



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**MISCELLANEOUS APPLICATION REF NO. E007 OF 2021**

**ELIJAH NJUGUNA NJOKI.....OBJECTOR/APPLICANT**

**VERSUS**

**PETER MURIU NJUGUNA.....1<sup>ST</sup> RESPONDENT**

**STANLEY KARANJA NJOKI.....2<sup>ND</sup> RESPONDENT**

**GLADYS WANGUI NJOKI.....3<sup>RD</sup> RESPONDENT**

**REBECCA NYAMBURA NJOKI.....4<sup>TH</sup> RESPONDENT**

**AGNES NJERI KIRAGU.....5<sup>TH</sup> RESPONDENT**

**RULING**

By a **Chamber Summons Application** dated **16<sup>th</sup> of July 2021**, brought under the **Advocates Remuneration Order, Section 11 of the Advocates Act**, Cap 16 Laws of Kenya, **Section 3A of the Civil Procedure Act** and **Article 159** of the Constitution of Kenya, 2010 the Applicant sought for orders that;

- a. The decision of the Honorable Taxing Master delivered on **24<sup>th</sup> June 2021**, in so far as the same relates to the reasoning and determination pertaining taxation of the bill of costs dated **13<sup>th</sup> May 2019** and **11<sup>th</sup> November 2019**, be set aside/removed/quashed and vacated by way of reference and all the consequential orders be and are hereby set aside.
- b. In the alternative to prayer 1, the Honorable Court exercises its inherent jurisdiction and be pleased to **re tax** the Bill of Costs dated **13<sup>th</sup> May 2019** and **11<sup>th</sup> November 2019**.
- c. In the alternative to prayer 1 and 2 above, the Honorable Court exercises its inherent jurisdiction and refer the Bill of Costs dated **13<sup>th</sup> May 2019** and **11<sup>th</sup> November 2019** to another Taxing Officer for re-taxation or make directions to a fresh taxation.
- d. That this Honorable Court issues a stay of execution of the Certificate of Costs dated **5<sup>th</sup> February 2021** for payment of **Kshs.189,350.00**, pending determination of this Honorable Court.
- e. That this Honorable Court issues a stay of execution of the Certificate of Costs dated **24<sup>th</sup> June, 2021**, for payment of **Kshs. 271,215.00**, pending determination of this Honorable Court.
- f. That this Honorable Court issues a determination that the monies paid upon the Respondent in the sum of **Kshs 65,000/=**, be deducted and considered as paid to the Respondent upon **re-taxation** of the two bills of costs above mentioned.
- g. That the costs of this Application be provided for.

The Application is founded on the grounds set out on the face of the Application and on the Supporting Affidavit dated **19<sup>th</sup> July 2021**, sworn by **Elijah Njuguna Njoki**. The Applicant contends that the bill of costs dated **13<sup>th</sup> May 2019**, was taxed on **25<sup>th</sup> January 2021**, and a certificate of costs dated **5<sup>th</sup> February 2021**, allowed in the sum of **Kshs. 189,350.00** and the same was signed by **Hon. V. Ochanda**.

That consequently, the Applicant made payments on various days via cheque amounting to **Kshs. 65,000.00**, towards settlement of the said Certificate of Costs.

That subsequently his advocates fixed the matter for mention on **1<sup>st</sup> April 2021** to record a mode of payment of the taxed costs. That on **19<sup>th</sup> May 2021**, the Applicant's advocates received a letter dated **12<sup>th</sup> May 2021**, from the Respondents stating that the bill of costs dated **13<sup>th</sup> May 2021**, but upon perusal of the court record, the said bill was never taxed on the said date and the court noted that it had already taxed the Bill of Costs dated **28<sup>th</sup> May 2020**, which had been taxed at **Kshs.26,240.00**, and there was no bill of costs dated **13<sup>th</sup> May 2021**, on record.

That the Applicants are strangers to the said bill of costs dated **28<sup>th</sup> March 2020**, as they were never served with the same. That on **8<sup>th</sup> October 2019**, the Bill of Costs dated **13<sup>th</sup> May 2019**, was issued with a hearing date of **9<sup>th</sup> October 2019**, before the Deputy Registrar. That the bill of costs dated **28<sup>th</sup> May 2020**, was never served upon the Applicant as alleged by the Respondents in the Affidavit of service dated **8<sup>th</sup> June 2020**. That based on the Affidavit of service dated **8<sup>th</sup> June 2020**, the Court proceeded to allocate the bill of costs dated **28<sup>th</sup> May 2020**, a ruling dated **29<sup>th</sup> June 2020**, and the same was taxed at **Kshs.26,640.00**, on **20<sup>th</sup> July 2020**. That the Applicant were subsequently not served with a certificate of costs for the ruling delivered on **20<sup>th</sup> July 2020**.

