



**Mulwa v Malutu (Miscellaneous Case 92 of 2021)
[2021] KEHC 214 (KLR) (9 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CASE 92 OF 2021
MW MUIGAI, J
NOVEMBER 9, 2021**

BETWEEN

PATRICK MASILA MULWA APPLICANT

AND

PHILIP MUMO MALUTU RESPONDENT

RULING

1. By a Chamber Summons dated and filed the 3rd day of January, 2021, the Applicant seeks the following orders:-
 1. THAT the Court to set aside the Ruling in Machakos CMCC No.546 of 2019 delivered on 26/5/2020 by Hon E. Keago, review or vary the same.
 2. THAT the Court to assess the costs in Machakos CMCC No. 546 of 2019 or order for the same to be assessed afresh by a different Judicial Officer or the Deputy Registrar.
 3. THAT the costs of this Reference be in the cause.
2. The Chamber Summons is supported by the affidavit of the Applicant herein sworn on 3rd June, 2021. He deposed that in CMCC No.546 of 2019 the court drew and issued a decree and certificate of costs on 12th March, 2021. The costs of the suit were computed at Kshs.67, 175/-. He deposed that the Respondent filed an application dated 30th March, 2021 seeking review and setting aside of the decree. According to the deponent, the Trial Magistrate vide his ruling of 26th May 2021, reviewed the computation of costs to Kshs. 16,975/-. He deposed that the Trial Magistrate reduced the costs of service to Kshs.400 each and the Court attendances to Kshs.500 each. He deposed that the reduced costs were exceedingly low and unreasonable. According to the deponent, party and party costs are awardable but were struck off. He averred that the Trial Magistrate did not award interest of Kshs.40,



000/-. He deposed that no reasons were given by the Trial Magistrate in his decision hence the Ruling is erroneous since the costs awarded are low yet they had been incurred.

3. The deponent urged the Court to reassess the costs or order a reassessment by the Deputy Registrar or by a different judicial officer.

RESPONDENT'S REPLYING AFFIDAVIT

4. On the Respondent's part, he deposed that the application is made in bad faith, vexatious and meant to subject him to unwarranted expense. Based on the advice from his advocate, the Respondent deposed that the Applicant has not satisfied the conditions for review since there is no error apparent on the face of the record or new evidence that has come up that was within the knowledge of the Applicant. Further, based on the advice of his advocate, the Applicant deposed that this Court has no powers to review a Ruling of the Magistrate's Court. He further deposed that based on the advice by his advocate, the Applicant has not exercised his right of appeal but sought to have costs assessed afresh. Based on the advice of his advocate, the Respondent deposed that the Applicant who acted in person could not have had his costs assessed under the Advocates Remuneration Order.
5. In response to the Respondent's opposition, vide his Supplementary affidavit sworn on 5th July, 2021, the Applicant deposed that his application was not one for review but a reference for costs to be assessed afresh. According to the Applicant, this court is vested with supervisory jurisdiction hence his application is legally competent and properly before this court. He deposed that the costs incurred is a matter of fact and not a matter of law hence the Respondent's argument that he acted in person is a misconception and in bad faith only driven by the desire to drive him from the seat of justice.
6. The Applicant urged the court to dismiss the allegations in the Respondent's replying affidavit and grant his application herein.

SUBMISSIONS

7. According to the Applicant, the two issues that fall for determination are:-
 - a. Whether this court is vested with the requisite jurisdiction to entertain the application herein.
 - b. Whether costs should be re-assessed.
8. On the first issue, it is submitted that this Court has supervisory jurisdiction over the subordinate courts pursuant to Article 165(6) of the Constitution, 2010. The Chamber Summons is properly before court as a Reference. Reliance is placed on the case of *Muka Mukuu Farmers Co-operative Society Ltd vs. B. M. Mung'ata & Company Advocates (2021) eKLR* where the Court quoted the holding in *Macharia & Co. Advocates vs. Magugu Nairobi HCC Misc.App.No.358* on the proposition that any decision of the Taxing Officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the Bill of Costs is ventilated by way of reference to the judge.
9. On the second issue, it is submitted that under Article 159(2) of the Constitution, justice is to be done to all irrespective of the status. According to the Applicant, he issued a demand letter to the Respondent who failed to make good the Applicant's claim which necessitated the filing of the suit. According to the Applicant, if the Respondent complied at the earliest time possible, then the issue of costs would not have arisen. The award of Kshs.400/- for service of pleadings was too low considering that the service is done by a Court Process Server. According to the Applicant, he could not have paid



