



REPUBLIC OF KENYA



**Muia (Suing as the legal representative of Mary Vose Muia) v Masai
(Environment and Land Miscellaneous Application E011 of 2022)
[2023] KEELC 21504 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2022
TW MURIGI, J
NOVEMBER 1, 2023**

BETWEEN

**ISAAC MAWEU MUIA (SUING AS THE LEGAL REPRESENTATIVE OF MARY
VOSE MUIA) APPLICANT**

AND

LABAN NDUVA MASAI RESPONDENT

RULING

1. Before me for determination is the Chamber Summons dated 25th November, 2022 brought under the provisions of Rule 11 (1) and (2) of the *Advocates (Remuneration) Order*, 1962, Schedule 6 of the *Advocates (Remuneration) Order*, 2014 and Sections 1A, 1B and 3A of the *Civil Procedure Act* in which the Applicant seeks the following orders: -
 1. That the decision of the Taxing Officer dated 14th November, 2022 in Makueni ELC Judicial Review Application No. E002 of 2021 *Laban Nduva Masai v Land Control Board Mukaa Sub- County*, The Honourable Attorney General and Isaac Maweu Muia (Suing as the Legal representative of Mary Vose Muia) on the taxation of the Ex Parte Applicant's Party and Party Bill of Costs dated 9th May, 2022 and filed on 10th May, 2022 and any consequential orders/ Certificates arising thereon be set aside/vacated.
 2. That the Bill of costs be taxed afresh.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Isaac Maweu Muia sworn on even date.



The Applicant's Case

3. The Applicant averred that the reference herein arises from the decision of the Taxing Officer made on 14/11/2022 in which the Respondent herein was awarded Kshs. 250,650/=. The Applicant contends that the Taxing Officer erred in principle by awarding costs on the entire suit in Makueni ELC Judicial Review No. E002 of 2021 rather than on the application.
4. The Applicant further averred that the Taxing officer erred in principle in arriving at a decision which is contrary to the applicable law. He argued that the Taxing officer misapprehended and misapplied the principles of taxation by failing to apply the principles and formula provided under Schedule 6 of the Advocates (Remuneration) Order, 2014 in the taxation of costs. He averred that the Taxing Officer erred in law and in fact by awarding instruction fees which were manifestly high and which therefore amounted to oppression and injustice towards him.
5. Lastly, the Applicant averred that the Taxing officer misapprehended the principles and the provisions of the law that were cited by the Applicant in his submissions to the bill of costs, thus arriving at an erroneous decision. The Applicant urged the Court to grant the orders sought in the reference.

The Respondent's Case

6. The Respondent filed his replying affidavit sworn on 9th March, 2023 in opposition to the application. He averred that the bill of costs dated 09/05/2022 was prepared on the basis of instructions emanating from the application dated 15/11/2021 which had sought inter alia to set aside and reverse the Title deeds to 72 parcels of land in Salama township with a cumulative value of over Kshs. 144,000,000/=. He asserted that the award of Kshs. 200,000/= as instruction fees was commensurate with the work done.
7. The Respondent further averred that the decision of the Taxing officer was anchored on Schedule 6 of the Advocates (Remuneration) Order, 2014 and not the Advocates (Remuneration) Order, 2006 as alleged by the Applicant. He averred that the Applicant has not adduced any evidence to challenge the value of the subject matter hence the Taxing officer was properly guided by the principles of taxation as set out in the case of *Joreth Ltd v Kigano & Associates* Civil Appeal No. 66 of 1999 (unreported).
8. The Respondent contended that the Taxing officer properly exercised her discretion when taxing items Nos. 2,3,5,6 and 10 of the bill of costs. Lastly, it was averred that the Applicant's Advocates are not properly on record in accordance with Order 9 Rule 9 of the Civil Procedure Rules, 2010. He urged the Court to dismiss the reference with costs.

The Response

9. In a supplementary affidavit sworn on 22nd March, 2023, the Applicant reiterated that the ruling of the Taxing officer was premised on the entire suit and not on the application. He asserted that the submissions filed on his behalf in the taxation proceedings were premised on the *Advocates (Remuneration) Order* 2006 as opposed to the *Advocates (Remuneration) Order* 2014. He argued that the mistake of his Advocate should not be visited upon him.
10. Lastly, the Applicant averred that the Notice of Appointment of Advocates was filed on 25/11/2022 and duly served upon the Respondent's Advocates on 12/01/2023.
11. The reference was disposed of by way of written submissions.



