



**Katoni & another v Kisele (Environment and Land Miscellaneous Application
E005 of 2020) [2024] KEELC 6775 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2020
TW MURIGI, J
OCTOBER 9, 2024**

BETWEEN

NASHON MUKEKU KATONI 1ST APPLICANT

MATHIAS NZENGU MUUMBI 2ND APPLICANT

AND

MANSON MUSYOKA KISELE RESPONDENT

RULING

1. This ruling is in respect of the Chamber Summons dated 8th December 2020 brought under Rule 11(1) and (2) of the Advocates Remuneration Order, 1962 (As subsequently amended), Schedule 6 of the Advocates (Remuneration) Order 2014, Sections 1A, 1B and 3A of the Civil Procedure Act in which the Applicants seek the following orders:-
 1. That the decision of the taxing officer dated 2nd December 2020 in Makueni ELC No. 451 of 2017 Manson Musyoka Kisele v Nashon Mukeku Katoni & Mathias Nzengu Muumbi on the taxation of the Respondent's Party and Party Bill of costs on instruction fees therein dated 12th August 2020 and any consequential order(s)/ certificate(s) arising thereon be set aside/vacated.
 2. That there be a stay of execution of the Taxing Officer's Orders issued on 4th December 2020 pending the hearing and determination of the reference.
 3. That the bill of costs be taxed afresh by a different constituted taxing officer.
 4. That during the hearing of the application, the original file of Makueni ELC 451 of 2017 Manson Musyoka Kisele v Nashon Mukeku Katoni & Mathias Nzengu Muumbi be brought to court.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Anne M. Munyao Advocate sworn on even date.



The Applicant's Case

3. The deponent averred that vide the ruling delivered on 2nd December 2020, the taxing officer awarded the Respondent Kshs 500,000/= as instruction fees. That despite having filed their submissions on 28th October 2020, the taxing officer noted in the ruling that the Defendant did not file any response to the party and party bill of costs. She deposed that the decision of the taxing officer is unreasonable and unjust as it is premised on the wrong principles of the law. She urged the court to allow the application as prayed.

The Respondent's Case

4. The Respondent filed a replying affidavit sworn on 25th January 2021 in opposition to the application. He deposed that the application is incompetent, bad in law, incurably defective and ought to be dismissed with costs.
5. He further averred that the Applicants have not given any plausible reason to fault the decision of the taxing officer. He argued that the Applicants did not comply with the directions issued by the court on 30/9/2020 with regards to filing of the response together with the submissions within 21 days. He maintained that the value of the suit property was not ascertained and thus the award by the taxing officer was reasonable given the nature of the proceedings and the time expended in prosecuting the suit.
6. He further averred that the application violates the provisions of paragraph 11(1) and (2) of the Advocates (Remuneration) Order as the Applicants did not issue a notice in writing to the Taxing officer on the items of Taxation that they wished to object to.
7. In Conclusion, the Respondent contended that the application is an abuse of the court process for the reason that Applicants filed their reference before the taxing officer gave her reasons for the decision. He urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions.

The Applicants Submissions

9. The Applicants submissions were filed on 6th April 2021.
10. On their behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether the application is properly before the court
 - b. Whether the Applicants are entitled to the orders sought.
11. As regards the first issue, Counsel submitted that the Applicants wrote to the court on 7/12/2020 requesting for the reasons of the ruling delivered on 2/12/2020.
12. Counsel further submitted that the orders sought by the Applicant were not limited to stay of the decision as they faced the real fear of execution.
13. Counsel further submitted that filing a reference without reasons is not fatal to the application. To buttress this point, Counsel relied on the cases of Mwangangi & Company Advocates v Machakos County (2018) eKLR and Evans Thiga Gaturu vs Kenya Commercial Bank (2012) eKLR.
14. Counsel submitted that the application is properly before the court as the ruling of the taxing officer contains the reasons for the decision.



15. With regards to the second issue, Counsel submitted that the main issue for determination is item No. 1 on the instruction fees and item 62 on getting up fees. Counsel submitted that instruction fees should be ascertained from the pleadings, judgment or settlement if any. According to Counsel, the taxing officer failed to exercise her discretion judiciously by appreciating the value of the suit property thereby arriving at a wrong decision.
16. Counsel relied on the pleadings to submit that the suit property measures 19 meters by 32 meters in size and is located in a rural area in Kilungu and has no developments thereon. She added that the purchase price for the suit property was Kshs 33,800/=.
17. Counsel further relied on Rule 13 of the Advocates Remuneration Order to submit that the court can only refer to documents such as the sale agreement, valuation report or the consideration noted in the transfer instrument provided in the course of the case which point to the value of the subject matter.
18. It was further submitted that the taxing officer erred in failing to hold that the value of the subject matter was ascertainable as submitted by the Applicants in their submissions. Counsel contended that instruction and getting up fees ought to have been based on the Advocates (Remuneration) Order, 2006 which was in force when the suit was filed.
19. Counsel submitted that the amount arrived at was manifestly high and grossly exaggerated. According to Counsel the suit property is not more than Kshs 100,000/= in worth and hence the instruction fees should be Kshs 49,000/= while the getting up fees should be Kshs 16,333/=.
20. Concluding her submissions, Counsel urged the court to remit the bill of costs to the taxing officer for re-taxation.

