



Kiragu & another v Aharoni & another (Environment & Land Miscellaneous Case E080 of 2024) [2025] KEELC 4750 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E080 OF 2024
SM KIBUNJA, J
JUNE 25, 2025**

BETWEEN

ANANAS NYAMU KIRAGU 1ST APPLICANT

PETER KINYUA KIRAGU 2ND APPLICANT

AND

YEHUDA AHARONI 1ST RESPONDENT

RONEN MAULEM 2ND RESPONDENT

RULING

1. The applicants moved the court through the chamber summons dated the 1st October 2024, seeking for:

a.

“The assessment of costs dated 19th September 2024, and the ensuing certificate of assessed costs be set aside, and instead the statement of costs be re-submitted to taxing officer for re-assessment, with specific directions to reckon and assess ‘instruction fees’ and other costs using the cumulative sum of arrears of rent in respect of which the distress for rent was initially levied, with accrued mesne profits of up to 16th November 2023, or such other period as rent was falling due under the instrument of lease the basis of the suit.

b.

The court does order that the auctioneers costs as invoiced and claimed be awarded against the respondents.”



The application is based on the seven grounds on its face marked [1] to [7] and supported by the affidavits of Ananas Nyamu Kiragu and Peter Kinyua Muchendu, the 1st and 2nd applicants, sworn on the 4th November 2024 and 18th November 2024 respectively, inter alia deposing that the trial court dismissed the plaintiffs' suit and stay of execution application in November 2023, and May 2024 respectively; that the defendants' statement of costs dated 7th December 2023 was assessed at Kshs.116,000; that the applicants were aggrieved by the said taxation for failure to take into account the full quantum of arrears of rent outstanding at the time of determination of the suit plus the auctioneer's [1st defendant's] fees of Kshs.145,000, less the amount paid, and hence this application.

2. The application is opposed by the respondents through the replying affidavit of Yehuda Aharoni, 1st respondent, sworn on the 14th March 2025, and filed on 17th March 2025, inter alia deposing that the application is fatally defective, as it includes 2nd defendant's costs that should be levied under the Auctioneers Rules; that the respondents had not instructed the said auctioneer whose action was enjoined by the trial court; that the application is frivolous, vexatious and a waste of court's time as the respondent did not oppose the taxation; that the application violates Rule 11[1] & [2] as the requisite notice to the taxing master was not issued before the filing of this proceedings, and the taxing master has not given the reasons for the taxation.
3. The court issued directions on the 19th November 2024, for parties to file and exchange replies and submissions within the given timelines. During the subsequent mention of 30th January 2025, the respondents had not filed any reply and was granted the last opportunity to do so in 14 days. By the next mention of 17th March 2025, the respondents had not filed any reply and upon an oral application by counsel, the court directed they file and serve replies before close of business that day, on condition they pay court adjournment fees of Kshs.5,000. The court also directed parties to file and serve submissions within the timelines given and fixed the reference for ruling today. The record confirms that only the learned counsel for the applicants that filed their submissions dated the 18th March 2025, on 28th March 2025, which the court has considered.
4. The following are the issues for the determination by the court in this reference:
 - a. Whether a notice to the taxing master was made by the applicants before filing the chamber summons, and whether failure to do so made the application defective.
 - b. Whether the inclusion of the auctioneer's [2nd defendant/2nd applicant] fees makes the application defective.
 - c. Whether the applicants have met the threshold for the taxation ruling to be set aside, and referred for fresh taxation.
 - d. Who pays the costs.
5. The court has carefully considered the grounds on the chamber summons, affidavit evidence, submissions by the applicants' counsel, and come to the following determinations:
 - a. That though on 17th March 2025, the respondents were granted a window of filing and serving their replies before close of business that day, on condition they paid Kshs.5,000 court adjournment fees, there is no evidence of payment traced on the record, including the CTS on that having been complied with. What the court has seen on the CTS is a letter to the court, from the respondents' counsel dated and filed on the 2nd April 2025, seeking for assistance in paying the said amount. In the absence of evidence to confirm the condition of 17th March



2025 was complied with, the standing of the replying affidavit filed by the respondent is up for challenge.

