



REPUBLIC OF KENYA



**Njuguna v Karanja & another (Miscellaneous Civil Case E264 of 2019)
[2024] KEHC 13110 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL CASE E264 OF 2019**

A MSHILA, J

OCTOBER 18, 2024

BETWEEN

CHARLES MBUGUA NJUGUNA APPLICANT

AND

JULIUS NGARACHU KARANJA & ANOR RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated the 9th day of March, 2023 which was brought under the provisions of Section 3A of the *Civil Procedure Act*, Order 10, 22, and 42 of the Civil Procedure Rules; the Applicant sought for orders that;
 - a. There be a stay of execution of the Warrants issued on 8/12/2022 pending the hearing and determination of this application inter-partes;
 - b. There be a stay of execution of the Warrants issued on 8/12/2022 pending the hearing and determination of this application;
 - c. The orders of the Deputy Registrar of 24/04/2020 and/or any subsequent orders be set aside.
 - d. The costs of this Application be provided for.
2. The Application was supported by the sworn Affidavit of Charles Mbugua Njuguna who stated that the subject matter emanated from the CMCC No.1281 of 1997 and that suit involved the ownership of land parcel LR 29 Gatura; the Bill of Costs as filed was incompetent ab-initio as it was not filed within the substantive suit but was filed as a miscellaneous application and taxed at the High Court; the orders were made by a court without jurisdiction as the jurisdiction was either the Magistrates Court or the ELC Court at Thika or Nairobi.
3. On 5/11/2029 the taxation was stood over pending the outcome of CA No. ELC 3/2018 thereafter no further notice of taxation or Ruling was served on the Applicant or his advocates; The orders for



taxation of the Bill of Costs was made on 24/04/2020 without notifying the Applicant or his advocates; It is in the interest of justice and fairness that the Court grants the orders sought.

4. In response the Respondent Julius Ngarachu Karanja filed his replying affidavit dated 18th May, 2023. He deposed that the applicant's advocate were serve with the bill of costs and the notice of taxation on 29th April, 2019 which they were not opposed as such the court ruled in his favour. The court was said to be *funtus officio* as the applicant should have filed a reference which they failed to do. The Deputy Registrar was said to have the jurisdiction to tax a bill of costs unlike the Magistrate's court which only has power to assessment of costs. The court was urged to dismiss the applicant's application with costs.
5. It is therefore just and fair that the application be dismissed and orders sought herein be granted.

Applicant's Case

6. It was the Applicant's argument that the matter related to Thika CMCC No. 1281 of 1997 and the Respondent proceeded to file a miscellaneous application in the Kiambu High Court and had it taxed thereat instead of at Thika ELC; the taxing master having no jurisdiction therefore the Bill of Costs as filed was incompetent *ab-initio*; jurisdiction was said to be everything and without it a court cannot take any step. Reliance was placed in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) eKLR. The applicant submits that the judgment creditor having not executed the decree that is older for more than one year, he should have been served with a Notice to Show Cause why execution should not issue. Reliance was placed in the case of Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 others (2012) eKLR.

Respondent's Case

7. It was submitted that the court lacks jurisdiction to entertain an application to set aside the decision by the taxing master. Reliance was placed in the case of Owners of Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1. The proper procedure to be have been applied by the applicant to move the court was said to be by way of a reference as held in the case of Donholm Rahisi Stores (firm) vs EA Portland cement Ltd (2005) eKLR. The respondent submits that the Deputy Registrar has the mandate to tax bill of costs as opposed to the Magistrate's court as alleged by the applicant. Reliance was placed in the case of Daphne Musyoki Mwose Kitele vs O N Makau & Mulei Advocates & 2 others (2022) eKLR. The High Court was said to have power to interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle but in this case the Deputy Registrar had the capacity to tax the bill of costs presented to before the court.

Issues for Determination

8. After reading the supporting affidavit filed herein this court has framed the following issues for determination which are;
 - i. whether the taxing master applied the wrong principles during the taxation of the Bill of Costs;
 - ii. whether there are sufficient grounds to warrant interference with its decision.
 - iii. whether the Ruling of the Taxing Officer delivered on 24/04/2020 should be set aside



Analysis

Whether the taxing master applied the wrong principles during the taxation of the Bill of Costs; whether there are sufficient grounds to warrant interference with its decision; whether the Ruling of the Taxing Officer delivered on 24/04/2020 should be set aside

9. The undisputed facts are that the proceedings emanated from CMCC No.1281 of 1997 that involved the ownership of land parcel LR 29 Gatura; and the Bill of Costs related to Party and Party Costs; the question then arises as to whether the Deputy Registrar had the jurisdiction to tax a Bill of Costs relating to a matter determined in the Chief Magistrates Court;
10. The locus classicus on jurisdiction is the celebrated case of Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (Kenya) Ltd [1989] KLR 1 where the Court of Appeal held;

‘I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’
11. The legal position is that costs in the subordinate courts matters are assessed not taxed; the assessment is provided for under Schedule VII of the Advocates Remuneration Order which is specifically titled ‘costs of proceedings in subordinate courts’; this position is fortified by Paragraph 51 of the Advocates Remuneration Order which reads as follows;

‘Subject to paragraph 22 the scale of costs applicable to proceedings in subordinate courts (other than Kadhi Courts) is set out in Schedule VII.’
12. This position was upheld in the case of Angelo Gitonga vs Angelo Gitonga & Another [2010] eKLR where the court held;

‘...there is no provision in the Advocates Remuneration Order for taxation in subordinate courts. A practice is however arising where parties in the subordinate court file laborious and detailed bill of costs and then engage the magistrate in taxation. That in my view is uncalled for and should be discouraged, subordinate courts party and party costs should be assessed following the provisions of Schedule VII of the Order...’
13. The jurisdiction of this court to intervene in the decision of Taxing Officer, is limited. In Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR the Court of Appeal explained that,

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
14. This court can only interfere in the decision of the taxing master if its shown that:
 - a) The taxing master has misdirected himself;
 - b) Applied wrong principles; and



- c) The amount taxed is extremely excessive or extremely low.
15. In light of this holding, this court is satisfied that the Taxing Officer applied the wrong principles of law in taxing a matter which was not within his jurisdiction;

From the material placed before the court is satisfied that the Applicant has established that the Taxing Officer misdirected himself and committed an error in well settled principles of law by proceeding to taxation of costs in a matter that was within the mandate of the subordinate courts and finds there are sufficient reasons to warrant interference with the taxing masters decision; and finds good reason to setting aside the Ruling delivered on 24/04/2020.

Findings and Determination

16. In the light of the foregoing this court makes the following findings and determinations;
- i. The application is found to have merit and it is hereby allowed; the taxing master is found to have applied the wrong principles in taxing the Bill of Costs;
 - ii. The decision of the taxing master made on 24/04/2020 is hereby set aside;
 - iii. There shall be no order as to costs on this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 18TH DAY OF OCTOBER, 2024.

HON. A. MSHILA

JUDGE

In the presence of:

Mourice – Court Assistant

Dida – h/b for Mutiso – for Applicant

Njeri Kariuki – for Respondent.

