



REPUBLIC OF KENYA



KENYA LAW
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**Nyaga v Chege & another (Civil Case 73 of 2015)
[2025] KEHC 763 (KLR) (Civ) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 73 OF 2015

AC MRIMA, J

FEBRUARY 4, 2025

BETWEEN

RUTH WARUGURU NYAGA PLAINTIFF

AND

KARIUKI CHEGE 1ST DEFENDANT

DAVID H. GRAY 2ND DEFENDANT

RULING

Introduction:

1. The Plaintiff/Applicant filed a Chamber Summons dated 15th November 2024 against a decision of a Taxing officer rendered on 8th October 2024. The taxation arose from the dismissal of the suit herein with costs by a judgment rendered on 30th September 2020. The impugned ruling was on the Defendants' Party to Party costs.
2. The application was vehemently opposed by the Defendants. They urged this Court to dismiss it. The application was heard by way of written submissions, hence, this rendition.

The Chamber Summons:

3. The application sought the following orders: -
 1. That the Honourable Court be pleased to certify this application urgent, hear the Applicant ex-parte initially and grant stay orders in the first instance.



2. That the Honourable Court be pleased to grant a stay of any execution emanating from the taxation of the Defendant's part and party costs in this case done on the 8th October, 2024 pending the hearing and determination of the reference filed against the said decision.
 3. That the Honourable Court be pleased to accept the Plaintiff's reference to the Hon. Judge, sought to challenge the Taxing Officer's decision on the taxation done on 8th October 2024, despite the Taxing Officer's default, delay or failure to give the reasons for the decision pursuant to the Plaintiff's notice of objection to taxation and request for the reasons.
 4. That the Honourable Court be pleased to set aside the decision on taxation delivered on the 8th October, 2024 for the reasons that:-
 - a. That the Taxing Officer did not have jurisdiction to tax the Defendant's party and party bill of costs dated 21/5/2024 in view of the mandatory provisions of Rule 62A of the Advocates (Remuneration) Order.
 - b. That the Taxing Officer based the instruction fees and fees for getting up and preparing for trial on figures that are not the judgment sum.
 - c. That the Taxing Officer committed a serious error on principal in the decision.
 5. That the Honourable Court be pleased to struck out the said bill of costs dated 21st May 2024 or, without prejudice to the plea to strike out, remit the said bill of costs for taxation before a different Taxing Officer.
 6. That the costs of this application be borne by the Defendants.
4. The application was supported by the Plaintiff's Affidavit and written submissions wherein several decisions were referred to, the gist whereof shall be referred to in the analysis part of this ruling. In essence, the application is premised on three main grounds namely whether there is an automatic stay of execution once a reference is filed, lack of jurisdiction on the part of the Taxing officer and the ascertainment of the instruction fees and the fees for getting up and preparing for trial.
 5. The application was opposed through the Replying Affidavit sworn by Kariuki Chege, the 1st Defendant, on his behalf and on behalf of the 2nd Defendant. Although the Respondents' Counsel indicated having filed written submissions, the same are neither in the CTS nor in the physical Court file despite taking all due diligence. I will, nevertheless, proceed to determine the application without the advantage of the Respondents' written submissions.

Analysis:

6. Having carefully read and understood the gist of the application and the opposition thereto, this Court proposes to deal with the three main issues for determination captured above and that will be in seriatim.

Whether there is an automatic stay of execution once a reference is filed:

7. The Applicant argued that since Rule 11 of the Advocates Remuneration Order [hereinafter referred to as 'the ARO'] was silent on stay of execution pending the determination of a reference then it is to be implied that an automatic stay ought to issue, without more, upon a party filing a reference against a taxation by a Taxing officer.
8. Without belabouring the issue, suffice to say that the Applicant's argument ought not to be taken seriously. I say so because if the framers of the ARO wished to provide for an automatic stay of



proceedings and/or execution upon the filing of a reference then nothing would have precluded them from doing so. Adopting the interpretation proposed by the Applicant will effectively render the provisions on stay of proceedings and execution otiose. The argument is, therefore, for rejection.

