



Mutai v Steve Odhiambo Opar t/a Odhiambo Opar (Environment and Land Miscellaneous Application E1'A' of 2020) [2022] KEELC 12803 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12803 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E1'A' OF 2020
FM NJOROGE, J
OCTOBER 3, 2022

BETWEEN

JANE CHEROTICH MUTAI APPLICANT

AND

STEVE ODHIAMBO OPAR T/A ODHIAMBO OPAR RESPONDENT

RULING

1. This is a ruling with respect to the applicant's Notice of Motion application dated 5/3/2021 and Amended Chamber Summons application dated 17/12/2021.
2. The Notice of Motion application dated 05/3/2021 has been brought under Order 40 Rule 2(1) and (2), Rule 4 (1) and (2) of the [Civil Procedure Rules](#) and Sections 3 and 3A of the [Civil Procedure Act](#) and seeks the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. The Honourable Court be pleased to grant injunction restraining the Respondent by itself, their Agents, employees, servants and or any individual or entity claiming through them from obtaining warrants of Attachment, issuing a proclamation or attaching any assets belonging to Applicant pending inter-parties hearing and determination of the reference challenging the award of costs by the Honorable Nancy Makau on 2nd February 2021.
3. The application dated 5/3/2021 is supported by the grounds on the face of the application and the affidavit sworn by Jane Cherotich Mutai. She deposed that the respondent herein filed a Bill of Costs on 24/09/2020 in respect of services rendered to her on 3/3/2020 in respect of Nakuru ELC No. 379 of 2013; that by a Notice dated 7/10/2020, the Deputy Registrar notified her that a Bill of Costs was slated for mention for the 17/11/2020; that on 17/11/2020 the matter was not mentioned as it was



not listed; that she did not receive any further communication until 17/02/2021 when she received an email from the respondent informing her that a ruling in respect of the said Bill of Costs had been delivered on 02/02/2021 where the taxing officer awarded the Respondent Kshs. 266,800/=; that she is advised by her advocates on record that the bill of costs is defective and ought to be struck out; that the bill of costs is not grounded on any evidence at all; that the award is manifestly excessive and is not based on the value of the subject matter; that she filed a Notice of Objection on 18/02/2021 but to date she has not received any response from the Deputy Registrar.

4. The Chamber Summons Application dated 17/12/2021 is brought under Paragraph 11(2) of the Advocates (Remuneration) Order and Sections 1A & 3A of the *Civil Procedure Act* and seeks the following orders:
 - a. That this Honourable court be pleased to set aside the entire ruling of the taxing officer the Honorable N. Makau delivered on 2nd February 2021.
 - b. That the honorable court be pleased to quash the entire ruling and award of costs delivered by the Taxing officer on 2nd February 2021.
 - c. That costs of this application be provided for.
5. The amended Chamber Summons application dated 17/12/2021 does not have a supporting affidavit attached to it. The Applicant had filed a Chamber Summons application dated 4/03/2021 before it was amended on 17/12/2021. The supporting affidavit to the application dated 4/03/2021 reiterated the contents of the supporting affidavit to the Notice of Motion application dated 5/3/2021 and further stated that despite serving the respondent with the Notice of Objection, the respondent instructed an auctioneer to contact her and demand for payment of costs; that the auctioneer had been trying to get in touch with her while the respondent sent her threatening messages to the effect that if she did not pay the costs as per the certificate of costs then she would be arrested and committed to civil jail; that she was advised by her advocates on record that the costs awarded to the respondent are founded on a defective bill of costs which does not state the schedule or paragraph of the Advocates Remuneration Order under which it was brought; that she had filed a reference to challenge the Bill of costs after the expiry of fourteen days from the date of filing the Notice of Objection; that the respondent intends to execute against her using a certificate of costs; that she is advised by her advocates that a party can only execute against another using a decree.
6. In response to both applications, the respondent filed a Replying Affidavit sworn by Steve Odhiambo Opar on 25/10/2021 where he deposed as follows; that the Applicant's applications are bad in law, incompetent and an abuse of the court process; that on 03/03/2020 the applicant had instructed their law firm to represent and defend her interest over land parcel No. Rongai/Lengenet Block 2/46(Mawe) in Nakuru ELC Number 379 of 2013 consolidated with Nakuru ELC No. 381 of 2013 between Samson Njuguna Mwaura versus Jane Cherotich Mutai; that at the time of receipt of instructions, the matter had been scheduled for defence hearing where they represented the applicant in court; that on 03/03/2020, they sought leave from the trial court and filed a Supplementary document dated the same date in support of the applicant's case; that based on the foregoing, their firm was properly instructed by the applicant to represent her in the above mentioned suit; that while the matter was pending submissions and directions on 30/04/2020, they were served with a Notice of Change of Advocates dated 29/04/2020 by the law firm of M/S Kibet & Co. Advocates taking the conduct of the matter in their place on behalf of the applicant; that vide the email dated 19/05/2020, they communicated to the firm of M/S Kibet & Co. Advocates informing them of their intention to file an Advocates-Client bill of costs for the services they rendered and invited the applicant to engage with them without the necessity of filing and taxing the same; that the said email was not responded to and so they sent



