



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS (REFERENCE) APPLICATION NO. 4 OF 2015**

**BERNARD GICHOBI NJIRA.....APPLICANT**

**-VERSUS-**

**KANINI NJIRA KATHENDU.....1<sup>ST</sup> RESPONDENT**

**HOSEA K. WENDOT.....2<sup>ND</sup> RESPONDENT**

*(Being an application against the decision of the Principal Magistrate's Court (D. Nyaboke) at Wanguru dated 3<sup>rd</sup> March, 2015)*

**RULING**

1. This is a reference filed by the Applicant herein vide the Chamber Summons dated 11<sup>th</sup> March, 2015. The reference or the application is in regard to the decision of the Resident Magistrate in **WANGURU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 87 OF 2015** to overrule the Applicant's Preliminary Objection. The Applicant herein had raised a preliminary objection in the subordinate court in Wanguru on the basis that a resident magistrate lacked jurisdiction to tax the Respondents Bill of Costs presented before that court by the Respondents who had been awarded costs by the same court.
2. The Applicant herein has not challenged any item in the Respondents' Bill of Costs filed in the subordinate court but rather has challenged the subordinate court's jurisdiction to assess or tax the costs. The Applicant opines that the subordinate court in the absence of the express conferment of the jurisdiction to tax costs by Hon. Chief Justice lacks jurisdiction to tax the Bill of Costs and that the Respondents ought to have applied to have their costs assessed rather than filing a formal Bill of Costs in a magistrate's court.
3. The Applicant has asked this Court to set aside the learned trial magistrate's decision dismissing the Applicant's Preliminary Objection and further proceed to strike out the Respondents' Bill of Costs arguing that formal bill of costs are only filed in matters that are before this Court and are taxed by Deputy Registrars or taxing officer as provided under ***paragraph 10*** of the **Advocates Remuneration Order**. His contention is that the only way he could challenge the trial court's decision was through this reference.
4. The Applicant has further contended that magistrate's (subordinate courts) can only assess costs without necessarily listing the assessment on the daily cause list. He has also faulted the Respondents for not complying with ***paragraph 72*** of the **Advocates Remuneration Order**.
5. The Applicant has for the record submitted that the Respondents are entitled to the costs awarded to them by the subordinate court and would have paid the costs had they moved the court properly.
6. The Applicant has further deponed in his affidavit in support of the reference that there is a distinction between taxing of costs which in his view is done in matters in the High Court and assessing of costs which is applicable to matters in the subordinate courts. In his view the

- Respondents filed an exaggerated Bill of Costs before the subordinate court besides perpetuating an illegality of filing an itemized Bill of Costs.
7. The Applicant finally relied on the authority in the case of **[MACHIRA & CO. ADVOCATES - VS- ARTHUR K. MAGUGU & ANOR (NBI HCC MISC. APP. NO. 358 OF 2001)]** where Ringera J., as he then was, held that a decision of a taxing officer on a matter other than taxation of a specific item in the bill can be ventilated by way of a reference to a judge in accordance with **paragraph 11** of the **Advocates Remuneration Order**.
  8. The Respondents strongly opposed the reference or the application before Court.
  9. The 2<sup>nd</sup> Respondent filed grounds of opposition and pointed out that the challenge on the Court's ruling on jurisdiction can only be ventilated by way of an appeal and not through a reference. He also filed a replying affidavit which I will analyse later in this ruling.
  10. The 1<sup>st</sup> Respondent has opposed the reference pointing out that the only issue for determination in his view is whether a magistrate has jurisdiction to determine how much costs are payable in a case before it. Mr. Kiama for the 1<sup>st</sup> Respondent argued that **Section 27** of the **Civil Procedure Act** empowered a trial court to assess costs and that the said provision is the backbone of the **Advocates Remuneration Order**.
  11. The 1<sup>st</sup> Respondent further argued **Schedule VII** of the **Advocates Remuneration Order** applies to subordinate courts and that it was incorrect to assume that only a Deputy Registrar is empowered to tax costs. He further pointed out that the letters from former Hon. Chief Justice only emphasized the importance of adhering to **Schedule VII** by magistrates when assessing costs in those courts. He contended that **Section 27** and **Advocates Remuneration Order** does not specify the procedure under which a successful litigant can have his/her costs assessed and that different courts have adopted different ways of assessing those costs. He however, faulted the Applicant's suggestion that an Executive Officer has power to determine costs payable in a case pointing out that a court does not include an Executive Officer.
  12. The 2<sup>nd</sup> Respondent's main basis of objection to the reference before Court is well stated in the replying affidavit deposed by Lee Maina Advocate and sworn on 12<sup>th</sup> May 2015. The Respondent's counsel has taken issue with the Applicant's decision to file a reference instead of an appeal arguing that the subordinate court was yet to tax or assess the costs to give the Applicant basis to file a reference. In his view the application before Court is not a reference but a disguised appeal by the Applicant who was dissatisfied with the decision by the learned magistrate to dismiss a Preliminary Objection filed in that court.
  13. The 2<sup>nd</sup> Respondent has therefore attacked the application for being misconceived and premature. He also pointed out that a similar Preliminary Objection dated 27<sup>th</sup> October, 2014 had been dismissed and the Applicant never appealed against the same therefore rendering the reference herein *res judicata*.
  14. The 2<sup>nd</sup> Respondent has further argued that the Applicant failed to comply with provisions of **paragraph 11(1) and (2)** of the **Advocates Remuneration Order** before making the application for reference and that in the absence of reasons from a taxing master, the only available remedy was for the Applicant to appeal rather than file for reference.
  15. I have considered all the arguments and submissions presented before me by the Applicant through Mr. Kariuki and both Respondents through Mr. Kiama and M/S Thungu Advocate holding brief for Lee Maina Advocate. In my view the application and the opposition raised has brought out basically two issues for determination by this Court. These are:
    - i. ***Whether magistrates or subordinate courts have jurisdiction to determine costs payable in cases before the said courts and if so whether determination of those costs can be properly referred to as "assessment of costs" or "taxation of bill of costs."***
    - ii. ***Whether the Applicant is correct to file for a reference rather than an appeal against the decision of the learned trial magistrate on a preliminary objection filed.***
  16. Before I embark on determining the above issues, this Court tried to get from the counsels appearing in this reference what the quarrel or disagreement was all about. For me the bottom line was payment of costs that had been awarded to the Respondents. The Applicant's counsel Mr.