In addition, the Applicant averred that the Respondents had on **23<sup>rd</sup> July 2020**, fixed the Bill of Costs dated **13<sup>th</sup> May 2019**, for taxation on **31<sup>st</sup> August 2020**, and a taxation notice to that effect. That on **5<sup>th</sup> February 2021**, a Certificate of costs in respect to the Bill of Costs dated **13<sup>th</sup> May 2019**, was issued for **Kshs.189,350.00**.

Subsequently, on **2<sup>nd</sup> June 2021**, the Applicant through their advocates received a mention notice for a mention scheduled for **7<sup>th</sup> June 2021** for directions on the same bill of costs dated **13<sup>th</sup> May 2019**.

That on the said **7<sup>th</sup> June, 2021**, the Respondents advocate sought a ruling for the bill of costs dated **13<sup>th</sup> May 2019**. On the said date, the Applicant's advocate informed the court of the already existing Certificate of Costs and that the same was partly paid, but the Court proceeded to issue a ruling date for the same on **24<sup>th</sup> June 2021**. That on the **24<sup>th</sup> June, 2021**, a Ruling was delivered and the bill of costs dated **13<sup>th</sup> May 2019**, was taxed at **Kshs.271,215.00**, by **Hon.S. K. Nyaga (DR)**. That the bill of costs dated **13<sup>th</sup> May 2019** was taxed twice first for **Kshs. 189,350.00** and subsequently at **Kshs.271,215.00**.

The Application is opposed through a Replying Affidavit sworn by **Stanely Karanja Njoki** on **20<sup>th</sup> September 2021**, and filed in Court on the same day. The Respondents contend that the two certificates of costs are properly on record. That the application failed to disclose the error of principle and fact and what relevant factors were disregarded.

The instant Application was canvassed by way of written submissions. The Applicant filed its written submissions dated **28<sup>th</sup> October 2021**, through the **Law Firm of Wangui Nkirote & Partners Advocates**. He submitted that the Deputy Registrar erred in principal by taxing the Party and Party Bill of Costs dated **13<sup>th</sup> May 2019**, twice resulting to two separate certificates of costs. That after the first certificate of costs was issued on **5<sup>th</sup> February, 2021**, the Court became **functus officio** on that issue.

With respect to the Bill of Costs dated **28<sup>th</sup> May 2020**, the Applicant submitted that the Certificate of Costs issued should be set aside as the Applicant was neither served with the said bill nor given a chance to submit on the same before a ruling was delivered. The Applicant relied on litany of cases to buttress their submissions.

The **1<sup>st</sup>** and **2<sup>nd</sup>** Respondents also filed their written submissions dated **12<sup>th</sup> November 2021**, through the **Law Firm of J. N Mbutia & Co. Advocates**. The Respondents submitted that the application is premature and should be dismissed with costs. That it offends the requirement that the reference should be filled within **14 days** of the Ruling. The ruling according to the Respondents was delivered on **24<sup>th</sup> June, 2021**, and therefore the application ought to have been within **14 days** from then but was filed **27 days** later on **21<sup>st</sup> July 2021**. To buttress this, the Respondents relied on the case of **County Government of Tana River vs. Miller & Co Advocates 2021 eKLR**.

The Court has considered the pleadings, the court records, the rival written submissions, the cited authorities and the relevant provisions of law and finds the following are issues for determination

- 1. Whether the ruling delivered on 24<sup>th</sup> June 2021, by Taxing Master and the subsequent Certificate of Costs should be set aside.**
- 2. Whether the reference for the bill of costs dated 28<sup>th</sup> May 2020 is merited**
- 3. Who should bear the cost of this application.**

**1. Whether the ruling delivered on 24<sup>th</sup> June 2021 by Taxing Master and the subsequent Certificate of Costs should be set aside.**

The principles of setting aside the decisions of Maxing Master were well established in the cases of **PremchandRaichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92**. These includes

- a. That there was an error of principle

- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

Further, in *First American Bank of Kenya Vs Shah and Others* [2002] E.A.L.R 64 AT 69, the court held as follows;

**“First, I find that on the authorities, this court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.**

The Question this Court has to address is whether the ruling delivered on **29<sup>th</sup> June 2021**, amounted to an error in principle. From the perusal of the documents on record the Court notes that indeed two Certificates of costs have been issued with respect to the Bill of cost dated **13<sup>th</sup> May 2019**. The first was issued on **5<sup>th</sup> February 2021**, by **Hon. V. Ochanda** for **Kshs.189,350.00** and the 2<sup>nd</sup> was issued on **29<sup>th</sup> June 2021** by **Hon. S.K.Nyaga** for **Kshs. 271.215.00**. No evidence was placed before the Court with regards to the Ruling that bore the Certificate of Costs dated **5<sup>th</sup> February 2021**. However, it is clear and evident from the Applicants attachment ENN 7, that the Applicant have already partly paid the costs awarded therein. The Applicant cannot now turn the wheel having partly performed and allege that he as not served.

