



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO**

**ELC 77 OF 2010**

**CHARLES K. MAIYO.....1<sup>st</sup> PLAINTIFF/RESPONDENT**

**FREDRICK K. SAWE.....2<sup>nd</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN MBURU.....DEFENDANT**

**ROSE WANJIKU MBURU.....LEGAL REPRESENTATIVE/APPLICANT**

**RULING**

1. Before me is a Chamber Summons under a certificate of urgency dated the 22<sup>nd</sup> November 2019 and filed on an equal date pursuant to the provisions of Order 22 Rule 22(1) of the Civil Procedure Rules, Sections 1A, 1B 3A and 63 (e) of the Civil Procedure Act and Article 159 of the Constitution of Kenya where the Applicant seeks for orders of stay of execution pending the hearing and determination of the Reference of taxation, therein annexed, to the High Court (sic).
2. The said Reference also dated the 22<sup>nd</sup> November 2019 brought pursuant to the provisions of Paragraph 11 of the Advocate's Remuneration Order, sought that the Court varies or sets aside the ruling of the taxing officer on the Plaintiffs' Bill of Cost dated the 1<sup>st</sup> August 2019 on the following items; 55, 79, 86, 89, 97, 100, 102, 109, 113 and items listed at No 3 on their supporting affidavit.
3. The said application was supported by the grounds on its face and the supporting Affidavit, sworn by the Applicant Rose Wanjiku Mburu on the 22<sup>nd</sup> November 2019 and her Counsel M/S Anyona A Munde Advocate on an undated day, respectively.
4. The Application was opposed through a Replying affidavit dated 2<sup>nd</sup> December 2019 to the effect that the Plaintiffs' Bill of Cost dated 1<sup>st</sup> August 2019 was taxed at Ksh 528,875/= and interest at Ksh 477,867.70/= and a certificate was issued. That the Decree was issued on 11<sup>th</sup> June 2019 requiring the legal representative to pay costs and interests wherein a Notice of intention to execute was served. That the Applicant's Application was therefore an afterthought and misleading.
5. That as a condition for stay of execution, the Defendant/Applicant to pay the interest of Ksh 477,867.70/= plus half of the taxed costs immediately.
6. In response to the Reference by the Defendant, the Plaintiff in their Replying affidavit of 20<sup>th</sup> January 2020 while opposing the same, deponed that the bill as taxed was extremely reasonable compared to the history of the matter with the Defendant.
7. That their Counsel, Enock Anyona Advocate had handled the matter since its inception and was therefore entitled to full fees. That the Reference was defective as no notice had been issued to the Deputy Registrar requiring reasons for his taxation before launching the same. That the suit had not been withdrawn but had been compromised at a cost of Ksh 640,000/= owing to the conduct of the Defendant during the hearing and the fact that he had already been evicted from the suit premises.
8. That the amount taxed was reasonable owing to the nature of the matter, the claim and counterclaim and the time it had consumed. The cost and interest should therefore be paid to their Counsel Enock Anyona Miruka Advocates for it was not open to the Defendant/Applicant to dictate the costs of the suit.
9. The Plaintiffs/Respondents filed a Counter Reference vide a Chamber Summons dated the 14<sup>th</sup> May 2020, pursuant to the provisions of Rule 11 and 10 of the Advocates Remuneration Order, where they sought for orders seeking to set aside the decision of the taxing officer delivered on the 6<sup>th</sup> November 2019 on items No. 1, 10, 15, 93, 96, 101, 107, 111, 126, 127, 128, 129, 130, 131, 132, 133, 143, 144, 145, 158, 159, 160, 161 and 194, re-tax the same or enhance it. The Plaintiffs further sought for the costs of their application to be provided for.

10. The said application was supported by the grounds on its face as well as the Supporting Affidavit, sworn by the Plaintiffs' Counsel Enock Miruka on the 14<sup>th</sup> May 2020.

11. On the 4<sup>th</sup> December 2019, directions were taken that the matter be disposed of through written submissions to which parties complied and I have considered the said submissions as herein under;

#### **The Defendant/Applicant's Submissions.**

12. The Defendant/Applicant's submissions to the application dated 22<sup>nd</sup> November 2019 seeking stay of execution pending the hearing of their Reference was to the effect that upon being served with a demand letter dated 14<sup>th</sup> November 2019, she had been given 10 days to pay the taxed costs together with interest at a total of Ksh. 1,006,741.70/=, or execution to follow.