9. The Applicant further contended that since both parties filed Notices of objection to the taxation then a stay of execution ought to issue as of right. The Defendants were of the contrary opinion.
10. The manner in which objections to taxation are carried out is provided for in Rule 11 of the ARO. The said provision states 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.
11. It is true that both parties filed notices of objection to the taxation under Rule 11(1) of the ARO. Once that happened, the officer was obligated to render the reasons for the decision on the items objected to. In this case, the Applicant objected to the instruction fees, the fees for getting up for trial and the attendances. On their part, the Respondents objected to the instructions fees as well as the fees for getting up for trial. The taxing officer obliged.
12. On receipt of the reasons, under sub-rule 2, 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. It, therefore, means that once the reasons are given the Objector has an option to either be satisfied with the reasoning of the taxing officer and drop the matter altogether or may proceed to file a reference through a Chamber Summons.
13. The Respondents stated that they were satisfied with the reasoning of the taxing officer and opted not to pursue the matter further. To me, the explanation is perfectly within the rights of the Respondents and cannot ipso facto be taken as an admission to a stay of execution. Therefore, this Court finds and so hold that the filing of an objection by a party in taxation proceedings calling for reasons for the taxation or the filing of a reference by a party dissatisfied with the reasons given by a taxing officer does not, without more, amount to an automatic stay of execution/proceedings in that matter. A party wishing to obtain such orders must formally apply for the same.



Jurisdiction on the part of the Taxing officer:

14. The Applicant vehemently protested to the taxing officer's jurisdiction. She argued that the officer lacked jurisdiction since there was no certificate under Rule 62A (3) of the ARO from Messrs. Coulson Harney Advocates who had earlier on acted for the Defendants. Elaborate submissions followed the argument and several decisions referred to. The Respondents, through their disposition, argued that the lack of such a certificate amounted to technicality and did not prejudice the Plaintiff.
15. I have keenly considered the argument. That is so since jurisdiction is the determinant on which a Court exercises its mandate. Without jurisdiction, a Court cannot move an inch. It must down its tools. [See, the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court in *Constitutional Application No. 2 of 2011 Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR and the Court of Appeal in *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd* [1989] KLR].
16. But, what does Rule 62A of the ARO entail? The provision states as follows: -
 - 62A. Costs where there has been a change of advocates:
 1. Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.
 2. On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs which he has not paid.
 - (3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.
17. A careful reading of the above provision captures two scenarios. They are, one, where the bill at hand is a Party and Party Bill of costs and, in the second instance, the bill relates to Advocate-Client costs. Sub-rules 1 and 2 relate to both type of bills as long as there is more than one Advocate who appeared for a party. Sub-rule 3 relates only to Advocate-Client bills. The reason being that the said provision is so clear on that intention. It speaks to agreements for remuneration made between Advocates and the client, any sums paid to the Advocates by a client and whether such sums were in full settlement of the Advocates fees. Such are dealings strictly between an Advocate and a Client and not between the main competing parties.
18. It is on the foregoing that this Court finds that the argument by the Applicant cannot succeed. The taxation at hand related to a Party and Party Bill of Costs and not an Advocate-Client Bill of Costs. Had the impugned bill been an Advocate-Client one, then the position taken by the Plaintiff would be correct and the response that the lack of the certificate is a mere technicality would not hold.
19. As I come to the end of this issue, I must state that Learned Counsel for the Applicant in his submissions dated 23rd December 2024 at paragraph 19 presented a wrong position in respect of the Supreme Court decision in *Kenya Airports Authority v Otiemo Ragot and Company Advocates* (Petition E011 of 2023) [2024] KESC 44 (KLR) (2 August 2024) (Judgment). Learned Counsel submitted that the Supreme Court in particular rendered an interpretation of Rule 62A of the ARO and quoted a paragraph from the said decision. However, the Apex Court in paragraph 50 only and so generally discussed the purpose of ARO to relate to the remuneration of Advocates. The Court



then referred to Rule 2 thereof which relates to assessment of costs incurred in a contentious matter which can be reimbursed to a successful party/litigant by the other party. As such, the decision did not address itself to the interpretation of Rule 62A of the ARO and had this Court not been vigilant, it would have been misled.

20. The taxing officer was, therefore, yielded of appropriate jurisdiction over the bill of costs. The objection is, hence, overruled.

Ascertainment of the instruction fees and the fees for getting up and preparing for trial:

21. In pursuit of the above issue, the Applicant contended that the officer erred in adopting the figure of Kshs. 3,000,000/= in the judgment since the suit was dismissed. She posited that the officer was, instead, supposed to exercise his discretion in determining the instruction fees and not be bound by the figure in the judgment where the Court just stated in passing that had it allowed the suit, it would have awarded the Plaintiff the said sum.