The Applicant's Submissions

12. The Applicant's submissions were filed on 22nd March, 2023. On his behalf, Counsel submitted that the principles applicable in the assessment of costs were outlined in the landmark case of *Premchand Raichand Limited v Quarry Services of East Africa Limited* (No. 3) [1972] 1 EA 162 as follows: -
- a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy;
 - b. That a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
 - c. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - d. That so far as practicable there should be consistency in the awards made;
 - e. 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.
13. Counsel contended that the Taxing Officer erred in principle on the following items:
- i. Item No. 1 on instruction fees was taxed based on the suit as opposed to the application. In addition, Counsel contended that the value of the suit properties was a mere estimate that was not proven by evidence;
 - ii. Item No. 4 on drawing list of authorities (2 folios) was taxed at Kshs, 1,100/= as opposed to Kshs. 360/=;
 - iii. Item No. 5 on attending court registry to file replying affidavit and list of authorities was taxed at Kshs. 3,000/= which is excessive and contrary to the provisions of Schedule 6 Rule 7 of the *Advocates (Remuneration) Order 2014*;
 - iv. Item No. 7 on attending court for directions was taxed at Kshs. 3,000/= contrary to the provisions of Schedule 6 Rule 7 (d) on the ordinary scale of the *Advocates (Remuneration) Order 2014*;
 - v. Item No. 9 on preparing submissions and research was taxed at Kshs. 10,000/= which is excessive and contrary to the provisions of the *Advocates (Remuneration) Order 2014*.
 - vi. Item No. 10 on attending court registry to file submissions was taxed at Kshs. 3,000/= which is excessive and contrary to the provisions of Schedule 6 Rule 7 of the *Advocates (Remuneration) Order 2014*;
 - vii. Item No. 12 on attending court for directions was taxed at Kshs. 3,000/= contrary to the provisions of Schedule 6 Rule 7 (d) on the ordinary scale of the *Advocates (Remuneration) Order 2014*;
 - viii. Item No. 13 on attending court for ruling was taxed at Kshs. 3,000/= contrary to the provisions of Schedule 6 Rule 7 (d) on the ordinary scale of the *Advocates (Remuneration) Order 2014*;
 - ix. Item No. 14 was taxed at Kshs. 750/= yet no receipt was attached to prove the same;
 - x. Item No. 15 was taxed at Kshs. 200/= which amount was not proven;
 - xi. Item No. 17 on attending court registry to file a bill of costs was taxed at Kshs. 10,000/= which is excessive and contrary to the provisions of Schedule 6 Rule 7 of the *Advocates (Remuneration) Order 2014*;



- xiii. Item No. 18 on service of the bill of costs was taxed at Kshs. 5,000/= which is excessive and contrary to the provisions of Schedule 6 Rule 9 of the Advocates (Remuneration) Order 2014.
14. Counsel submitted that the Applicant's submissions against the bill of costs in the taxation proceedings were premised on the Advocates (Remuneration) Order 2006 as opposed to the Advocates (Remuneration) Order 2014. Counsel argued that the mistake of an Advocate should not be visited upon the Applicant.
15. Counsel further submitted that the Taxing Officer erred in principle by assessing the instruction fees at Kshs. 200,000/= when there was no evidence that the value of the subject matter was indicated in the pleadings. Counsel argued that the assessment was based on the main suit as opposed to the application. Lastly, Counsel contended that no receipts were annexed to support the claim for disbursements in the bill of costs.

The Respondent's Submissions

16. The Respondent's submissions were filed on 3rd May, 2023.
17. On his behalf, Counsel contended that the bill of costs dated 09/05/2022 was correctly assessed as per Schedule 6 of the Advocates (Remuneration) Order 2014. Counsel submitted that the value of the subject matter as per the application dated 15/11/2021 was Kshs. 144,000,000/= which amount still remains undisputed. Counsel argued that the Applicant had failed to demonstrate the relevant factors the Taxing officer had failed to take into consideration when making the award of Kshs. 200,000/=.
18. On the disputed Items Nos. 2,3,5,6, and 9, Counsel submitted that the said items were taxed to scale and that the Taxing officer properly exercised her discretion. Moreover, Counsel argued that the Applicant's Advocates are not properly on record in accordance with Order 9 Rule 9 of the Civil Procedure Rules, 2010. Counsel urged the Court to expunge the entire application from the record with costs to the Respondent.
19. Counsel for the Respondent concluded by stating that the reference herein lacks merit and that it ought to be dismissed with costs.

