



Oloo v Yatoyi & 2 others (Environment and Land Miscellaneous Application E010 of 2022) [2022] KEELC 14642 (KLR) (8 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2022
DO OHUNGO, J
NOVEMBER 8, 2022**

BETWEEN

ANTHONY OKELLO OLOO APPLICANT

AND

BENJAMIN KEMEI YATOYI 1ST RESPONDENT

JUSTIN MAKARI MUTOBERA 2ND RESPONDENT

IDI OSUNDWA 3RD RESPONDENT

RULING

1. Through Chamber Summons dated March 28, 2022, the applicant seeks the following orders:

1. [Spent]
2. [Spent]
3. [Spent]
4. That this Honourable Court be pleased to set aside the Ruling of the Taxing Master delivered on the 16th day of March 2022 with regard to the respective Bills of Costs by the Respondents each dated the 15th day of December 2021.
5. That this Honourable Court be pleased to direct that Respondent's Bills of Costs be taxed afresh.
6. That costs be provided for.

2. The application is supported by an affidavit sworn by Anthony Okello Oloo, the applicant, who deposed that he sued the respondents in Mumias MCLE Cause No E6 of 2021 but the matter was dismissed with costs to the respondents. That the respondents thereafter each served his counsel in



- the subordinate court with a bill of costs on March 15, 2022 and that taxation took place on March 16, 2022 in the absence of his counsel pursuant to which the bills were each assessed at KShs 52,575. The applicant further deposed that his counsel in the subordinate court never informed him of the developments and he only got to know when his goods were proclaimed on March 25, 2022. He added that he immediately sought reasons through a letter to the taxing master, but the taxing master endorsed on the letter ‘parties know what to do when aggrieved’ thereby necessitating this reference.
3. The applicant further deposed that the taxing master erred in regard to the instruction fees since the Advocates Remuneration Order pegs instruction fees upon a motion at KShs 3,000 and that the taxing master failed to hold that the filing of a separate bill by each respondent was improper and unjustified.
 4. The respondents filed grounds of opposition in which they contended that the application is bad in law and incompetent, that there can be no stay in respect of stay, that they are not of small means and can refund the costs, that the procedure adopted is strange in law, that there is no affidavit by the previous advocate on record justifying the matters complained of and that the application is misconceived, frivolous, vexatious and an abuse of court process.
 5. The application was canvassed through written submissions.
 6. The applicant submitted that the taxation notice annexed to the Notice of Motion shows that the assessment of the bill of costs was prosecuted on March 16, 2022 only one day after service yet Order 51 Rule 13 (3) of the *Civil Procedure Rules* 2010 stipulates that bills of costs should be served at least seven clear days before the inter partes hearing date. That, consequently, the applicant was condemned unheard.
 7. The applicant further submitted that the proceedings from which the bills arose were commenced by way of Notice of Motion and were therefore not a suit or pleadings as defined under Section 2 of the *Civil Procedure Act* and Order 3 (1) of the *Civil Procedure Rules* 2010. That, consequently, instruction fees should have been computed under Schedule 7 (A) (5) of the *Advocates Remuneration Order* which pegs instruction fees upon a motion at KShs 3000 and further that no reasons were advanced by the taxing master why he held otherwise.
 8. The applicant went on to argue that the respondents having filed a joint response, there was no justification for filing separate bills of costs. That the grounds of opposition filed by the respondents violate the requirement that grounds of opposition must not raise any matters of fact and that, therefore, the present application is unopposed.
 9. The respondents on the other hand argued that there can be no stay in respect of costs. They relied on Civil Application No 298 of 1996 *Francis Kabaa vs. Nancy Wambui & Jane Wanjiru* and further argued that they can settle the amounts due. They further argued that the applicant was represented by an advocate who ought to swear an affidavit to justify the applicant’s allegations. That the bills of costs were not adopted separately, and the applicant should not misdirect the court. They therefore urged that the present application be dismissed with costs.
 10. I have considered the application, the affidavit, grounds of opposition and the submissions. The issue that emerges for determination is whether the orders sought should issue.
 11. The background of the application is that the applicant commenced proceedings before the Senior Resident Magistrate’s Court at Mumias by way of Notice of Motion dated May 12, 2021. The matter was serialised as Mumias SPM Misc. MELC No. 6 of 2021. As is manifest, the proceedings were a miscellaneous cause. The respondents named in the application were six persons, including the respondents herein who were listed as the fourth to sixth respondents, respectively. Upon hearing the application, W K Cheruiyot (SRM) found no merit in it and dismissed it with costs to the respondents



through ruling delivered on December 3, 2021. The respondents herein thereafter filed three separate bills of costs, each dated December 15, 2021. The bills were “taxed” at an “all inclusive sum” of KShs 52,575 and a certificate of taxation dated March 22, 2022 issued.

12. Whereas the correct terminology for the exercise of determination of costs in the subordinate court is assessment as opposed to taxation, it really does not matter how the court termed its undertaking since it ultimately determined the costs payable. See *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [2015] eKLR.
13. The applicant has attacked the assessment of costs on two fronts: firstly, that he was condemned unheard, and that the quantum of costs is excessive. The question of whether the applicant was given notice of the taxation is one that should have been raised before the Subordinate Court through an appropriate application for setting aside *ex parte* proceedings. The applicant cannot raise it in this court in the first instance.
14. Regarding quantum of costs, the applicant contends that the proceedings from which the bills arose were commenced by way of Notice of Motion and were therefore not a suit or pleadings and that instruction fees should have been computed under Schedule 7 (A) (5) of the *Advocates Remuneration Order* which pegs instruction fees upon a motion at KShs 3000. I however do not agree with the applicant. The notice of motion referred to under Schedule 7 Part A Paragraph 5 of the *Advocates Remuneration Order* is an application arising within an existing suit. In this case, the Notice of Motion dated May 12, 2021 did not arise within an existing suit but originated a cause of action. It fits perfectly within “suit” which is defined at Section 2 of the *Civil Procedure Act* to mean “all civil proceedings commenced in any manner prescribed”.
15. Consequently, the bills were to be assessed under Schedule 7 Part A Paragraph 2 of the *Advocates Remuneration Order* which provides:

In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs. 50,000.
16. The ruling delivered on December 3, 2021 conclusively determined the Notice of Motion dated May 12, 2021 and is therefore akin to a judgment in the matter. The learned magistrate had discretion to award anything between KShs 20,000 and KShs 50,000 as instruction fees. Considering that there were other headings in the bills such as court attendances, I find that an assessment at an all-inclusive sum of KShs 52,575 in respect of all three bills is reasonable. Since the respondents herein presented identical bills, it is presumed that they will share the sum of KShs 52,575 equally or through such formula as they may agree among themselves. The learned magistrate exercised discretion correctly and I see no valid reason to interfere with the ruling.
17. In the result, I find no merit in Chamber Summons dated March 28, 2022 and I therefore dismiss it. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



No appearance for the applicant

Mr Mukabwa holding brief for Mr Namatsi for the respondents

Court Assistant: E. Juma