13. That the Applicant was a widow, a small business lady within Kericho town and the legal representative of the Defendant. That if execution was allowed, she was likely to suffer great loss and prejudice.

14. That the Bill of Cost from which the taxing officer made a ruling was being challenged through a Reference to which she sought for the court to interfere with the amount taxed as the same was too high and amounted to injustice. That the taxing officer had erred in principle when he relied on the Advocates Remuneration Order of 2014 instead of the one of 2009. She therefore sought for stay of execution to allow the court to make a finding in respect to the whole bill of costs dated 15<sup>th</sup> August 2019 for which the respondents would not be prejudiced. That she had already paid a sum of Ksh 640,000/= when judgment had been entered.

15. Defendant/Applicant's Submissions on their Reference dated the 22<sup>nd</sup> November 2019 was to the effect that in reaching the decision to tax the bill of costs at Ksh 528,875/=, the taxing officer had made errors of principle which occasioned the Defendant serious injustice and therefore it became necessary for the court to intervene.

16. The Defendant's submissions on instruction fee was that the taxing officer erred in principle in taxing the bill of costs at Ksh 272,000/= under schedule VI of the Advocates Remuneration Order of 2014 instead of the Advocates Remuneration Order of 2009 the case having been filed on 9<sup>th</sup> November 2010.

17. That judgment had been entered in favour of the Plaintiffs for a sum of Ksh 640,000/= as mesne profits plus costs and interests. Given that the claim of eviction had been marked as withdrawn, the costs to be awarded ought to have been only for mesne profits of Ksh 640,000/= which attracted a cost of Ksh 35,000/= on a liquidated claim as per schedule VI of the Advocates Remuneration Order 2009.

18. On the Item of attendance at the registry to file documents, the Defendant submitted that the taxing officer erred in principle in taxing of Ksh 500/ instead of Ksh 790/= on items 6, 13, 18, 26, 34, 40, 45, 50, 62, 72, 76, 81, 99, 104, 108, 115, 116, 117, 169, 179, 185 and 191 on items 123 and 124, the same had been taxed at Ksh 840/= respectively.

19. That on item 2, and taxing officer allowed the sum of Ksh 40,800/= as fees for getting up, despite the fact that parties had not confirmed the matter for hearing but had compromised the same for Ksh 640,000/= being mesne profits only.

20. That further although the number of folios had not been mentioned by the Plaintiff, the taxing officer made an assumption and awarded the amount as drawn instead of ksh 180/= for one folio and each other item .

21. The Defendant's submission was that for items No. 127, 128, 129, 130, 131, 132, 133, 143, 144, 145, 158, 159, 160, 161, and 194 the taxing officer awarded ksh 5000/= in each of this item whereas paragraph 7(d) provided for the amount of ksh 1,260/= for half day.

22. That items number 5, 7, 14, 19, 27, 33, 37, 41, 49, 54, 57, 68, 73, 74, 82 ought to have attracted a sum of Ksh 1000/= herein for items 93, 96, 101 and 193 service had been effected through courier.

23. The Defendant relied on the decided case in **Premchand Ralchand Ltd vs Quarry Services of East Africa Ltd & Others [1970] EA** to submit that the law allowed a court to intervene on an award of the taxing officer where an error of principles in the decision on the bill of costs had been made.

24. Further submissions were to the effect that since the sum of Ksh 640,000/= at the time of the demise of the Applicant's husband had not been paid, that the court do consider the payment of the interest at 8% and the cost be taxed of at Ksh 397,802/=

25. The Defendant further submitted that the Plaintiff's Counter Reference was an afterthought and was not made in good faith. That the amount taxed by the taxing officer was more than the principle decretal sum awarded and further that the costs awarded were punitive and more so since the original Defendant had been sick for a long time, which sickness finally killed him, thus denying him the chance to defend the suit.

#### **Plaintiffs' Submission.**

26. The Plaintiffs' submission to both the Defendant's Reference and their Counter Reference against the decision of the taxing officer in the ruling dated the 6<sup>th</sup> November 2019 was to the effect that both parties were against the awards of the itemized items as afore stated in both the Reference and the Counter Reference respectively.

