



REPUBLIC OF KENYA



KENYA LAW
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**Ong’udi v Odhiambo (Environment and Land Appeal
E013 of 2020) [2024] KEELC 3986 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E013 OF 2020**

SO OKONG’O, J

MAY 2, 2024

BETWEEN

HEZEKIA ONG’UDI APPELLANT

AND

DANIEL OJJO ODHIAMBO RESPONDENT

RULING

1. This appeal was allowed with costs to the Appellant on 31st May 2022. The Appellant filed a party and party bill of costs for taxation on 3rd June 2022. The Appellant’s bill of costs dated 3rd June 2022 which was drawn in the sum of Kshs. 434,728/- was taxed at Kshs. 209,534/- on 24th November 2022 and a certificate of costs for the said amount issued on 30th November 2022. The bill was taxed in the absence of the Respondent’s advocates who were said to have been served with the bill of costs and notice of taxation but did not turn up for the taxation of the bill on 9th November 2022.
2. The Respondent filed an application by way of a Notice of Motion dated 14th December 2022 brought under Orders 45 and 51 of the Civil Procedure Rules and sections 3 and 3A of the *Civil Procedure Act* seeking the following orders;
 1. That the certificate of costs dated 24th November 2022 and issued on 30th November 2022 be reviewed, set aside and substituted with an order by the court(sic).
 2. That the costs of the application be provided for.
3. The Respondent’s application was brought on the ground that the Respondent’s advocates were not served with the bill of costs and the notice of taxation and as such the taxation on the basis of which the said certificate of costs was issued proceeded in their absence. The Respondent averred that substantial loss would be occasioned to the Respondent unless the said certificate of costs was reviewed.



4. The application was opposed by the Appellant. The Appellant contended that the Respondent's advocates were served with the bill of costs and the notice of taxation through their known e-mail address in accordance with the provisions of the Civil Procedure Rules. The Appellant contended that the Respondent was mischievous and had brought the application before the court in bad faith to delay the Appellant from enjoying the fruits of his judgment.
5. In a ruling delivered on 18th May 2023, the court held that the jurisdiction to tax bills of cost is conferred upon the Deputy Registrar under paragraph 11 of the Advocates Remuneration Order (hereinafter referred to as "ARO") and that the court only intervenes in the taxation of costs in limited circumstances provided for in the ARO. The court held further that Paragraph 13A of the ARO gives the Deputy Registrar (hereinafter referred to only as "the taxing officer") full power to deal with all the issues that may arise during the taxation of bills of cost. The court held that the instances when the court could intervene in the taxation of a bill of cost were first; when an objection was raised to a decision of the taxing officer under paragraph 11 of the ARO and secondly, where with the consent of the parties, the taxing officer refers any matter in dispute arising out of taxation of a bill of cost for the opinion of the court under paragraph 12 of the ARO.
6. The court held that the Respondent's application that was before it was not brought either under paragraph 11 of the ARO or paragraph 12 of the ARO. The court held that it had no power under the provisions of the law under which the application was brought to review any order or decision made by a taxing officer on the taxation of a bill of costs under the ARO and that the review that was sought by the Respondent could only be undertaken by the taxing officer who made the order that was sought to be reviewed and not by the court. The court held that any party aggrieved by a decision of the taxing officer had only one remedy before the court namely, to file a reference under paragraph 11 of the ARO and that what was before the court was not a reference but an application for review. For the foregoing reasons, the court struck out the Respondent's Notice of Motion application dated 14th December 2022 for want of jurisdiction.
7. Following the dismissal of the said application, the Respondent moved the taxing officer/Deputy Registrar through an application dated 11th August 2023 seeking an order that the Certificate of Costs dated 24th November 2022 and issued on 30th November 2022 be reviewed and set aside and be substituted with an order of the court. The application that was brought on the same grounds as the application that was struck out by this court on 18th May 2023 was heard by the taxing officer who dismissed the same on 28th September 2023. In the ruling, the taxing officer found that the Respondent's advocates were served with the bill of costs and notice of taxation and that they chose for reasons only known to them not to participate in the taxation. The taxing officer stated that if the Respondent was aggrieved with the taxation of the said bill of costs, he should have filed a reference against the same.
8. What is now before me is yet another application by the Respondent brought by way of a Notice of Motion dated 17th November 2023. In the application which was brought under Sections 3 and 3A of the *Civil Procedure Act*, paragraph 11 of the ARO and Order 21 rule 9A of the Civil Procedure Rules, the Respondent has sought the following orders;
 1. That court be pleased to set aside the taxation and consequential certificate of costs.
 2. That in the alternative, the court be pleased to order that the Appellant's Bill of Costs be taxed afresh.
 3. That the costs of the application be provided for.



