

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCMISC No. 19 of 2018

MCKAY & COMPANY ADVOCATES APPLICANT

VERSUS

OLOIRIEN GROUP RANCH RESPONDENT

RULING

1. The applicant in this miscellaneous suit is a firm of advocates (the advocate) and the respondent was its client (the client). The advocate represented the client in the suit Kisii ELC NO. 47 of 2015 and subsequently filed an advocate/client bill of costs vide this miscellaneous cause. The advocate raised a total bill of Kshs. 130,903,475/=. The taxing officer taxed the bill at Kshs. 205,115/= in a ruling delivered on 16 October 2018. The advocate was not satisfied and made a reference to this court vide the chamber summons application dated 30 October 2018. The reference was opposed through a replying affidavit filed on 28 November 2018. The advocate failed to move the court since filing the reference and never appeared in court during the mention of the matter. The client filed an application dated 9 May 2022 to dismiss the reference for want of prosecution. The advocate did not file anything to oppose the motion and the reference was duly dismissed on 23 February 2023 with costs.
2. In a situation akin to the hunter becoming the hunted, the client, through his advocate on record, M/s O.M Otieno & Company Advocates, then filed a bill of costs dated 9 August 2023 for costs on the said reference, seeking inter alia an instruction fee of Kshs. 300,000/= and a total fee of Kshs. 548,750/=.
3. The advocate has raised a preliminary objection on this bill inter alia on the following grounds :
 - (a) The bill of costs is with respect to defending the advocate/client bill of costs dated 7 March 2018 which was determined in favour of the advocate, whereby the taxing master taxed the advocate/client bill of costs at the sum of Kshs. 205,115/=.

- (b) Logically, the costs of defending the Advocate/Client bill of costs could not be awarded to the client/respondent as the ruling delivered on the 16 October 2018 was against it.
- (c) There is no provision in law for a party and party costs arising out of an advocate/client bill of costs.
- (d) In any event the entire bill of costs is misconceived as no costs were awarded to the client/applicant.
4. Counsel filed their submissions to argue that preliminary objection and I have taken those submissions into account.
 5. Starting with the last point in the preliminary objection, i.e that no costs were awarded to the client, the fact of the matter is that the reference was dismissed for want of prosecution with costs to the client. It is the advocate who filed the reference i.e objecting to the costs as taxed by the taxing officer, but failed to move it, and also failed to attend court on the mention dates; there can be very little sympathy for such conduct. That is why costs were awarded to the client. If indeed the advocate had lost interest in pursuing the matter the gracious thing to have done would have to withdraw the reference rather than leaving it hanging and dragging his client through the court process for no reason.
 6. Though it is urged in this preliminary objection that costs are not awardable, I have not seen any law or authority in the submissions of counsel for the advocate, that support this contention. Costs remain in the discretion of court pursuant to Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, and in the court's discretion, given the conduct of the advocate after filing the reference, the court deemed it fit to award costs of the reference to the client.
 7. The issue is what costs then can be awarded. That is a matter for the taxing officer and I would not wish to go into that. I will restrict myself to whether instruction fees is awardable. No instruction fees is awardable in respect of a reference and this is clear from Rule 13 (3) of the Advocates Remuneration Order which provides as follows on taxation of costs between advocate and client :

13 (3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.
 8. Surprisingly, I did not see mention of the above rule in the submissions of either counsel for the advocate or counsel for the client, but this is the applicable rule. I have not however seen anything that would defeat an award of reasonable costs for either

presenting or defending a reference since, as I have earlier mentioned, costs are in the discretion of the court. These costs however need to be reasonable. It should not be forgotten that a reference is no more than a Chamber Summons application and that should be taken into account. In my view, it would be a case of nominal costs at best, simply to take care of any court attendances and any extraneous expenses that may have been incurred. That however I will leave to the taxing officer to deal with.

9. For the above reasons, save for limb (3) which in any event was for the taxing master to consider when taxing the bill, the preliminary objection is dismissed. I award the costs of this preliminary objection to the client.
10. Orders accordingly.

DATED AND DELIVERED THIS 27 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Michael Oyuko – Court Assistant

No appearance on part of M/s McKay & Company Advocates for the applicant/advocate

No appearance on part of M/s O.M Otieno & Company Advocates for the respondent/client