

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLA NO. E001 OF 2025

DAVID OTIENO DACHE APPELLANT

VERSUS

ROSE AKELLO OTIENO RESPONDENT

*(An appeal from the ruling of Hon. Beryl Omollo SRM delivered on 2nd July
2024 in VIHIGA SPMCL & E No. 1 of 2017)*

JUDGEMENT

The appellant was the defendant in VIHIGA PMCEL CASE NO. 1 OF 2017. Vide the plaint dated 20th December 2017, the appellant was sued by the respondent herein over a portion measuring 2 acres of land parcel known as W. BUNYORE/EKWANDA/1124, which she claimed was bought by her late husband, one George Washington Otieno in the year 1968. She sought an order declaring her as the owner of the said portion of land, a permanent injunction, and costs of the suit.

The record shows that in response to the claim, the appellant filed the defendant's statement of defence dated 26th January 2018, denying the respondent's claim and stating that land parcel No. WEST BUNYORE/EKWANDA/1124 does not exist.

The appellant also raised a point of law that the respondent lacked the locus standi to bring the suit on behalf of the estate of her late husband.

The suit was heard by the trial court, which found that the respondent was only entitled to a refund of Ksh 1,400/= which she had paid to the appellant. The court entered judgment in favour of the respondent for Ksh 1,400/= and interest thereon from 30th July 1989 at court rates. The court also awarded the costs of the suit to the respondent.

Subsequently, the respondent filed a Party and Party Bill of Costs for assessment by the court, in respect of which the trial court delivered a ruling dated 2nd July 2024, assessing the costs at Kshs 116,745/-. The ruling is the subject of the appeal herein.

The appeal

Dissatisfied with the ruling, the appellant filed the present appeal vide the Memorandum of Appeal dated 4th July 2024, seeking that the appeal be allowed and the ruling be set aside. The grounds of appeal are that:

- (i) the trial Magistrate erred both in law and fact by awarding costs to the respondent in respect of a prayer that was dismissed by the Honourable Court.
- (ii) the trial Magistrate erred both in law and fact by awarding costs to the respondent without following the provisions of the Advocates

- Remuneration Order and without following the guidelines provided by law in assessing costs.
- (iii) The honourable Magistrate erred both in law and fact by awarding excess costs to the respondent.

Submissions

The appeal was heard by way of written submissions pursuant to directions made on 15th October 2025.

Written submissions dated 6th February 2026 were filed on behalf of the appellant by Momanyi Manyoni Advocates. Counsel submitted that the trial court had awarded a sum of Kshs 1,400/- plus costs and interests from 13/7/2021 to the respondent, but dismissed the prayers for an order of eviction and injunction. That a bill of costs subsequently filed was taxed at KShs 116,745. Counsel submitted that the respondent was entitled to costs on the Kshs 1,400/= awarded, together with interest.

That the award of Kshs 10,000/- in respect of instructions fees was sufficient for an award of Kshs 1400/=. Counsel submitted further that the trial court awarded excessive instruction fees to the respondent and urged the court to reduce the same. Counsel urged the court to also reduce the other items of the

respondent's bill of costs. Counsel submitted that the appeal was restricted to the issue of the bill of costs only.

On behalf of the respondent written submissions dated 27/1/2026 were filed by the firm of Ben Aduol Nyanga & Co advocates.

Counsel submitted that the appeal is devoid of merit and ought to be dismissed.

Counsel submitted that costs are governed by Section 27 of the Civil Procedure Act which provides that costs are at the discretion of the court and that such discretion shall be exercised judiciously. That the general principle is that costs follow the overall outcome of the proceedings and not isolated prayers taken in isolation.

That the respondent was the successful litigant in the lower court judgment having been entered in her favour. That the award of costs therefore followed the correct legal principles.

Counsel submitted further that the appellant's argument that the trial court failed to follow the Advocates Remuneration Order was misconceived. Counsel relied on the cases of Joreth Limited –Vs- Kigano & Associates (2002) eKLR and Peter Muthoka –vs- Ochieng and 3 Others (2019) eKLR and urged the court to find that the trial court exercised its discretion judiciously by awarding

costs to the respondent that the costs were assessed fairly in accordance with the principles of the Advocates Remuneration Order.

On whether the appellant had met the threshold for appellate interference with an award of costs, Counsel submitted that the appellant never filed a reference order Rule 11 of the Advocates Remuneration Order or successfully challenged the taxation hence the taxation remains valid, lawful and binding.

That for a party who is aggrieved by a taxation, the proper procedure is a reference and not an appeal. That the court cannot sit on appeal over a taxation where no reference is filed and where the taxation has not been set aside. That the appeal invites the court to act without jurisdiction. That in the absence of a reference, the court lacks the jurisdiction to interrogate the quantum or propriety of the costs. Counsel urged the court to dismiss the appeal.

Analysis and determination

The 1st ground of appeal is that the trial court erred both in law and fact by awarding costs to the respondent in respect of a prayer that was dismissed by the honourable court.

It is not in dispute that none of the prayers in the plaint was granted except costs. The trial court awarded the respondent the Kshs 1400/- which she had pleaded in paragraph 5 of the plaint as the consideration she had paid for

purchase of the suit land. The court also awarded interest on the Kshs 1400/= from 30th July 1989 at court rates. Further the court awarded costs of the suit. There was no appeal against the judgment of the trial court. As indicated in the Memorandum of Appeal, the appeal herein is against the taxation of the Bill of costs. The judgment awarded the respondent the sum of Kshs 1400/= and interest thereon from 30th July 1989. In *Joreth Limited vs Kigano & Associates* (2002) eKLR, relied on by the respondent herein, it was held inter alia that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, the judgment, or settlement, if any.

In the suit, although the respondent had pleaded in the plaint that the current market value of the suit land was Kshs 300,000/-, there was no evidence in the form of a valuation report or at all to prove the claim. Furthermore, the claim for the respondent to be declared as the owner of the suit land failed, as did the claim for an order of permanent injunction. What the court found due to the respondent was only Kshs 1400/-, and in my view, guided by the principles set in the case of *Joreth* (supra), the sum awarded ought to be the basis for charging the costs.

In *Kenya Anti-Corruption Commission v Marshalls East Africa Ltd & another, Court of Appeal at Nairobi, Civil Appeal No. 84 of 2017*, it was held that costs are awarded to compensate the successful party for the trouble taken in

prosecuting or defending the case and not to punish the unsuccessful party. The Court referred to Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, Supreme Court Petition No. 4 of 2012, where it was stated thus:

“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

For the foregoing reasons, I respectively find that the ruling of the trial court was erroneous to the extent that it failed to apply the sum awarded as the value of the subject matter of the case, hence the basis for the taxation of the respondent’s party and party costs.

I find that the appeal has merit and hereby allow it. The ruling dated 2nd July 2024 by the trial court is set aside. The matter is referred back to the trial court to reassess the respondent's party and party costs based on the award of Kshs 1400.

Each party shall bear its own costs of the appeal.

Judgment dated and signed at Vihiga, delivered virtually this 12th day of March 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi--Court Assistant.

Manyoni for the Appellant

Mwilolo for the Respondent.