



**Lupe Contractors Co. Limited v Kariuki (Environment and Land Appeal
31 of 2018) [2025] KEELC 8224 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 31 OF 2018
JM ONYANGO, J
NOVEMBER 26, 2025**

BETWEEN

LUPE CONTRACTORS CO. LIMITED APPELLANT

AND

WILLIAM KARIUKI RESPONDENT

RULING

1. This ruling is in respect of the Appellant’s applications dated 25.10.24 and 19.12.24.
2. In the Chamber Summons dated 25.10.24 which is brought pursuant to Rule 11 (2) of the Advocates Remuneration Order, Section 3 and 3A of the Civil Procedure Rules, the Appellant seeks a stay of execution and an order setting aside the ruling of the Taxing Officer delivered on 24.5.23 in ELCA No. 31 of 2018 in reference to the Appellant’s and Respondent’s Party and Party Bills of Costs dated 30th November 2022 and 24th June 2022 respectively. The Appellant prays that the said bills be taxed by this Honourable court or in the alternative, that this honourable court be pleased to refer the taxation of the said bills to another Taxing Officer for re-taxation.
3. The said application is anchored on the grounds set out on the face of the Notice of Motion which are amplified in the Supporting affidavit of Peter Mwangi, the Managing Director of the Appellant sworn on 25th October 2024. In he said affidavit he avers the Taxing Officer misdirected himself in finding that the Applicant’s Bill of Cost dated 30.11.22 was a response to the one dated 24.6.22. He challenged the amounts awarded under various items in the Bill of Costs. He also faulted the Taxing Officer for striking out the Appellant’s Bill of Costs dated 30th November 2022 despite the amounts charged therein being justified.
4. In opposing the application, the Respondent filed a Replying affidavit.



5. The second application dated 19.12.24 seeks a stay of execution of the Warrants of Attachment date 30.10.24 pending the hearing of the application and the Respondent's Notice of Preliminary Objection dated 25.11.24.
6. The application is premised on the grounds that the Respondent has extracted warrants of attachment and sale dated 30.10.24 and if he executes the same, the Reference shall not be heard on its merits and the Respondent shall have no means of reimbursing the Appellant.
7. The application was equally opposed by the Respondent vide his Replying affidavit sworn on 21.3.25 in which he deposed that the Applicant has not met the conditions for stay of execution.
8. The court directed that the 2 applications be canvassed by way of written submissions and both parties filed their submissions.

Applicant's Submissions

9. In his submissions learned counsel for the Applicant submitted that the Respondent was not entitled to instructions fees of Kshs. 120,000 allowed under item 1 of the Respondent's Bill of Costs. He contended that Schedule 6 Paragraph 1(b) of the Advocates Remuneration Order provides for the instruction fees where a party presents or opposes an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and the amount is capped at 75% of the fees chargeable.
10. He argued that since the value of the subject matter in ELCA 31 of 2018 was Kshs. 500,000, the instruction fees chargeable was 75% of Kshs. 75,000 which is Kshs. 56,250.
11. It was his submission the Respondent did not meet the requirement for an award of costs for instruction fees under the Advocates Remuneration Order and he was therefore not entitled to the same.
12. He faulted the Taxing officer for awarding "getting up fees" as the court had not issued any certificate to the effect that getting fees was payable in accordance with Schedule 6 paragraph 3 of the Advocates Remuneration Order.
13. Counsel further submitted that the Taxing Officer erred in law by awarding costs under items 3-8 of the Respondent's Bill of Costs in respect of the application dated 19.12.2018 which was compromised by a consent adopted on 19.12.2018. He was of the view that it was erroneous to award costs on an application compromised by a consent order as it amounted to re-writing the agreement between the parties thus violating the principle of privity of contract. Reliance was placed on the case of *Flora N. Wasike v Destimo Wamboko* (1988) eKLR on setting aside or varying the terms of a consent.
14. With regard to the costs on the application dated 1st March 2019, counsel submitted that Taxing officer erred in awarding costs on items 10-19 of the Respondent's Bill of Costs as the Respondent's application was dismissed with costs. Reliance was placed on the case of *Alice Muthoni Wahome v James Maina Kamau & 2 Others* (2017) eKLR where the court held that costs awarded to parties on interlocutory applications were proper. The court relied on the case of *Jiwan Singh Rugnath* (1945) 12 EACA 21 where the East African Court of Appeal held that where the suit involves separate issues, the costs of any particular issue go to the party who succeeds upon it.
15. In conclusion, counsel submitted that the sums awarded to the Respondent were irregular and unlawful and unjustifiable and prayed that the same be set aside.