9. The Respondent's application was brought on the same grounds as the application that was struck out by this court on 18th May 2023 save that the Respondent added that he would suffer substantial loss unless the orders sought were granted. The application was opposed by the Appellant through an affidavit sworn by Cecil Kouko on 20th December 2023. The Appellant contended that the Respondent's application was *res judicata* in that the same was brought on the same grounds and sought similar orders as the application that was struck out by this court and the second application that was dismissed by the taxing officer on 28th September 2023. The Appellant averred that the only remedies that were available to the Respondent were to appeal against the ruling of the taxing officer delivered on 28th September 2023 or to file a reference against the taxation of the Appellant's bills of costs by the taxing officer none of which he had done. The Appellant urged the court to dismiss the Respondent's application as an abuse of the process of the court.
10. The application was argued by way of written submissions. The Respondent filed his submissions dated 9th February 2024 while the Appellant filed his submissions on 2nd February 2024. I have considered the Respondent's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the Appellant in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties.
11. I agree with the Appellant that the application before the court is an abuse of the process of the court. When the Respondent approached this court in the first instance through the application dated 14th December 2022, he sought a review and setting aside of the taxation of the Appellant's bill of costs dated 3rd June 2022 by the taxing officer on 24th November 2022 on the ground that the Respondent was not served with the said bill of costs and notice of taxation. The court considered the application and made it clear that the court could only set aside taxation on a reference and that the review sought could only be granted by the taxing officer since it was not a reference but a complaint that the taxation was conducted without notice. The Respondent went back to the taxing officer and sought to set aside the taxation on the ground that the same was conducted without notice to the Respondent. The taxing officer considered the matter and dismissed the Respondent's application after finding that the Respondent was duly served with the bill of costs and notice of taxation. The taxing officer in essence found that the taxation was regular and there was no basis for setting it aside. The taxing officer stated that the only remedy that was available to the Respondent if he was not happy with the taxation was to file a reference against the same to this court.
12. What is before me is not a reference. A reference under paragraph 11 of the ARO is preceded by a Notice of Objection to taxation and has timelines. A reference cannot be brought 1 year after taxation without a Notice of Objection to taxation. What is before me is also not an appeal against the ruling of the taxing officer dated 28th September 2023. What is before me is another review application seeking to set aside the taxation of the Appellant's bill of costs dated 3rd June 2022 on 24th November 2022. The application has been brought on the same grounds on which the first application which was struck out by this court on 18th May 2023 was brought. Similar grounds were raised in support of the application that was brought before the taxing officer. Both this court and the taxing officer considered those grounds and made findings and determinations. This court made it clear that it could only set aside taxation on a reference and not otherwise. The taxing officer made a finding that the Respondent was duly served with the bill of costs and notice of taxation and as such there was no basis for setting aside the taxation. The decision of the taxing officer has not been set aside and as such the same is binding upon the Respondent.
13. It is my finding that the issues raised by the Respondent were exhaustively considered by this court in its ruling delivered on 18th May 2023. The same were again considered by the taxing officer in her



ruling dated 28th September 2023 which has not been appealed. The application before me dated 17th November 2023 is in the circumstances frivolous, vexatious and amounts to an abuse of the process of the court. The same is dismissed with costs to the Appellant.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF MAY 2024

S. OKONG'O

JUDGE

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

Mr. Odhiambo for the Respondent

Mr. Kowinoh h/b for Mr. Kouko Appellant

Ms. J.Omondi-Court Assistant