The Respondent's Submissions

21. The Respondent's submissions were filed on 28th April 2021.
22. In his submissions, Counsel reiterated the contents of the Respondent's replying affidavit. Counsel submitted that the Applicants did not provide the value of the suit property and cannot raise it at this stage.
23. Counsel contended that the law obligates the taxing master to take into account the following principles in awarding costs; a) the difficulty and complexity of the issues; b) the length of the trial; c) value of the subject matter and d) other factors which may affect the fairness of an award of costs.
24. Counsel submitted that the application is not properly brought under paragraph 11(1) and (2) of the Advocates (Remuneration) Order as the Applicants issued a very short notice in writing to the Taxing Master on the items that were objected to. He submitted that paragraph 11 is the governing law and ought to be followed.
25. It was further submitted that the application is an abuse of the court process as the Applicants filed their reference before the Taxing officer gave reasons for her decision. Counsel submitted that the application was filed a day after seeking for reasons for the decision. Counsel argued that the Applicants ought to have given the taxing officer time to give her reasons for the decision.
26. Concluding his submissions Counsel submitted that the taxing officer considered all the issues and applied the principles of taxation in arriving at her decision.
27. None of the authorities cited by counsel were availed for the court's perusal.



Analysis and Determination

28. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination;
- i. Whether the application offends Paragraph 11 of the Advocates Remuneration Order.
 - ii. Whether the Deputy Registrar erred in awarding the instruction fees and Getting Up fees in the manner that she did.
29. The Respondent contended that the application is not properly brought under paragraph 11 (1) and (2) of the Advocates (Remuneration) Order as the Applicants issued a very short notice in writing on the items they wished to object to. The Applicants on the other hand asserted that they wrote to the court on 7/12/2020 requesting for the reasons for the ruling. They annexed the letter to the supporting affidavit. Counsel maintained that a reference filed without reasons being supplied is not fatal to the application.
30. Paragraph 11(1) and (2) of the Advocates Remuneration Order provides as follows:-
1. Should any party object to the decision of the taxing officer, he may within 14 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 the judge by chamber summons which shall be served on all the parties concerned setting out the grounds of his objection.
31. From the above provision it is clear that a party to the decision of the taxing officer may within 14 days after the decision give a notice in writing to the taxing officer of the items of taxation to which he objects. In the matter at hand, the Applicants gave notice to the taxing officer within 14 days as required. Paragraph 11(1) is not therefore couched in mandatory terms.
32. The next issue for determination is whether the taxing officer erred in awarding instruction and getting up fees in the manner that she did.
33. The Principles of taxation were aptly stated in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others* (1972) EA 162 where the court noted as follows:
- “(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”
34. The gist of the application revolves around the award on item No. 1 and 62 (instruction and getting up fees) which the Applicant contends are manifestly too high.



35. The suit was filed in the year 2009 and determined in the year 2020. The applicable Remuneration Order is the 2006 for the instruction fees and 2014 Advocates Remuneration Order for the services rendered after 2014.

36. Instruction fees is calculated from the value of the subject matter. The guiding principles to be applied when assessing instruction fees in a suit are well settled. In *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR the Court of Appeal outlined the principle as follows:

“We would at this stage point out that 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 the 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”.

37. Further, the Court of Appeal in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR expounded on the principles in *Joreth Ltd v Kigano & Associates* (supra) and set down the proper basis of taxing the instruction fees as follows:-

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court”.

38. I have carefully perused the record in ELC No. 451 of 2017. In paragraph three of the Plaintiff averred that he purchased a parcel of land measuring 30.40 metres by 19.8 metres from Samuel Mbolu Katoni the brother of the 1st Defendant at a total consideration Kshs 40,000/= payable in instalments. Further in paragraph 6, the Plaintiff averred that in 2005 he purchased another portion which was originally was part of the first from the said Samuel Mbolu Katoni measuring 19 metres by 32 metres for a total purchase price of Kshs 33,800/= which was paid in full and the agreement reduced into writing on or about 28.12.2005. This made the Plaintiff's total parcel of land to be about 19 metres by 62 metres (hereinafter referred to as the suit land). The Respondent on his part contended that the value of the suit property was not ascertained.

39. From the foregoing, I find that costs were ascertainable from the pleadings. Getting up fees flows directly from the instruction fees. The issue of Getting up fees which is governed by Paragraph 2 of the above mentioned schedule provides as follows;

“In any case in which denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up trial and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed in taxation”.



40. In the ruling dated 2/12/2020 the Taxing officer noted that no response was filed by the Defendant and stated as follows in in part:-

“I have perused the pleadings herein, the value of the property was not ascertained, I bear in mind the general conduct of the proceedings and the time expended in prosecuting the suit. An award of Kshs 500, 000/= would be sufficient in the circumstances.”

41. From the ruling it is not clear what order the Taxing Officer used in assessing costs. It is the finding of this Court that the Taxing Master erred in her assessment hence arriving at the wrong assessment of costs.

42. For the above reasons, the application is hereby allowed. The decision of the Taxing Master dated the 2nd December, 2020 is hereby set aside. It is further ordered that the bill of costs dated August 12, 2020 shall be taxed afresh on items No. 1 and 62 only by the Deputy Registrar ELC, Makueni.

43. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF OCTOBER, 2024.

In the Presence of:

Parties absent.

Court assistant Steve