- b. The learned counsel for the applicants has submitted that their application is a challenge to the subordinate Court's order made in Mombasa CMCC No. E130 of 2020, *Yehuda & Another v A. N. Kiragu & Another* of 19th September 2024 on costs, under Rule 9C of Order 21. That an appeal does not lie from such an order as of right by dint of Order 43 [1]. That as the taxation of Party and Party bill of costs or statement of costs in contentious matters is under section 16, discretionary, the jurisdictional point taken by the respondents through their replying affidavit is untenable. The respondents have not rebutted the applicants' contention, as they did not file any submissions. However, if the applicants' position is that they moved to this court in the manner they did, because the lower court order/ruling was not appealable as of right, then under section 75 of the [Civil Procedure Act](#) and Order 42 Rules [3] of the Civil Procedure Rules, they ought to have sought for leave to appeal from the trial court or from this court.
- c. From the documentary evidence presented by the parties in these proceedings, it is apparent that the lower court suit was filed by the respondents against the applicants herein in 2020. The applicants moved the court to dismiss the suit through the notice of motion dated 26th May 2023. The application was heard and allowed through the ruling of 16th November 2023, that dismissed the suit with costs. The applicants then filed their statement of costs dated 7th December 2023, seeking for among others Kshs.145,000, for the 2nd applicant as auctioneers fees. Vide the ruling delivered by Hon. L. K. Sindani, PM, on the 19th September 2024, the costs was assessed at Kshs.116,000. Among the amounts not allowed was the Kshs.145,000 for 2nd applicant. The applicants wrote the letter dated 1st October 2024 to the court indicating their objection on the assessment on the instructions and auctioneers fees items and seeking reasons for decision "if they are different from the reasons and explanation in your ruling of 19.09.2024." The applicants then filed the instant chamber summons, dated 1st October 2024, invoking Sections 11 & 16 of the Advocates [Remuneration] Order.
- d. Starting with the item claimed to be for 2nd applicant, as the auctioneer's fees of Kshs.145,000, that is based on an invoice No. 1971 dated 3rd June 2021, the learned trial magistrate in her ruling declined to grant it and inter alia stated that:

"....auctioneers fees invoice is a matter to be dealt in a different bill other than by way of disbursement thus the same is declined. It is an invoice and not a receipt. Rule 74 of the Advocates Remuneration Order only talks of vouchers and receipts as prove of disbursements and not invoices. I am therefore hesitant to allow the disbursement costs based on the invoices. This therefore means that Kshs.145,000/ auctioneer's fees is taxed off."

The learned counsel for the applicants has inter alia submitted that as their application dated 26th May 2023 for dismissal of the suit was allowed, and that they had at ground [w] pleaded to the auctioneer's fees, and the statement of costs was not opposed, then "This is further confirmation that the auctioneer's costs had been interrogated and allowed in the ruling of 16.11.2023. The taxing officer was only to adopt the invoice raised by the auctioneers. It was immaterial if the instructing client had paid the invoice sum, now that the auctioneer was a party in the suit and equally enjoyed the order awarding costs, just like the principal." With respect to the learned counsel, this is an erroneous position for the reasons that, firstly, the value in an invoice cannot qualify as a disbursement before it is paid; secondly, there was no specific prayer in the dismissal application dated 26th May 2023 seeking for the auctioneer's



fees of Kshs.145,000 or any other amount to be granted, and there was no order in the ruling of 16th November 2023 granting that amount; thirdly, auctioneers fees are not covered under the Advocates Remuneration Order, and the taxing officer was correct to tax that amount off as she did. This finding should not make the 2nd applicant's claim of his fees res judicata, and needless to state, he should be at liberty to pursue for his costs in accordance with the law.

- e. From the pleadings and documents availed, I agree with the finding of the taxing officer that from the plaint, the respondents suit was "for a permanent injunction against laying distress for rent. The amount is not specified in the plaint..." The taxing officer proceeded to take the value of Kshs.2.4 million on the application for injunction as the value of the suit for purposes of calculating the instructions fees, and awarding Kshs.50,000. The applicants had sought for the value of the suit to be taken as the total of the rent due, including arrears, as at the time being Kshs.12,324,000. The reasoning behind this proposal is that though at the time the court issued the injunction order the rent due was Kshs.2.4 million, the amount had risen to Kshs.12,324,000 due to the arrears that continued to increase, and which they could not distress on due to the restraining order. The respondents have not rebutted that position, and I am in agreement with the applicants, that as the respondents had through the court order restrained them from distressing for rent arrears for period the injunction order was in force, then the instructions fees should be determined of the basis of the rent arrears proved to be due as of the date of the statement of costs, 7th December 2023. On this item, the learned trial magistrate's decision on instructions fees is set aside.
 - f. That under section 27 of the Civil Procedure Rules costs follow the events unless where for good cause the court orders otherwise. In this application, I award the applicants costs.
6. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That applicants' chamber summons is allowed and the taxing officer's assessment on item 2 of the statement of costs dated 7th December 2023, on instructions fees is hereby set aside.
 - b. That the statement of costs dated 7th December 2023 is hereby resubmitted to the trial court for re-assessment of item 2, on instructions fees, taking the value of the suit property to be the value of the rent proved due, including all the outstanding arrears, as at 7th December 2023.
 - c. The applicants are granted costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF JUNE 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Applicants : Mr Kimani

Respondents : Mr. Egunza

Shitemi-court Assistant.