- Kshs.400/- for each service. According to the Applicant he had proposed Kshs.1, 400/- as per annexure 'PMM2' while the Respondent had proposed Kshs.1, 000/- as per annexure 'PMM3'.
10. As regards the Court Attendances, the Applicant submitted that he proposed Kshs.1, 400/- but the Trial Court awarded Kshs.500 for each attendance on the basis that there was no evidence from where travelled from to attend court. According to the Applicant, this was a miscarriage of justice given the high costs of living today, Kshs.500 was unreasonable and improper.
 11. According to the Applicant, he at a point engaged the services of an advocate but withdrew instructions, costs were therefore incurred hence improper for the court to have not awarded Party and Party costs. The Applicant urged court to allow the application as prayed since the costs were too low and ought to be disturbed.
 12. On the Respondent's part, it is submitted that the Applicant's application is incompetent, vexatious and misleading. According to the Respondent, the application ought to be dismissed since it offends the provisions of the Civil Procedure Rules, 2010 and the Advocates (Remuneration) Order.
 13. Firstly the Respondent submitted that the application does not specify what provisions of the law has been relied upon to approach this court.
 14. According to the Respondent, the application on the face of it, is for review and not a Reference as stated in the Applicant's Supplementary affidavit. It is submitted that the application cannot be a Reference as it calls for reassessment of costs computed by a Magistrate in the subordinate court hence not a taxation. According to the Respondent, one can only file a Reference against Taxation of a Bill of Costs and an appeal against a Decree. It is therefore submitted that the application does not fall under the meaning of Rule 11 of the Advocates (Remuneration) Order wherein a procedure is provided for when a party is objecting to the decision of the taxing officer.
 15. It is submitted that a 'taxing officer' has been described under Rule 10 of ARO as the registrar or a district or deputy registrar of the High court or in the absence of a registrar such other qualified officer as the Chief Justice may in writing appoint. Based on the definition, it is submitted that a Magistrate is not a taxing officer hence costs awarded by the subordinate court could not be the basis for a Reference under the Rule.
 16. According to the Respondent, the only avenue open to the Applicant was to file an appeal against the decision of the subordinate court on costs as provided for under Order 42 of the Civil Procedure Rules. It is submitted that this court does not have jurisdiction to entertain the Reference nor can it Review the Ruling of the subordinate court. Reliance is placed on the decision of A.O Muchelule J. in *Dalmas Okach Randa vs. Peter Lolwe Ombo*, Kisumu Misc. App. No.145 of 2013 wherein a reference was held to be incompetent was struck out as it was an assessment by Principal magistrate was a Taxing officer as envisaged under Rule 10 ARO and what was referred to as reference was not filed in compliance of Rule 11 of ARO.
 17. It is submitted that the Trial Court ruling was in order in reassessing the costs awarded as the Applicant acted in person and thus could not have had his costs assessed under the Advocates (Remuneration Order) since he is not an advocate as described under the *Advocates Act*. According to the Respondent, the Trial Court had awarded the Applicant inter alia Instruction and Attendance Fees as though he was an advocate hence the successful review upon the application by the Respondent.
 18. According to the Respondent, the Applicant has come to this court to review an order for review that was granted by the Trial Court on 26th May 2021 reviewing the decree from Kshs.67, 175/- to Kshs.16, 975/- contrary to Order 45 Rule 6 of the Civil Procedure Rules (No application to review an order made on an application for a review of a decree or order passed or made on a review shall be



entertained). Accordingly, the only option is to appeal and since none was preferred by the Applicant, the application herein should be dismissed with costs.

19. In response to the Respondent's submissions, the Applicant further submitted that the Respondent caused the Trial Court to assess costs instead of filing a Bill of Costs upon being dissatisfied with the Decree drawn by the Executive officer hence the Applicant rightly filed the Reference before this court since all that was in contest was costs.
20. According to the Applicant, courts have pronounced that there is no difference between 'taxation' and 'assessment of costs'. On the meaning of 'taxation of costs' reliance is placed on the *Black's Law Dictionary* that it is the process of fixing the amount of litigation related expenses that a prevailing party is entitled to be awarded while in the same dictionary 'assessment of costs' has been defined as 'determination of the rate or amount of something (costs in the instance). In the Oxford Dictionary taxation of costs as follows 'to examine and assess the costs of a case while assessment means to evaluate or estimate the nature, value or equality.' It is therefore submitted that the Applicant's reference before this court is proper. Reliance is placed on the case of *Machira & Co. Advocates vs. Arthur K. Magugu* (supra).
21. According to the Applicant, the argument by the Respondent that he ought to have filed an appeal is neither here nor there since the issue in contest is on costs. Reliance is placed on Article 159(2) of the Constitution to urge the court to disregard procedural technicalities. According to the Applicant this court has supervisory jurisdiction over the subordinate courts. In opposition, it is submitted that the application herein is not one for review per se as the Respondent would want the court to believe. As regards lack of provision indicated in the application, it is submitted that it amounts to a procedural technicality. The Applicant urged the court to allow the application herein.