Kariuki told the Court that he was not opposed to payment of those costs and indeed indicated that the Respondents were entitled to the costs. However, it was difficult to understand why counsels would not agree on some compromised amount to be paid on an issue which on paper appeared simple and straight forward. Nevertheless in view of the apparent disagreement, I will now consider the issues framed above and determine them.

17. On the question of jurisdiction, there is no dispute from both sides in this reference that magistrates or indeed subordinate courts in Kenya have jurisdiction to determine costs payable in cases filed before those courts. The Applicant conceded that magistrates also have jurisdiction to assess costs but on the same breath contended that they lacked jurisdiction to tax costs presented to them by way of Bill of Costs. For me this is simply a question of semantics because ‘taxation of costs’ and ‘assessment of costs’ mean one and the same thing. The Black’s Law Dictionary defines “Taxation of Costs” as follows:

***“The process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded.”***

On the other hand the same dictionary defines assessment of costs as follows:

***“Determination of the rate or amount of something (costs in this instance) – imposition of something (costs) e.g. fines.....”***

The Oxford English Dictionary defines “taxation of costs” as follows:

***“To examine and assess the costs of a case.”***

The same dictionary (Oxford) defines ‘assessment’ as follows:

***“To evaluate or estimate the nature, value or quality.....to set the value of a tax, fine etc for a person at a specified level.”***

The above definitions clearly for me mean one and the same thing and is simply a question of semantics and practice in our courts at different levels. In the High Courts determination of costs payable has always been referred to as taxation while at the lower 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.

18. Now turning to the law, a look at the provisions of **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. **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. It is therefore clear and indisputable that a magistrate’s court has jurisdiction to assess costs and as a matter of law, **paragraph 51** of the **Advocates Remuneration Order** clearly gives the applicable scale to be used in the subordinate courts as **Schedule VII**.

19. The Applicant’s contention that an executive officer can assess or tax costs in his administrative capacity is not hinged on law and in that regard a misconception. An executive officer certainly cannot be a taxing officer for purposes of Advocates Remuneration Order.

20. The question of whether a bill of costs can be presented before a magistrate’s court sitting as such is moot but a look at **Schedule VII** as compared to **Schedule VI** suggests that it is desirable and practical to file a bill of costs in the High Court cases in view of the extensive and laborious nature of the bill to enable a successful litigant and the taxing officer to comprehensively deal with ease all the taxable items on costs awarded. In the subordinate court however, the only discretion given is that court in relation to **Schedule VII** is under **subsection 2** thereof and it relates to instructions

fees on suits by the nature of which no specific sum is sued for. Otherwise the amounts in other taxable items are specified and in my view it is for that reason that it is desirable and practical for parties in whose favour costs are awarded to write to the subordinate court by way of letter asking the court to assess the costs as proposed or drawn. The subordinate court has a discretion either to assess costs *ex parte* and notify the parties or invite the parties and tax the same *inter partes* that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or the other.