Respondent's Submissions

16. Learned counsel for the Respondent started by submitting that the application dated 25.10.24 was defective and non-starter as no Notice of Objection to the Decision on Taxation was filed or sent to the Taxing Officer. He submitted that the Notice of Objection dated 7.6.23 and the one dated 25.10.24 were missing from the e-filing system.
17. Counsel submitted that the Appellant had not established a valid case for setting aside the ruling of the Taxing officer as the Appellant failed to provide the court with a copy of the said Bill of Costs by attaching a copy thereof to his Supporting affidavit.
18. It was counsel's submission that the instruction fee was based on the arrears of Kshs. 2,316,000 which the Appellant owed the Respondent and the instruction fee of Kshs. 120,000 was justified. It was his further submission that the getting up fee being 1/3 of the instruction fee was awarded in accordance with Schedule 6A(3) of the Advocates Remuneration Order as the Respondent participated in the appeal.
19. With regard to the Respondent's Bill of Costs dated 24.6.2022 counsel submitted that the Respondent having been awarded the costs of the appeal was entitled to recover the expenses relating to the applications dated 19.12.2018 and 26.11.2018 contained in items 3-8.
20. With regard to items 10-19 counsel submitted that even though the Respondent lost the application dated 1st March 2019, he was nevertheless entitled to all costs as the appeal was eventually dismissed with costs to the Respondent. Reliance was placed on Rtd Justice Kuloba's book, Judicial Hints on Civil Procedure where he explains that a successful litigant is entitled to recover all the costs and he should not be deprived of costs merely because he raised an issue which did not succeed but it did not affect the result of the suit.
21. On the Appellant's Bill of Costs dated 30th November 2022 based on the Appellant's application dated 1st March 2019, counsel faulted the Appellant for failing to furnish the court with a copy of the said Bill. It was his submission that since costs follow the event, the Appellant could not claim costs on the application after losing the appeal.
22. He relied on DGM v EWG Nyahururu Civil Case No. E002 of 2021 where the court stated that:

“the event means the result of the entire litigation.”
23. In conclusion, counsel submitted that the grounds on the face of the Reference are vague, prolix and unsubstantiated without setting out specific grounds or points of law for consideration in a review as required by established law and practice and therefore the court ought not to interfere with the discretion of the Taxing officer.
24. With regard to the application for stay of execution counsel submitted that the Appellant had not met the conditions for stay as no substantial loss had been demonstrated. He urged the court to dismiss the Appellant's applications with costs.

Analysis and Determination

25. Having considered the 2 applications together with the Notice of Preliminary Objection the affidavits and rival submissions as well as the applicable law the issue that fall for determination are:
 - i. Whether the Preliminary objection should be upheld.



- ii. Whether the Reference is incompetent.
 - iii. Whether the Taxing Officer's ruling should be set aside
 - iv. Whether a stay of execution ought to be granted.
26. The Preliminary Objection is based on the grounds that the Appellant's application dated 25th October 2024 is resjudicata as the court had rendered its decision on the Reference vide its ruling delivered on 16.9.24.
27. In the said ruling the court struck out the reference for having been filed outside the limitation period of 14 days for filing an objection to which he objects.
28. I note from the proceedings that subsequent to the order striking out the Reference, the Appellant filed an application dated 26.9.24 for enlargement of time. The said application was allowed on 22.10.24.
29. It is trite that a matter that has not been heard on merit is not res judicata. Consequently, the preliminary objection lacks merit and I disallow it.
30. The Respondent also took issue with the fact that the Applicant failed to comply with the provisions of paragraph 11 of the Advocates Remuneration order 2009. It was his further submissions that the Appellant did not comply with the orders of 22.10.24 as the application was not filed within 7 days and the Reference be filed within 7 days from the date of service of the Notice of Objection. The Notice of Objection dated 25.10.24 was filed on 28.10.24 and the Reference was filed on 4.11.24 which is within the timelines given. The Reference is therefore properly on record.
31. I will now move on to the crux of the matter which is whether the Taxing officer's ruling should be set aside.
32. With regard to the Bill of costs dated 24.6.2022, whereas the Appellant states that value of the subject matter is Ksh. 2,316,00 being outstanding rent, the Respondent asserts that the value of the subject matter is Kshs. 500,000 claimed by the Appellant. In order to accurately assess the instruction fees it would be necessary to look at the pleadings and the Record of Appeal.
33. The next item relates to getting up fees. As correctly submitted by counsel for the Applicant Schedule 6 paragraph 3 of the Advocates Remuneration Order provides that:
- “in any appeal to the High court in which a Respondent appears at the hearing of the appeal, and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing office may allow such a fee in addition to the instruction fee an such a fee shall not be less than one third of the instruction fee”
34. There is no evidence that the court indicated that the appeal was complex to warrant the getting up fee being awarded.
35. On the costs of the application dated 9.11.2018 which was compromised by a consent order, I am of the view that the consent does not preclude the court from awarding costs which have been incurred by the parties as costs are within the court's discretion. I do not agree that awarding costs amounts to varying the terms of the consent.



36. With regard to the Respondent's application dated 1.3.2019 which was dismissed I am of the view that the Taxing officer erred in principle in awarding costs to the Respondent who lost the application. (See the case of Alice Muthoni Wahome v James Maina Kamau (supra).
37. In the final analysis, it is clear that the Taxing officer made some the errors of principle which justify interference with her decision.
38. As regards, the prayer for stay of the warrants of Attachment, the Applicant would suffer substantial loss if the said warrants were executed before the errors pointed out are corrected. The ends of justice would thus be met if a stay of execution is granted pending the re-taxation of the Bills of Costs.
39. The upshot is that the two applications succeed and I make the following orders:
- a. The Ruling of the Taxing Officer issued on 24.5.23 in ELCA 31 of 2018 in reference to the Appellant's and Respondent's Party and Party Bills of Costs dated 30th November 2022 and 24th June 2022 are hereby set aside.
 - b. The said Bills of Costs are hereby referred for re-taxation by an officer other than Hon. M. Kurumbu P.M. The Taxing officer shall take into account the areas highlighted in this ruling.
 - c. There shall be a stay of execution of the warrants of attachment issued herein pending re-taxation of the Appellant's and Respondents Bills of costs dated 24th June 2022 and 30th November 2022.
 - d. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF NOVEMBER 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Ms Njagi for the Applicant

Ms Mwangi for Mr Gatuhi for the Respondent

Court Assistant: Hinga

