



Ebel (Suing as the Legal Administrator of the Estate of Amolo Agenga- Deceased) v Magwanga & 3 others (Environment & Land Case E002 of 2022) [2024] KEELC 1762 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E002 OF 2022
GMA ONGONDO, J
APRIL 9, 2024**

BETWEEN

HENRY ONDIEKI EBEL (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF AMOLO AGENGA- DECEASED) PLAINTIFF

AND

JOHN MALAGO MAGWANGA 1ST DEFENDANT

MATATA NURSING AND MATERNITY HOME 2ND DEFENDANT

LAND REGISTRAR, HOMA BAY COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This ruling is in respect of an application by way of Chamber Summons dated 4th October 2023 brought under, inter alia, Rule 11(2) of the Advocates Remuneration Order, Order 21 Rule 9A of the Civil Procedure (Amendment) Rules 2020 and Section 1A, 3A and 3B of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya by the 1st and 2nd defendants/applicants, through O. M. Otieno and Company Advocates seeking the following orders;
 - a. The Honourable Court be pleased to set aside the entire Deputy Registrar’s ruling on the 1st and 2nd defendants’ bill of costs dated 25th July 2023 delivered on 15th September 2023.
 - b. The Honourable Court be pleased to refer the matter back to the Deputy Registrar with directions on proper manner of taxation of costs.
 - c. That in the alternative, this Honourable Court be pleased to remit the 1st and 2nd defendants’ bill of costs dated 25th July 2023 before a different Taxing Master for taxation of the costs in accordance with the law.



- d. Cost of the reference be awarded to the defendants/applicants.
2. The application is founded on grounds (a) to (m) on the face of it and anchored on the supporting affidavit of sixteen paragraphs sworn on even date by John Malago Magwanga, alongside the annexed documents marked as JM1 to JM8 which include; a copy of the plaint, a copy of the statement of defence, a copy of application dated 6th September 2022, a copy of ruling dated 30th May 2023, a copy of the bill of costs dated 25th July 2023, a copy of a letter to the Deputy Registrar dated 15th September 2023 and a Notice of objection, a copy of the ruling by the Deputy Registrar and a copy of the valuation report. There is also a further affidavit sworn on 11th March 2024 by Ouma Maurice Otieno, counsel for the applicants, in support of it.
 3. Briefly, the applicants lament that the plaintiff's suit against them was struck out with costs for being time barred. That thereafter, they lodged their bill of costs. That in her ruling delivered on 15th September 2023, the Taxing Master erred in awarding instruction fees at Kshs. 75,000/-, yet the value of the suit property was Kshs.66,276,000/=, according to the Valuation Report which formed part of the trial court's record. That in so doing, the Taxing Master failed to consider the applicable law as provided under Schedule 6 of the Advocates (Remuneration) Order 2014. That such assessment was inordinately low and calls for intervention and interference by this court.
 4. The respondent's counsel, Moses Munuang'o, through Omondi Abanda and Company Advocates, filed a replying affidavit dated 11th December 2023 on even date. He averred that the applicants are bound to await the Taxing Master's reasons for her decision. That in any case, the reference has been filed outside the statutory time limit of fourteen days and the same ought to have been preceded by an application for extension of time under Rule 11(4) of the Advocates Remuneration Order.
 5. Hearing of the application proceeded by way of written submissions pursuant to this court's directions of 6th November 2023.
 6. By the submissions dated 12th March 2024, learned counsel for the applicants submitted that the reference was filed within time as provided for in law and stated in the case of Waiganjo Wachira & Co. Advocates -vs- Pacis Insurance Company Limited (2020) eKLR. That the instruction fees as taxed is erroneous and inordinately low. Thus, counsel urged the court to set aside the assessment in its entirety and that the same be taxed afresh. To buttress the submissions, reliance was placed on the case of Muthoka & another -vs Ochieng& 3 others (2019) eKLR.
 7. The respondent's counsel filed submissions dated 11th December 2023 and identified two issues for determination thus: whether the application is merited and who is to bear the cost of this application? Counsel submitted that the Taxing Master indicated her reasons in the ruling thus, the applicants ought to have lodged the present reference within fourteen days instead of seeking further reasons from the Taxing Master. That the instant reference was filed out of time and without leave of court, thereby contravening the provisions under Paragraph 11(4) of the Advocates Remuneration Order. To reinforce the submissions, counsel relied on various authorities including the case of Kipkorir, Titoo & Kiara Advocates -vs- Deposit Protection Fund Board Civil Appeal No. 220 of 2004 (2005) eKLR.
 8. The 3rd and 4th defendants neither opposed the instant application nor filed any submissions herein.
 9. In the foregone, was the instant application lodged within the prescribed time and have the applicants established their case for grant of the orders sought in the application?
 10. In the first instance, Rule 11(1) and (2) of the Advocates Remuneration Order stipulates that:



- (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.
11. The respondent contends that the instant application was lodged outside the statutory time limit and without leave of court. Notably, the ruling of the Taxing Master was delivered on 15th September 2023. Vide a letter of even date and filed herein on 18th September 2023, the applicants sought a copy of the ruling and reasoning of the Taxing Master.
 12. Together with the letter, the applicants lodged a Notice of Objection. That upon obtaining a copy of the ruling on 25th September 2023, the applicants noted that the same contained reasons. Being aggrieved thereby, they lodged the instant reference.
 13. Thus, it is my conserved view that the instant application is promptly on record. Bearing in mind the decision in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR, the apparent delay has been satisfactorily explained herein.
 14. The applicants aver that the Taxing Master award of Kshs. 75,000/- as instruction fees was inordinately low since the value of the suit property was Kshs.66,276,000/=. This award is disclosed in paragraph 1 of the Taxing Master’s ruling.
 15. In her ruling dated 15th September 2023, the Taxing Master assessed instruction fees at Kshs. 75,000/- being 75% of the fees chargeable. The basis of the same is that the value of the property was not indicated in the pleadings and a valuation report not filed.
 16. It is noteworthy that the applicants filed a Valuation Report as part of their list of documents dated 6th September 2022. The Valuation Report is dated 24th September 2016 and approximates the value of the suit property to be Kshs.66,276,000/=.
 17. In *Non- Governmental Organizations Coordination Board -vs- EG & 5 others* (Petition (Application) 16 of 2019) (2023) KESC 102 (KLR), the Supreme Court of the Republic of Kenya laid down the guiding principles on setting aside a certificate of taxation. The Honourable Court stated that:

“A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer’s decision on taxation if:

 - a. There was an error of principle committed by the taxing officer.
 - b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).
 - c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party).



- d. The award proposed was so far as practicable, consistent with previous awards in similar cases.
 - e. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances.
 - f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically.
 - g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes.”
18. In light of the foregoing, it is my considered view that the value of the land which is the subject matter of this application is manifestly high and that the instruction fees of Kshs. 75 000/= awarded by the Taxing Master is extremely low.
 19. To that end, this Court holds and finds that the applicants have demonstrated that the instant application meets the principles of setting aside the decision of the Taxing Master.
 20. Afortiori, the Chambers Summons application dated 4th October 2023 is merited and the same is allowed in terms of Prayers 1, 2 and 4.
 21. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 9TH DAY OF APRIL 2024.

G.M.A ONGONDO

JUDGE

Present

1. Ms. Raburu holding brief for M. M. Omondi, Learned Counsel for the plaintiff/respondent
2. Mr. O. M. Otieno, Learned Counsel for the applicant/1st defendant
3. Mr. F. Kajo, Learned Counsel for the 3rd and 4th defendants
4. Fiona, Court Assistant

