



Ebrahim v County Government of Mombasa & 9 others (Environment and Land Miscellaneous. (Reference) Application E031 of 2023) [2024] KEELC 99 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 99 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS.
(REFERENCE) APPLICATION E031 OF 2023**

SM KIBUNJA, J

JANUARY 24, 2024

BETWEEN

ABDUL HAMID EBRAHIM PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE OFFICER IN CHARGE OF PHYSICAL PLANNING AND
ENFORCEMENT OF BUILDING CODE, COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT**

THE ASSISTANT PUBLIC TRUSTEE, MOMBASA 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

NYONDO NGAO NYAE 5TH RESPONDENT

HAMISI MOTO 6TH RESPONDENT

SAJADI KAZI KIRUMBI 7TH RESPONDENT

MUSTAFA ZWAI MZUNGU 8TH RESPONDENT

JOHN BOSCO- RIMBA KAI 9TH RESPONDENT

SAIDI GOMO BADI 10TH RESPONDENT

RULING

1. The chamber summons dated 31st July 2023 was brought by the petitioner/applicant under section 1A and 3A of the *Civil Procedure Act* and rule 11 (2) of the *Advocate Remuneration order* and sought for the following orders;



- a. That the decision of the taxing master in his Ruling delivered on 2nd November 2022 pursuant to the 5th – 10th respondents’ primary party and party bill of costs dated 10th February 2022 be set aside and taxed afresh.
- b. That the decision of the taxing master in his Ruling delivered on 2nd November 2022 pursuant to the 5th – 10th respondents’ supplementary party and party bill of costs dated 11th August 2022 be set aside and taxed afresh before this honourable court.
- c. That costs of this application be in the cause.

The application is based on the seven (7) grounds on its face and supported by the affidavit of Abdul Hamid Ebrahim, the petitioner, sworn on the 31st July 2023.

2. The application came up for hearing on the 12th October 2023, and counsel for the respondents informed the court that they do not oppose the application for re-taxation of the bill of costs. The court immediately granted prayers (a) and (b) and directed counsel to file submissions.
3. The learned counsel for the petitioner and the respondents filed their submissions dated the 1st November 2023 and 13th November 2023 respectively, which the court has considered.
4. The following are the issues for the court’s determinations:
 - a. Whether the chamber summons application is opposed or not.
 - b. Whether the re-taxation should take place before this court or another taxing master.
 - c. Who pays the cost of the application?
5. The court has carefully considered the grounds on the application, the submissions by both learned counsel, the record and come to the following findings:
 - a. That during the hearing of the application on the 12th October 2023, Ms. Umara, the learned counsel for the petitioner, submitted that there was no opposition filed to their application and it should therefore be allowed as unopposed. In response, Mr. Obinju, the learned counsel for the respondent informed the court that “we do not oppose the application for re-taxation.” However, at paragraphs 28 and 29 of their submissions, the learned counsel seem to depart from that position as they seek to have “... the two rulings by the deputy registrar be upheld” and for “... the reference be dismissed with costs.” Unfortunately, for counsel, it is too late to change their declared support for re-taxation through submissions. Indeed, as no replies in opposition were filed to the chamber summons as required under order 51 rule 14 of the Civil Procedure Rules, the application remains unopposed to date. In any case, submissions are not among the processes recognized under order 51 rule 14 of the Civil Procedure Rules through which a party can respond to an application against them.
 - b. Prayer (a) had sought for the taxing master’s ruling of 2nd November 2022 in respect of the bill of costs dated the 10th February 2022 to “be set aside and taxed afresh” while prayer (b) sought for the supplementary bill of costs dated the 11th August 2022 to “be set aside and taxed afresh before this honorable court.” The question that arises is whether the re-taxation of the said bills of costs should take place before this court or another taxing master.



- c. The principle, that guide the taxing officer in assessing instruction fees for the constitutional petition are set out in schedule 6 paragraph 1 (j) (ii) of the *Advocates Remuneration (Amendment) Order* 2014 which provides as follows:

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate-

- i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000.
- ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000.”

In the case of *William Kabogo Gitau v Ferdinand Ndung’u Waititu* [2019] eKLR the court held that,

“From the above and considering the provisions of schedule 6 paragraph 1 (j) (ii) of the Advocates Remuneration (Amendment) Order 2014, and the assessed costs being fifty (50) times in respect of instruction fees in an opposed constitutional petition, I have no doubt in finding the sum of Kshs.5,000,000/- to be astronomical and excessive for instruction fees for a constitutional petition, and taking into account that the petition was determined on a preliminary point of law and did not proceed to full hearing.

I am further of the view, that the taxing master having in her ruling found, that the petition was not complex, that it did not go to full hearing and that no experts were involved made an error in principle in arriving at the payable instruction fees. I find the taxing officer erred in awarding the sum of Kshs.5, 000,000/- as instruction fees. This without doubt was a manifest error in principle on the award of instruction fees which in the interest of justice ought to be varied and/or set aside.”

And in the case of *Ilongo Tokole Jean v Pallet Logistics Limited & 2 others* [2021] eKLR it was held that;

“This Court only interferes with the decision of the Taxing Master where there has been an error in principle but should not do so on questions solely of quantum as that is an area where the Taxing Master is more experienced and therefore more apt to the job. A Court can therefore only interfere with the decision of the Taxing Master in the event that while taxing the bill of costs, he considered factors that he ought not have been considered in the first place or failed to consider facts which he ought to have considered.”

In the instant matter, the application for setting aside the taxing master’s ruling of 2nd November 2022 in respect of the two bills of costs has been conceded. The re-taxation has also been conceded. The above superior courts decisions will therefore be important guide in the re-taxation, which I find should be before another taxing master and not before this court. The orders of 12th October 2023 are therefore reviewed accordingly.



- d. On the issue of costs of the application, and considering it was conceded, I find it fair and just for each party to bear their own costs.
6. That flowing from the foregoing, and further to the orders of October 12, 2023, the court finds and orders as follows:
 - a. That the taxing master's ruling of 2nd November 2022 on the respondents' bills of costs dated 10th February 2022 and 11th August 2022 is hereby set aside.
 - b. That the two bills of costs be taxed afresh before a different taxing master.
 - c. That each party to bear their own costs in the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JANUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : Mr. Mutugi for Umara.

Respondents: M/s Oweya.