On the 2<sup>nd</sup> Certificate of costs dated **29<sup>th</sup> June 2021**, the Court notes that the same was issued on the backdrop of an already existing certificate of costs issued on **5<sup>th</sup> February, 2021**, with respect to the same bill of costs dated **13<sup>th</sup> May 2021**.

Where a bill of costs has been taxed and a certificate of costs issued, the only bar to adoption and execution of the same is where the same has been set aside or stayed. **(See *Mwangi and Co Advocates vs. Machakos County 2020 Eklr*)**. In other words, once a bill of cost has been taxed and a certificate of costs issued, the same is final as to the costs covered thereby.

From the foregoing, it is clear that once the first certificate of costs dated **5<sup>th</sup> February 2021**, was issued, the Court became *functus officio* with regards to the bill of costs dated **13<sup>th</sup> May 2019**. Further the Certificate of Costs dated **5<sup>th</sup> February, 2021** has not been set aside, varied or altered by this Court. Therefore, this Court holds and finds that the Certificate of Cost dated **29<sup>th</sup> June 2021** was issued irregularly and is therefore invalid to the extent that it purported to tax an already taxed bill of costs.

The upshot of the foregoing is that the **Certificate of Costs** dated **5<sup>th</sup> February 2021** is valid and is subsequently adopted as a judgment of this Court. However, the **Certificate of Costs** dated **29<sup>th</sup> June 2021**, is invalid and is forthwith expunged from the Court Record.

#### **1. Whether the reference for the bill of costs dated 28<sup>th</sup> May 2020 is merited**

The Applicant has sought to set aside the ruling on the bill of cost dated **28<sup>th</sup> May 2020** on the ground that the said bill of costs was not served upon them and as a result his right to be heard was infringed.

Rule 11 of the Advocates Remuneration Order makes provision for the procedure an aggrieved party must adopt. It provides:

**(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.**

The procedure contemplated above is:

- a. **The aggrieved party issues a notice within 14 days on the items objected**
- b. **The Taxing Officer shall forthwith give reasons for his decision**
- c. **Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection**

**d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.**

The procedure as stated above carries a mandatory requirement. Undoubtedly, the Applicant did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. (*See Nairobi Civil App. No. 810 of 2001:- Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR*)

**Article 159(2) (d)** of the **Constitution** and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. However, this court concurs with the findings of Kiage J in *Nairobi CoA Application No. 228 of 2013 Nicholas Kiptoo Arap Korir Salat VS Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*, where he held that:

**“ I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”**

The Court has noted that no plausible reason was advanced by the Applicant for non-compliance, save for the allegations that the Applicant was not served with the bill of cost in question. The Court of Appeal in *Nairobi CoA Appeal No. 199 of 2002:- Machira & Co. Advocates vs Arthur K. Magugu & another [2012] eKLR*, held that the purpose of filing of references is for expeditious disposal of cases and if notices as required by procedure are vague, the same defeats the purpose of procedure.

On timelines, the Applicant had **14 days** after delivery of the ruling to file the present reference. The Applicant states in his Supporting Affidavit that he is aware that the Ruling was delivered on **20<sup>th</sup> July 2020**.

No evidence has been presented before this court to show the steps that the Applicant took to comply with the law provided before filing the instant application 21<sup>st</sup> July 2021. No material evidence has been placed before this court as to the attempts made to obtain certified copy of the ruling. The decision to file this reference was in the Court’s considered opinion amounted to the gun as the Applicant had not exhausted the mechanisms provided in the law.

The upshot of the foregoing is that the Reference in respect of the Ruling issued on **20<sup>th</sup> July 2021**, in respect of the bill of costs dated **28<sup>th</sup> May 2020**, is dismissed.

**2. Who should bear the costs of this suit**

Section 27 of the Civil Procedure grants the Court the discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant Application, the Court finds that both the Applicant and Respondent have partially succeeded and consequently each party should bear his/her own costs.

No orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**L. GACHERU**

**JUDGE**

**9/12/21**

Delivered online

In the presence of Alex Mugo – Court Assistant

Mr. Mwai for Objector/Applicant

1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent Mr. Kai HB for J. Mbuthia

4<sup>th</sup> Respondent

5<sup>th</sup> Respondent

**L. GACHERU**

**JUDGE**

**9/12/21**