DETERMINATION

22. I have considered the Miscellaneous Reference, affidavits in support and in opposition, the written submissions filed on behalf of the respective parties.
23. The Applicant seeks to set aside, review or vary the ruling of Hon. C.M. E. Keago on costs and to have the assessment of costs be done afresh by a different Judicial Officer /Deputy Registrar. The Applicant contends that the costs were unreasonable and improper.
24. The Notice of Motion dated 30th March, 2021 filed by the Respondent before the Trial Magistrate was based on grounds that there was an error apparent on the face of record that the decree was issued pursuant to the provisions of the Advocates Remuneration Order (ARO) yet the Applicant herein was/is not an advocate.
25. The substantive law in respect of review of an order or decree is set out under Section 80 of the *Civil Procedure Act* which provides inter alia:-
Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.



26. The Order 45 rule 1 of the [Civil Procedure Rules](#) provides that the court can only review its orders if the following grounds exist:-
- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - b. There was a mistake or error apparent on the face of the record; or
 - c. There were other sufficient reasons; and
 - d. The application must have been made without undue delay.
27. The Court is of the view that there is no error apparent on the face of the record or new evidence or important matter that has come up that was not within the knowledge of the Applicant. Further, there are no circumstances that consist of sufficient reasons to warrant a review of the impugned Ruling of 26th May 2021.
28. Secondly, if there was legal basis for a review the instant application is incompetent as it would amount to a 2nd review of the review sought, heard and determined by the instant Ruling of 26th May 2021.
29. Indeed, the court in [Richard Omari Nyamatura vs. Daniel Ombachi Mogeni \[2015\] eKLR](#), held: -
- “In our view, to allow the second review application would have been, not only contrary to the provisions of section 80 of the [Civil Procedure Act](#) and Order 45 Rules 1 and 6 of the Civil Procedure Rules, but would have also violated section 1A and 1B of the [Civil Procedure Act](#).”
30. Thirdly, the jurisdiction of this Court is to hear and determine appeals from matters heard and determined by the Magistrate Courts, Tribunals etc and not hear & determine through review of the Trial Court’s Ruling/Judgment/Order/Decree. The review is by the Trial Court of its decision as prescribed by Order 45 Rule 1 CPR 2010. It is trite that the power to review orders/decree is for the court that made the orders.
31. The Ruling sought to be challenged was/is in respect of costs assessed by the magistrate. The Respondent contends that one can only file a Reference against Taxation of a Bill of Costs hence the application herein does not fall under the meaning of Rule 11 of the Advocates (Remuneration) Order wherein a procedure is provided for when a party is objecting to the decision of the taxing officer. According to the Respondent, Hon. E. Keago was not taxing officer hence a challenge to his decision would only be through a review (Order 45) or an appeal. The Applicant asserted that he has filed a reference since there is no difference between ‘taxation’ and ‘assessment of costs’.

JURISDICTION TO ENTERTAIN THE CHAMBER SUMMONS

32. The Court of Appeal pronounced itself in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd. \(1989\)](#) that:
- “Jurisdiction is everything. Without it a court has no power to make one more step...”