27. That instructions had been issued by the Plaintiffs to the firm of M/s Enock Anyona Miruka & Co Advocates who conducted the suits to its final determination and therefore the award of the instruction fee by the taxing officer was proper. Reliance was placed on the provisions of Section 62(1) of the Advocates (Remuneration) Order 1962 that stipulated that where there had been a change of Advocates, the Advocate who was finally on record should draw a single bill for the whole matter in respect to which costs be awarded.

28. That what was drawn herein was a party and party Bill of Costs which was for the winning party, and not an Advocate-Client Bill of Costs to which counsel could still be entitled to costs of instruction fees.

29. That the instructions fee was static and independent and could not be affected by the state the suit had reached, the full fee was still to be earned.

30. That the taxing officer did not error in awarding Ksh 272,000/= as instruction fee upon analyzing the circumstance of the case including the conduct of the parties and the adjournment of the matter by the Defendant. That further, during the hearing of the case on 26<sup>th</sup> June 2015, through the both documentary and oral evidence by PW1 and his witnesses, the value of the suit property was placed at Ksh 14, 000,000/= on which value the taxing master pegged while taxing the instruction fee.

31. That the matter had proceeded to a full hearing and judgment delivered on 26<sup>th</sup> June 2015 and that it was not true that the claim for vacant possession in default eviction to issue had been withdrawn. However the issue of mesne profits had been compromised by a consent where the Defendant was to pay Ksh 640,000/= of which the ruling had been delivered on 26<sup>th</sup> February 2016.

32. The Plaintiffs however faulted the taxing officer for failing to capture the interest on the mesne profit which covered the period from November 2010 to February 2016 at 14% making it a total of 477,000/=. That this sum added to the mesne profit gave a total of Ksh 1,006,741.70/= for which the instruction fee ought to have been Ksh 78,155/= the sum that the Plaintiffs sought for the court to grant.

33. The Plaintiffs had no objection to the taxed items as per paragraph 10 of their submissions but took issue with item 126 to the effect that the taxing officer ought to have awarded fee for half a day at Ksh 5040/=

34. That the fee for items 127, 128, 129, 130, 131, 132, 133, 143, 144, 145, 158, 159, 160, 161 and 194 ought to be enhanced to Ksh 5040/= since witnesses testified, had been cross examined and re-examined.

35. That should the Defendant dispute the amounts as proposed by the Plaintiffs on items No. 93, 96, 101, 107, 111, and 193 which was service effected at Kisii which was 101 km away, the court should apply the applicable scale.

36. The Plaintiffs further submitted that the taxing officer failed to award them costs on item 10 as directed by the honorable judge which was contrary to the provisions of Schedule VI N(sic). They therefore sought to be awarded Ksh 272,000/= for reasons that a counter claim was a suit on its own.

37. Lastly on the interest chargeable, the Plaintiffs submitted that this issue was not before the taxing officer and was not part of costs as it was a prayer in the main suit and had been determined via a consent which was endorsed by the honorable trial Judge. That this court therefore had no jurisdiction to sit on a decision of the court of equal jurisdiction. The Plaintiffs sought that their disputed items herein above stated be enhanced.

### **Determination**

38. I have considered the Applications, the submissions, as well as the Authorities herein cited by the parties. I find the issues arising for determination therein as follows:-

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending the hearing and determination of the Reference of taxation.
- ii. Whether the Applications for Reference and counter Reference herein are competent before this Court.
- iii. What orders should this Court make.

39. I have considered the Defendant's Application for stay of execution pending the hearing and determination of the Reference of taxation, I have also considered the reasons given for and against the said application.

40. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. By analogy of the stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a Reference to a judge from taxation of costs be guided by presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the Applicant.

41. An application of stay of execution according to Order 42 Rule (6)(2) the Civil Procedure Rules can only succeed if the Applicant satisfies the following criteria:-

*“(1) The Applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.*

(2) Secondly, from the facts of the case appealed from the Applicant would suffer substantial loss unless stay of execution is granted.

(3) That the Applicant has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.”

42. In the instant application, the Bill of Cost was taxed on the 6<sup>th</sup> November 2019 wherein the Applicant filed her application on the 22<sup>nd</sup> November 2019 which was not inordinate delay in my opinion. However although the Applicant states that she will suffer substantial loss if the application is not allowed, it was incumbent upon her to demonstrate the kind of substantial loss she would suffer if the stay order was not made in her favour.

43. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

*“The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”*

44. In an application of this nature therefore, the Applicant ought to have shown the damages she would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before the ruling and that would be denying the Respondents costs. See **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410**

45. On the last condition as to provision of security, I find that the Applicant has offered no security for the performance of the decree which is a condition precedent in granting the application. Although this is a mandatory legal requirement under the provisions of Order 42 Rule 6(2)(b) of the Civil Procedure Rules, however it should be noted that the court has been called upon to exercise its discretion and consider the application in the interest of justice. This court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities. The Respondents have confirmed that the original Defendant gave vacant possession of the suit premises and parties consented to payment of mesne profits thereafter. I am thus not persuaded that the Plaintiff/respondents will suffer any prejudice if the application is allowed as long as they can be compensated in costs in respect to this application which is herein allowed.

46. On the second issue as to whether the Applications for Reference and counter Reference herein as filed by the parties are competent before the Court, I find that Paragraph 11 of the Advocates Remuneration Order provides that:

*‘Where a party is aggrieved by the decision of a Taxing Master, he is required to object in writing by requesting the Taxing Master to give reasons for the items of taxation that he is objecting to and thereafter file Reference to this Court.’*

47. The procedure therefore for challenging a decision of a Taxing Officer is provided for under Section 51 of the Advocate’s Act and Rule 11 of the Advocates (Remuneration) Order. Rule 11 (2) further provides that a person who objects (Objector) to a decision of the Taxing Officer may within 14 days from the receipt of the reasons of the Taxing Officer (Ruling on taxation) apply to the Judge in chambers setting out the grounds of his objection. This is done by way of a Reference filed vide a chamber summons under Rule 11 of the Advocates (Remuneration) Order.

48. In the both the applications dated the 22<sup>nd</sup> November 2019 and the 14<sup>th</sup> May 2020 by way of counter Reference, Counsel for the Applicants are deemed to have been aware of the fact that Rule 11 of the Advocates (Remuneration) Order expressly provided a specific procedure for addressing a grievance and ought therefore to have followed it. Having not requested for the reasons from the Taxing Master in order to file a Reference, there had been no explanation given as to why both the Applicants opted to use a totally different procedure while preferring their Reference and counter Reference. In the case of **Speaker of the National Assembly vs James Njenga Karume Court of Appeal at Nairobi Civil Application No. 92 of 1992** it was held as follows:-

*“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”*

49. Further in the case of **Machira & Co. Advocates vs Magugu [2000] 2 EA 428** Ringera J (as he then was) stated as follows:

*“As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.*

50. A similar view was also held by Odunga J in **Gacau Kariuki & co. Advocates vs Allan Mbugua Nganga [2012]eKLR** as follows:-

*“I must make it very clear that what is before is not a Reference from taxation, but an Application seeking to set aside the orders made on the 29<sup>th</sup> day of September, 2011 and 27<sup>th</sup> day of October, 2011. The orders, which were made on 29<sup>th</sup> September, 2011 were made by the Deputy Registrar when in her capacity as the Taxing Master taxed the Bill as presented. What is the procedure for challenging such a decision; in my view the only available recourse to a person aggrieved by a decision of a Taxing Officer is to lodge a Reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein paragraph 11(4) of the Advocates Remuneration Order empowers the court to extend time. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with”.*

51. Guided by the above decisions, I am satisfied that the instant Applications are in violation of the Provisions of Rule 11 of the Advocates (Remuneration) Order and are at best incurably defective, improper, un-procedural and an abuse of the court’s due process;.

i. The Applicants shall within fourteen (14) days from the date hereof give the requisite notice in writing in accordance with Paragraph 11 (1) of the Advocates' Remuneration Order, 2009, and subsequently comply with sub-paragraph (2) of paragraph 11 thereof with regard to the filing of a Reference and counter Reference by Chamber Summons setting out its grounds of objection to the taxation of costs.

ii. There shall be a stay of execution of the Certificate of Costs dated the 11<sup>th</sup> June 2019 pending the hearing and determination of the Reference and counter Reference to be filed by Chamber Summons in accordance with Paragraph 11 of the Advocates' Remuneration Order, subject to the deposit in court of the amount of taxed costs in the sum of Ksh.528,875/=or a Bank Guarantee therefor within thirty (30) days hereof.

iii. Since Counsel failed to comply with the provisions set out in seeking for Reference and counter Reference of an objection on taxation under paragraph 11 of the Advocates' Remuneration Order, there shall be no orders as to costs of both the applications.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**