Analysis and Determination

20. Having considered the Reference, the response, the rival submissions, the relevant legal framework and jurisprudence, the following issues arise for determination:-
- a. Whether the Firm of Stanley Nthiwa is properly on record for the Applicant.
 - b. whether the taxing officer erred in law and principle while taxing the party and party bill of costs.
21. The Respondent alleged that the Applicant's Advocate was not properly on record for failing to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010. He contended that the application was filed by a stranger to the proceedings and as such it ought to be expunged from the record with costs.



22. Order 9 Rule 9 of the Civil Procedure Rules, 2010 which provides for change of Advocates to be effected by order of Court or consent of parties to wit: -
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court :-
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”
23. It is clear from the above provisions that it is mandatory that for any change of Advocates after judgment has been entered, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate for the change of Advocates to be effected.
24. The record in the main file which prompted the taxation proceedings and the instant reference shows that the Applicant’s Advocates filed a Notice of Change of Advocates together with a duly executed Consent with the previous Advocates, R. K. Mutua & Company Advocates. Both the Consent and the Notice of Change of Advocates were signed on 25/11/2022 and filed in Court on 30/11/2022. Service was effected upon the Respondent’s Advocates on 12/1/2023 and the application herein was filed on 18/1/2023. The consent and the notice of change were filed concurrently with the instant reference.
25. From the foregoing, it is crystal clear that the Notice of appointment of Advocates filed together with this reference on 25/11/2022 is regular and in absolute compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010. The firm of Stanley Nthiwa & Company Advocates is therefore properly on record.
26. The second issue for determination is whether the taxing officer erred in principle while taxing the bill of costs.
27. On Item No. 4 being drawing list of authorities, it is not in doubt that paragraph 4 (d) of Schedule 6 provides for Kshs. 180/= per folio. The taxed amount of Kshs. 1,100/= is manifestly excessive.
28. On Item No. 5 being attendance to the Court registry for filing of a replying affidavit and list of authorities from Machakos and back, the same was taxed at Kshs. 3,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.
29. On item No. 7 being attendance before the Judge for directions, the same was taxed at Kshs. 3,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.
30. On Item No. 9 being preparing submissions and research, the same was taxed at Kshs. 10,000/= for 16 folios. The same is evidently excessive and contrary to the provisions of paragraph 4 (a) (i) and (ii) of Schedule 6.
31. On Item No. 10 being attendance to the Court registry for filing of submissions from Machakos and back, the same was taxed at Kshs. 3,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.
32. On Item No. 12 being attendance before the Judge for directions, the same was taxed at Kshs. 3,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.



33. On Item No. 13 being attendance before the Judge for Ruling, the same was taxed at Kshs. 3,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.
34. On Items Nos. 14 and 15, the said disbursements are generic items which require proof in the form of receipts. Having failed to supply the said receipts, the said items were not proved.
35. On Item No. 17 being attendance to the Court registry for filing a bill of costs, the same was taxed at Kshs. 10,000/=. That amount is manifestly excessive.
36. On Item No. 18 being service of the bill of costs on F.M. Mulwa Advocates, the same was taxed at Kshs. 5,000/=. That amount is reasonable and the Taxing officer properly exercised her discretion.
37. Lastly, the Applicant contested the award of Kshs. 200,000/= on Item No. 1 as instruction fees. In *Joreth Ltd v Kigano and Associates* [2002] 1 EA 92 (CAK), the Court of Appeal aptly held as follows: -

“We would at this stage point out that the value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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.”
38. The Notice of Motion dated 15/11/2021 was dismissed with costs vide the Ruling dated 27/04/2022 on the grounds that the law firm of F.M. Mulwa Advocates did not meet the threshold of showing that they were authorized agents for the Applicant. The said law firm had failed to comply with the elementary rule of filing a Notice of Appointment of Advocates prior to filing any pleadings on behalf of the Applicant.
39. Having considered the general conduct of the ensuing proceedings after the application dated 15/11/2021 was filed, heard and dismissed, it would appear that an award of Kshs. 200,000/= as instruction fees was manifestly excessive.
40. In light of the foregoing, I allow the reference and set aside the taxing officer’s decision on items 1, 4, 9, 14, 15, and 17. The bill of costs is remitted back to the taxing officer to assess fees on the said items.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 1ST DAY OF NOVEMBER, 2023.

In the presence of:-

Court assistant - Mr. Kwemboi.

