyi (Environment & Land Case 175 of 2017)
[2024] KEELC 526 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 175 OF 2017
LN GACHERU, J
FEBRUARY 8, 2024**

BETWEEN

HEZEKIAH NJUGUNA MWANGI PLAINTIFF

AND

JAMLECK CHEGE KANYI DEFENDANT

RULING

1. By a Chamber Summons Application, brought under Rule 11 of The [Advocates \(Remuneration\) Order](#) (2014), dated 24th August 2023, the Defendant/Applicant has sought for the following orders: -
 - I. That the ruling on instruction fees delivered on 12th July 2023, be set aside and the same be taxed as per the Bill of Costs dated 3rd March 2022, and/or be remitted to the taxing officer for re-taxation.
 - II. That costs be provided for.
2. This application is premised on the grounds enumerated on the face of the said application and on the Supporting Affidavit sworn by Jamleck Chege Kanyi, the Defendant/Applicant herein on 24th August 2023.
3. In main the suit, the Plaintiff/Respondent had sought for the following orders: a permanent injunction be issued, restraining the Defendant and his representatives from interfering with the Plaintiff's ownership, possession, right of use and right of ingress and egress in and out of five (5) parcels of land registered in the name of the Plaintiff.
4. In opposing the Plaintiff's claim, the Defendant averred that it was the Plaintiff who had encroached on his parcel of land and not vice-versa. By a judgment dated 4th July 2019, this Court dismissed the Plaintiff's claim with costs to the Defendant. Thereafter, the Defendant filed a Bill of Costs dated 23rd May 2023, which was taxed by the taxing officer on 12th July 2023.



5. The Defendant/Applicant avers that in the ruling by the taxing officer of this Court dated 12th July 2023, the taxation of instruction fees was manifestly low and warrants the intervention of this Honourable Court.
6. The Defendant/Applicant avers that the taxing officer failed to appreciate the value of the suit property in dispute and that the same was ascertainable from the pleadings of the parties and the judgment of the Court.
7. The Defendant/Applicant further avers that the taxing officer committed an error of principle by failing to appreciate both the relevance and complex nature of the matter and misunderstood the dispute to be a case of mere encroachment.
8. The Defendant/Applicant also contends that the taxing officer failed to take into account the great interest of the parties in the case, as evidenced by the ten years spent in litigation.
9. The Defendant/Applicant further avers that the taxing officer failed to appreciate that the dispute did transform in nature over time, having been lodged initially as a Civil claim before the Nyeri High Court in 2012, whereby, after the lapse of five years, the matter was transferred to and registered in the Environment and Land Court at Murang'a.
10. The Application was canvassed by way of written submissions, which the Court has considered.
11. The Defendant/Applicant's submissions were drawn by the Law Firm of Milimo, Muthomi & company Advocates dated 29th September 2023, and he submitted that following the transfer of the file to the Environment and Land Court at Murang'a in 2017, the applicable taxation scale to the case is the Advocates Remuneration Order 2014, and not the Advocates Remuneration Order 2009, and that the taxing officer was misguided in applying the Advocates Remuneration Order 2009, to the case.
12. The Defendant/Applicant further submitted that the sum of Ksh 75,000/- is the minimum amount that can be awarded under the Advocates Remuneration Order 2009, and that the said amount is meant only for cases that are not complex in nature.
13. The Defendant/Applicant further submitted that the taxing officer failed to appreciate the large size of the parcels of land in the dispute as the Plaintiff's land measures approximately 0.409 Hectares, which has been sub-divided into sixteen plots, while the Defendant's land measures 0.505 Hectares, which fact was ascertainable from the pleadings of the parties.
14. The Defendant/Applicant also submitted that in arriving at the figure of Kshs 75,000/=, as instruction fees in the matter, the taxing officer failed to consider the numerous resources expended by the Defendant/Applicant in gathering evidence for the case, and the analysis of complex calculations in respect of land areas and dimensions and verification of the physical position and actual boundaries of land held by the parties which was done by the Defendant/Applicant.
15. The Plaintiff/Respondent opposed the Application and swore a Replying Affidavit dated 19th September 2023, in opposition to the instant application.
16. The Plaintiff/Respondent averred that the dispute between the parties concerned boundaries, which cannot be said to possess any such value as claimed by the Defendant/Applicant.
17. The Plaintiff/Respondent further averred that the instant Application amounts to an attempt by the Defendant/Applicant to use the Court as an avenue for unjust enrichment and ought to be dismissed with costs.



18. The taxing officer in her ruling delivered on 12th July 2023, stated that the suit was taxed in accordance with the Advocates Remuneration Order 2009, as the matter was filed in 2012; However, for the attendances taking place in 2014, and thereafter, the Taxing Master clarified that these were taxed according to the Advocates Remuneration Order 2014.
19. The taxing officer in her ruling further stated that the value of the suit property was not ascertainable from either the pleadings of the parties or the judgment of this Court dated 4th July 2019.
20. The taxing officer stated in her reasons dated 15th August 2023, that she taxed the Defendant's instruction fees at Ksh 75,000/= upon taking into consideration the general conduct of the case and recognizing that the subject-matter of the suit concerned encroachment.
21. Having considered the instant Application, the Reply to the same, and the rival written submissions, the Court finds the issues for determination are as follows:
 - i. Whether the taxing master erred in principle in awarding Kshs 75,000/- as instruction fees in the matter.
 - ii. Whether the taxing officer erred by applying the Advocates (Remuneration) Order 2009, to the present case.