33. This court is conferred with supervisory jurisdiction over the subordinate courts under Article 165(6) of the Constitution in the following terms:-
- “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
34. Section 27 of the *Civil Procedure Act* gives both the subordinate court and the High Court discretion and the jurisdiction to not only award costs but determine the extent at which those costs are to be paid and by which party. “Court” is defined, under Section 2 of the Act, as “... the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.
35. Paragraph 49 of the Advocates Remuneration Order clearly defines a “court” to mean both the High Court or any judge thereof or a Resident Magistrate’s Court or a magistrate sitting in a magistrate’s court. A court in Part III of the Advocates Remuneration Order is given the mandate to determine costs in contentious matters as between advocate and client and between party and party.
36. *Ringera J. in Machira and Company Advocates V Magugu [2002] 2 EA 248* at page 422 put it aptly inter alia that:
- “...secondly, as I understood the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order.”
37. Limo J. in *Bernard Gichobi Njira vs. Kanini Njira Kathendu & Another [2015] eKLR* the Learned Judge held that:-
- “17.For me this is simply a question of semantics because ‘taxation of costs’ and ‘assessment of costs’ means one and the same thing.....In the High Court determination of costs payable has always been referred to as taxation while court the determination of costs payable has been commonly referred to as ‘assessment’ but the two terminologies mean one and the same thing. Any of the terminologies can be used both by the High Courts and the courts below without any problem.”
38. Subordinate courts have jurisdiction to determine costs pay-able in cases filed before them and that they also have jurisdiction to assess/tax costs. The court’s view is that the argument by the Respondent that the Magistrate was not a Taxing Officer as per the definition under Paragraph 10 of the Advocates Remuneration Order hence the inapplicability of the Paragraph 11 of the Order that requires a reference to be filed before Judge is misconceived. The court finds that it has jurisdiction to entertain the Chamber Summons as filed.
39. The Respondent contend that no legal provision has been cited in the application. The Applicant invoked Article 159 (2) (d) of the Constitution that justice should be administered without undue regard to technicality.



40. In *Daniel Kimani Njibia v. Francis Mwangi Kimani & Another [2015] eKLR* where the Supreme Court held that:

“Objections to the recourse to improper legal provisions did not come from the other parties. However, the extraordinary standing of this Court would demand that, in principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.” [Emphasis Added]

41. The Supreme Court in *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR* the Learned Judges of the court stated that:

“Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

42. Order 51 Rule 10(2) of the Civil Procedure Rules as well as Article 159(2) (d) of the Constitution that technicalities should not be a hindrance to access of justice by a party. Order 51 Rule 10(2) stipulates that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

43. The court finds that the failure to cite the legal provision does not affect the substance of the Chamber Summons.

MERITS OF THE CHAMBER SUMMONS

44. The Applicant sought the court to reassess the costs or order for the same to be assessed afresh by a different Judicial Officer or the Deputy Registrar. The Applicant is aggrieved by the Trial Court’s decision who struck off party and party costs of Kshs.40, 000/-. The attendance costs were reduced to Kshs.500/- as subsistence as there no evidence he travelled from which place to the Court and therefore for 10 attendances the figure was/is Kshs.5,000/-.The costs of service were reduced to Kshs. 400/- each. The total costs were reduced to Kshs. 16,675 from Kshs. 67,175/-. The Court held the Applicant was not an advocate hence his costs would not be assessed based on the Advocates Remuneration Order.
45. Paragraph 51 of the Advocates Remuneration Order clearly gives the applicable scale to be used in the subordinate courts as Schedule VIII. The schedule is only applicable to advocates.
46. The Applicant contends that at one point he engaged the services of an advocate but withdrew instructions. The court has keenly perused the court file. The firm of L.M. Wambua & Co. Advocates had been appointed by the Applicant vide a Notice of Appointment dated and filed 3/12/2020. The firm further filed an Application dated 10th February, 2020 to cease acting for the Defendant which was served upon the Plaintiff in person. The court notes that all the other pleadings were filed by the Applicant in person. It follows therefore that the Trial Court was on firm ground in reviewing the



costs as the Applicant was/is not an advocate and cannot rely on Advocates Remuneration Order scales which are preserved for Advocates Legal Fees only.

47. As to the extent to which the court will interfere with the decision of the Taxing Officer, the court is guided by the case of *Republic vs. Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006] eKLR*, Ojwang J. (Retired) stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The 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 manifestly excessive as to justify an inference that it was based on an error of principle.”

48. The Court upholds the Trial Court's finding that the Costs were assessed under Advocates Remuneration Order (ARO) and the Applicant was not an Advocate and therefore reviewed the costs downwards.
49. The Applicant's claim that the costs were incurred, these costs were not verified by attachment of any receipts to show that the costs awarded on review were less than the recorded costs in any of the available receipts.
50. The Court finds that the Applicant has not demonstrated whether the decision of the Trial Magistrate was based on an error of principle or the costs were too low, with proof provided by the Applicant.

DISPOSITION

51. Accordingly, the court grants the following orders: -
- a. The Chamber Summons dated 3rd day of January, 2021 lacks merit and is hereby dismissed.
 - b. Costs to the Respondent.

DELIVERED, DATED, SIGNED AT MACHAKOS THIS 9TH DAY OF NOVEMBER 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

PATRICK MASILA MULWA - THE APPLICANT IN PERSON

NO APPEARANCE - FOR THE RESPONDENT

GEOFFREY - COURT ASSISTANT