22. The manner in which a taxing officer is to determine the basis of instruction fees is by now well settled by the Supreme Court. In Kenya Airports Authority v Otieno Ragot and Company Advocates case [supra], the Court discussed the purpose of the Party and Party costs as under: -

53. Schedule VIA provides for Party-Party costs, that is, the manner in which costs awarded to a successful party as against another party therein should be assessed/computed/taxed. The essence of such costs is to ensure a successful litigant/party receives a fair reimbursement/recompense for the costs/expenses he/she has had to incur on account of a suit. See Outa vs. Odoyo & 3 Others, SC Petition No 6 of 2014; [2023] KESC 75 (KLR).

23. The Court then dealt with the value of the subject matter as the basis of assessing Advocates instructions fees. In ascertaining the value of the subject matter, the Court stated as much: -

55. How is the value of the subject matter to be determined? Paragraph 1 of Schedule VIA is clear on this issue, and in point of fact stipulates that, "... where the value of the subject matter can be determined from the pleading, judgment or settlement of the parties". This means that the value of the subject matter can be determined from the pleadings or judgment or settlement of the parties. In that regard, the Court of Appeal in the case of Joreth Ltd. vs. Kigano & Associates [2002] 1 E.A. 92.....

24. The Apex Court then proceeded to deal with instances where the value of the subject matter cannot be ascertained from the judgment or settlement of the parties. The Court had the following to say: -

57. Whilst the determination of the value of subject matter from a judgment and settlement of the parties is quite straight forward, the determination from pleadings is not. The determination of the value of the subject matter, may be difficult, for instance, where the pleadings/suit is struck out at a preliminary stage, such as in this case, and the value can only be determined/ascertained upon the conclusion of a trial. In considering this pertinent issue, we make reference to D. Njogu and Co. Advocates vs. Kenya National Capital Authority, where Ochieng, J., as he then was, held that-

So, whilst I accept that the advocate may have been instructed to sue for not only the principal sum, but also for interest thereon, at a specific rate, that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest, or even with interest at rates other than those claimed. Effectively,



therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case. [Emphasis added]

61. In the event that value of the subject matter of a suit cannot be determined from either the pleadings, judgment or settlement by the parties, and the nature of the said suit is not provided for in Paragraph 1 of Schedule VIA, proviso (i) thereunder empowers a Taxing Officer to exercise his/her discretion in assessing instruction fees for such a suit. The proviso in question reads as follows:
- ... the Taxing Officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances; ...”
- See *Joreth Ltd. vs. Kigano & Associates* (supra).
25. Returning to the matter at hand, it is true the suit, which was based on defamation as the cause of action, was dismissed with costs. In doing so, the Court stated in paragraph 57 as follows: -
- Considering the plaintiff’s qualifications, stature and standing locally and internationally..... I would have awarded her general damages in the sum of Kshs 3,000,000.
26. The taxing officer then used the above figure as a basis of assessment of the instruction fees. That was where the Applicant raised a red flag. Having considered the issue at hand and in view of the foregoing judicial precedents, this Court can only restate that the judgment pegged the value of the subject matter at Kshs. 3 Million. As such, the taxing officer was bound to use the said figure as a basis of the assessment of the instruction fees. The taxing officer did not err. It, hence, follows that the argument over the getting up fees also fails since it was one-third of the instruction fees as so provided in the ARO. I have also considered the assessment in respect of the attendances and find no reason to impugn them.
27. This issue likewise fails.

Disposition:

28. Having dealt with all the issues raised in the application, suffice to say that the application cannot stand. In the end, the following final orders hereby issue: -
- a. The Notice of Motion dated 15th November 2024 is hereby dismissed with costs.
 - b. The costs of the application are assessed at Kshs. 20,000/= [Twenty Thousand Only].
 - c. The stay orders granted on 16th January 2025 by this Court are hereby discharged forthwith.
 - d. Leave to appeal, if needed, is hereby granted.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Masore Nyang’au, Learned Counsel for the Applicant/Plaintiff.

No appearance for Mr. Makori, Learned Counsel for the Defendants/Respondents.



Michael – Court Assistant.