Whether the Taxing Master erred in principle in awarding Kshs 75,000/- as instruction fees in the matter.

22. Instruction fees cover the advocate's work including taking instructions from the client and preparing the case for trial or appeal. The Taxing Master award of Kshs 75,000/- as instruction fees is disputed by the Defendant/Applicant for being manifestly low in light of the value of the property in dispute, and considering the complexity of the matter and history of litigation. The Applicant in his submissions cited the case of *Joreth Limited v Kigano & Associates* [2002] eKLR where the Court held as follows:

“...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 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”.

23. Further, the Court in *Joreth Limited v Kigano & Associates* [2002] eKLR, held that that an instruction fee is a static item, which is charged only once and the same is not affected or determined by the stage that the suit has reached, and that the principles that guide the assessment of instruction fees include the care and labour required on the part of counsel, the number and length of papers to be perused, the nature and importance of the matter to the parties, the amount and value of the subject-matter and all other circumstances as may be fair and reasonable.
24. The scope and limits of taxing officer's authority is settled in terms of case-law. The Court of Appeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB Civil Appeal No. 220 of 2004[2005] eKLR, stated that:

“On a 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”.



25. In the case of *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, the High Court of Kenya set out the mandate of Taxing Officer's authority as follows:

"... before the court interferes with the decision of the taxing master, it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling".

26. Further, Court also in the same case of *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, proclaimed as follows:

"It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'"

27. The Supreme Court of Uganda in the case of *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No. 23 of 1999, proclaimed as follows:

"Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

28. Further, the Court in the case of *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 Others* {2006} eKLR, held as follows;

"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, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... 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 interference



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 factors.”

29. Again, in the East African Court of Appeal in the leading case of *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another* {1972} EA 162, the court dealt with such an issue and set out, six (6) principles as follows:

- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
- ii. The taxing master was expected to tax each bill on its merits;
- iii. The value of the subject matter had to be taken into account;
- iv. The taxing master’s discretion was to be exercised judicially and not whimsically or capriciously;
- v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
- vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference”.

30. From a perusal of the documents filed in the suit, it is clear that the nature of the dispute between the parties is a boundary dispute. Consequently, it is the finding and holding of this Court that the taxing officer was well-guided to characterize the dispute as one founded on encroachment.

31. From the pleadings of the parties and the judgment of this Court, the value of the property in dispute between the parties was not ascertainable. It is the holding and finding of the Court that the decision by the taxing officer to consider the general conduct of the case and the subject-matter of the dispute in awarding instruction fees of Kshs 75,000/=-, to the Defendant was neither misguided, misconceived, nor unwarranted.

32. Having regard to the primary issue in contention between the parties, which is a boundary dispute, it is the holding and finding of the Court that the dispute was not a complex one in nature and did not raise novel, weighty or convoluted jurisprudential issues for determination. Consequently, the Court finds and holds that the instruction fees amounting to Kshs 75,000/- awarded by the taxing master is not so manifestly low as to invoke this Court’s discretion to refer the matter back to the taxing officer for re-taxation.

33. It is the holding and finding of this Court that the sum of Kshs75,000/- awarded by the Taxing Master is sufficient as per the provisions of schedule 6 of the Advocates Remuneration Order 2014.

Whether the taxing officer erred by applying the Advocates (Remuneration) Order 2009 to the present case?

34. The Defendant/Applicant contends that the taxing officer in her ruling dated 12th July 2023, applied the [Advocates Remuneration Order](#) 2009, to the Defendant’s Bill of Costs dated 23rd May 2023,



instead of the Advocates Remuneration Order 2014, which, the Defendant/ Applicant submits, is the applicable taxation scale.

35. The Court has reviewed the evidence on record and the documents and submissions filed in the matter. It is the finding of this Court that the taxing master taxed the costs incurred by the Defendant prior to 2014, using the [Advocates Remuneration Order](#) 2009. To that extent, the decision of the taxing officer is sound and proper. Consequently, the taxing officer's ruling dated 12th August 2023 is upheld.
36. The Court notes that the taxing officer taxed all costs incurred by the Defendant during, from 2014, and thereafter using the [Advocates Remuneration Order](#) 2014. In this regard, the Court is not persuaded by Defendant/Applicant's contention that the Taxing Master applied the [Advocates Remuneration Order](#) 2009, indiscriminately or to all items appearing on the Defendant's Bill of Costs dated 23rd May 2023.
37. Having carefully considered the instant application, the reasons for and against the said application, the rival written submissions, the Court finds the application is not merited. Consequently, this Chamber Summons Application dated 24th August 2023, is hereby dismissed entirely with costs to the Plaintiff / Respondent.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF FEBRUARY, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Absent - Plaintiff/Respondent

Mr Muthomi for the Defendant/ Applicant

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

8/2/2024