21. This court is minded and indeed persuaded by the decision in the case of **PETER NJUGUNA NJOROGE –VS- JULIUS NARANICLAK OLOLGOLIMOT [2010] eKLR** where the Respondent’s counsel drew a bill of costs in Narok Senior Resident Magistrate’s Court and had it taxed as if it were a matter which arose in the High Court. The Applicant in a reference before High Court in Nakuru argued that since the case was before a subordinate court, a bill could not be drawn and taxed in the manner it was done. Justice Anyara Emukule made the following observations which this Court agrees with;

***“I have examined the plaintiff’s bill (Bill of Costs) drawn on 21<sup>st</sup> December, 2005 and it substantially conforms to the requirements of Schedule VII of the Advocates Remuneration Order. Perhaps the only arguable departure is that it is termed a bill of costs. It might have been called the plaintiff’s or defendant’s costs and set out in conformity with the requirements of Schedule VII of the Advocates Remuneration Order. I do not propose to strike out the plaintiff’s Bill of Costs. I direct however, that because it was not assessed or ascertained in the presence of the plaintiff the same is remitted to the Senior Resident Magistrate Narok for assessment in the presence of the plaintiff or his counsel and the defendant or his counsel.”***

22. A magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether “assess” or “tax” is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology “taxation” to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of **Schedule VII** of the **Advocates Remuneration Order**. To make a different finding in my view would be unconstitutional in view of **Article 159 (2) (d)** of the Constitution. The objection that the Applicant raised at the subordinate court was based on form rather than substance and the learned trial magistrate’s decision on the preliminary objection cannot be faulted because it is hinged on the Constitution in so far as substantial justice is concerned. The learned magistrate had not taxed the Bill of Costs and the Applicant herein did not demonstrate what prejudice if any he was likely to suffer if the subordinate court had proceeded to tax/assess the costs payable. I do not find the submissions by the Applicant that he is willing to pay costs to be made in good faith because surely a willing party to pay costs does not engage in preliminary objections and references which results in more costs and eating of precious judicial time. If the Applicant was so minded about saving judicial time as he submitted, he should be engaging the other parties on the amount of costs to be paid in the spirit of Alternative Disputes Resolutions if he really accepted the Court’s verdict on the payment of costs.

23. On the issue of whether the Applicant was correct to prefer a reference rather than an appeal, the Respondents have submitted that the application before court is disguised as a reference but it is actually an appeal against the decision of the learned trial magistrate to overrule the Applicant’s Preliminary Objection filed before the said Court on 27<sup>th</sup> October, 2014 and dated the same day. The Preliminary Objection was not availed to this Court but the ruling on the Preliminary Objection was annexed to the application for reference. It is from the ruling and the application now before me that I can perhaps draw inference to the nature of the Preliminary Objection filed. It was about the jurisdiction of the subordinate court to assess or tax costs payable in that court. I have already determined the issue of jurisdiction, what is pending is the question of remedy that was available in law to the Applicant. The Applicant chose to proceed under **paragraph 11** of the

**Advocates Remuneration Order** which presupposes that taxation has taken place and the party against whom the costs are taxed has become dissatisfied with certain items taxed or all the items. **Paragraph 11(1)** states as follows:

***“Should any party object to the decision of the taxing officer, he may within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects.”***  
(emphasis added).

For me this paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill but the question of jurisdiction to entertain the taxation or assessment of costs is a different matter altogether.

24. In the first place the Applicant submitted that the learned trial magistrate was not a taxing officer under **paragraph 10** of the **Advocates Remuneration Order** and if that was the case then it would then follow that **paragraph 11 (2)** thereof would not be invoked as there would be no basis to entertain the same as a ‘reference’ properly so called. Be that as it may I have considered the reference filed and looking at the wording of the main prayer under prayer 4 of the application, it is understandable why the Respondents have termed it as a disguised appeal. The decision by the learned trial magistrate that he had jurisdiction to determine the issue of costs dissatisfied the Applicant and being aggrieved I do agree with the Respondents that the available remedy was to appeal against the ruling. I am not persuaded by the decision of Ringera J (as he then was) quoted by the Applicant in the case of **MACHIRA & CO. ADVOCATES** (supra). In my considered view the decision is quoted out of context and is not relevant in this case. The decision by Ringera J. related to an actual taxation that had been done by a taxing officer despite the opposition that the bill had been filed prematurely. The distinction here is that the subordinate court in this reference had not taxed the costs courtesy of this reference. The Applicant should have appealed against the decision of the learned trial magistrate because the operation of **paragraph 11** of the **Advocates Remuneration Order** can be invoked after taxation or assessment of costs.

The upshot of the above is that this court finds no merit in the application dated 11<sup>th</sup> March, 2015. The same is dismissed with costs.

***Dated and delivered at Kerugoya this 9<sup>th</sup> day of June, 2015.***

**R. K. LIMO**

**JUDGE**

9.6.15

Before Hon. Justice R. Limo

Court Assistant: Willy

Nyambura holding brief for Kariuki for Applicant

**COURT:** Ruling signed, dated and delivered in the presence of Nyambura holding brief for Kariuki for Applicant and in the absence of Respondent.

R. K. LIMO

**JUDGE**

9.6.15

**NYAMBURA:** I have instructions to seek leave to file an appeal vide rule 11 (3) of the Advocates

Remuneration Order.

**COURT:** Leave to appeal granted.

R. K. LIMO

JUDGE

9.6.15