another email to the applicant on 4/06/2020 where they served her with their fee note invoice dated the same date and copied to the firm of M/S Kibet & Co. Advocates; that the subsequent email was not responded to so they filed their Advocate-Client bill of Costs dated 22/09/2020 on 24/12/2020; that vide the email dated 6/11/2020, the respondent served the applicant with their Advocate-Client bill of costs dated 22/09/2020 and a Taxation Notice dated 7/10/2020 for mention for directions on 17/11/2020; that the said documents were also served upon the applicant via WhatsApp to her mobile number; that the applicant in her supporting affidavit acknowledges receipt of the bill of costs but has not indicated why she did not respond to the same; that on 17/11/2020 when their Advocates -Client bill of costs came up for mention the court did not sit and that neither was the applicant present so they took a further date for taxation of their Bill of Costs for the 16/12/2020 at the registry; that they served the applicant vide the email dated 24/11/2020 and WhatsApp communication on 29/11/2020 the Taxation Notice dated 24/11/2020; that on 16/12/2020 the applicant did not attend court for taxation and that neither did she respond to the bill of costs; that the Deputy Registrar set the matter for ruling for the 2/02/2021; that vide the email dated 27/01/2021 they effected service of the Ruling Notice dated the same date on the applicant and filed the affidavit of service dated 29/01/2021; that on 02/02/2021 the applicant did not attend court and the court taxed the bill of costs at Kshs. 266,800/=; that on 14/02/2021 and on 17/02/2021 they served the applicant via WhatsApp the Certificate of Costs dated 10/02/2021; that it is therefore not true that the applicant did not receive any further communication on the bill of costs until 17/02/2021 when she was informed of the ruling; that their bill of costs was filed pursuant to the provisions of paragraph 2 of the Advocates Remuneration Order; that as per the Deputy Registrar's ruling, item 1 was taxed at Kshs. 75,000/= which is the minimum fees charged under the category of 0 to 500,000/= under Schedule 6 and that no legal basis has been laid for the court to interfere with the taxing officer's ruling and that the applicant's applications should be dismissed with costs to the respondent.

7. In response to the respondent's replying affidavit, the applicant filed a further affidavit sworn on 17/12/2021 and filed on 10/01/2022. She deposed that the respondent came on record as her advocate on 03/03/2020 when the matter was slated for defence hearing; that they had agreed that the applicant was to pay Kshs. 15,000/= on that day and Kshs. 25,000/= once submissions are filed; that pursuant to that agreement she paid the Kshs. 15,000/= together with all the other required charges; that the applicant was surprised when the respondent increased the fee to Kshs. 100,000/= and demanded that the same be paid before the submissions were filed; that she instructed another advocate after the respondent declined to prepare the submissions; that in response to paragraphs 9 to 16 of the respondent's replying affidavit, she stated that she has been advised by her advocates on record that the course taken by the respondent is in contravention of paragraph 62(A)(1) of the *Advocates Remuneration Order*; that the bill drawn by the respondent is not single for the whole of the matter as provided by the above provision; that the award of the taxing officer is questionable as the taxing officer did not show how she arrived at the award of Kshs. 266,800/=.
8. The applications were canvassed by way of written submissions. The applicant filed her submissions dated 20/06/2022 on the same date while the respondent filed its submissions dated 24/06/2022 on 27/06/2022.
9. The applicant in her submissions identified two issues for determination which were whether the bill of costs as taxed was in compliance with the statutory provisions and whether the award is reasonable.
10. The applicant relied on the case of *Wycliffe Chitayi Mubalya v Dorothy Awiti Omboto t/a Dao Associates & another* [2017] eKLR and submitted that the bill of costs does not state the schedule and paragraph of the Advocates Remuneration Order it is brought under and that the respondent used the 2014 Advocates Remuneration Order and yet the matter was filed in 2013 and therefore the



applicable remuneration order is the 2009 Advocates Remuneration Order and therefore the bill of costs is untenable.

11. The applicant further observed that the bill of costs contravenes paragraph 62(A) of the Advocates Remuneration Order and submitted that the bill of costs is not accompanied by the Certificate setting out the dates during which all the advocates acted and does not include the fees already paid to the respondent. The applicant also submitted that where more than one law firm has represented a party in a suit, then there should only be one bill of costs.
12. It was the applicant's submissions that even though she seeks to review the taxing officer's award in the matter before the court, there is a separate pending bill of costs filed by counsel who represented the appellant before the respondent came on record. The applicant submitted that the award of costs is unreasonable and on the higher side and that the value of the suit property being Kshs. 870,000/=, she is not sure how the honourable Deputy Registrar arrived at the award of Kshs. 266,800/=. The applicant concluded her submissions by seeking that the ruling delivered on 02/02/2021 be set aside.
13. The respondent in their submissions reiterated that it served the applicant with the various notices before the bill of costs were taxed. The respondent further submitted that that the reference hereon does not comply with the provisions of paragraph 11 of the Advocates Remuneration Order which requires a reference to be filed within 14 days from the date of the decision of the taxing officer. The respondent submitted that the reference herein was filed on 5/03/2021 which was over 30 days after the decision of the taxing officer and without the leave of court and sought that the bill of costs be dismissed with costs.
14. The respondent also submitted that should the court find that the reference is properly before the court, the only issue that the court will have to determine is whether it should interfere with the taxing officer's findings on the taxation. It was the respondent's submissions that the taxing officer did not error in principle in assessing the costs as the court used the Advocates Remuneration Order 2014 Schedule 6 as it represented the applicant in 2020 and not in the year 2009 as alleged.
15. The respondent submitted that the reasons for taxation were well captured in the ruling of 2/02/2021 and concluded their submissions by stating that the bill of costs was unopposed and was properly taxed and therefore the applicant's applications dated 17/12/2021 and 5/03/2021 ought to be dismissed with costs to them.

Analysis and Determination

16. I will first address the application dated 5/03/2021 which was filed on 11/03/2021. Prayers 1 and 2 of the said application were granted by the court on 06/10/2021. It is my view that prayer 3 of the said application is overtaken by events as it seeks for the grant of an injunction pending the hearing and determination of the reference which is under consideration in this ruling. Therefore, the application dated 5/03/2021 is spent as submitted by the respondent.
17. After considering the Amended Chamber Summons, the replying affidavit, further affidavit and submissions, the issues that arise for determination are whether the reference was filed on time and whether the court should set aside the ruling and award of costs delivered by the taxing officer on 2/02/2021.
18. On the first issue, the respondent argues that the reference contravenes the provisions of Paragraph 11 of the Advocates Remuneration Order as it was filed thirty days after the decision of the taxing officer.



19. Paragraph 11 of the Advocates Remuneration Order provides as follows:

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (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.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

20. It is not disputed that the taxation ruling in this matter was delivered on 02/02/2021. A per the provisions of paragraph 11 of the Advocates Remuneration Order, any party who wishes to object to the decision of the taxing officer gives a notice in writing to the taxing officer on the items of taxation to which it objects. The applicant in this matter stated that she filed a Notice of Objection in compliance of the said provisions. A perusal of the court record indicates that there is a Notice of Objection dated 15/02/2021 and filed on 18/02/2021.

21. It is my view that the said notice was not filed within fourteen days as required under paragraph 11 (1) of the Advocates Remuneration Order. Had the notice been filed within the required timeframe, then the applicant would have had fourteen days from receipt of the reasons to file the reference. Nevertheless, the applicant would have filed the reference without giving a notice to the taxing officer on the items of taxation to which she objects as was held in the case of *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5 as follows if the reasons are apparent from the face of the ruling;

“ Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...”



22. The applicant subsequently filed her reference vide the chamber summons dated 4/03/2021 on 11/03/2021 before it was amended on 17/12/2021. As pointed out by the respondent, the reference was filed after a period of thirty days from the date the taxing officer delivered her ruling.
23. The court further in the case of *Evans Thiga Gaturu, Advocate Vs Kenya Commercial Bank Limited* [2012] eKLR held as follows:

“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference... Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.

In the present case, the ruling on taxation was made on 6th July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in *Kipkorir, Titoo & Kiara Advocates (ibid)*, is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished.”

24. As pointed out before, the applicant in this matter filed her reference on 11/03/2021 which was a period of over thirty days after the delivery of the ruling by the taxing officer. As this was the case, the applicant was required under Paragraph 11(4) of the Advocates Remuneration Order to apply for extension of time which she did not do. It is this court’s opinion therefore that since the applicant filed the reference outside of the fourteen days of the delivery of the taxing officer’s ruling, the applicant’s amended Chamber Summons dated 17/12/2021 is hereby struck out with costs.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 3RD DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

