



**Marenyo Limited v Kuni Holdings Limited & another (Environment & Land Case E190 of 2021) [2024] KEELC 1070 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1070 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E190 OF 2021  
AA OMOLLO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**MARENYO LIMITED ..... PLAINTIFF**

**AND**

**KUNI HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SAMSON MUTUA MUTUKU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff/Applicant filed chamber summons dated 18<sup>th</sup> May 2023 against the Defendants seeking for the following orders;
  - a. This Honourable Court be pleased to extend time to file the instant application for reference.
  - b. Spent.
  - c. The decision of the Taxing Master delivered on 26th April 2023 on Item 1 and 20 in the Bill of Costs dated 12th October 2022 be set aside and/or vacated.
  - d. Item 1 and 20 in the Bill of Costs dated 12th October 2022 be taxed afresh.
  - e. The cost of this application be provided for.
2. The application was supported by the affidavit of Kevin Wakwaya advocate sworn on 18<sup>th</sup> May 2023. The Applicant stated that the suit was filed against the Defendants restraining them from trespassing on the property known as L.R No 25469 as delineated on Land Survey Plan Number 410128 and registered in I. R. No 180161 (the suit property). The Defendants filed a defence and a counterclaim seeking a declaration that they are the registered proprietors of properties known as LR. Nos 209/13998, 209/14000, 209/14001, 209/14002, 209/14004 and 209/14005 which was one and the same with the Plaintiff's suit property.



3. Mr Wakwaya deposed that the value of the property was never disclosed on the pleadings filed in court and that the suit was determined by way of consent. The question of costs was left for the court to decide with the Court awarding half the costs of the suit and counterclaim to the Defendants because the matter had not progressed.
4. The Plaintiffs further stated that the Defendants filed the Bill of Costs dated 12<sup>th</sup> October 2022 seeking instructions fees of Kshs. 20,935,000 for the suit (item 1) and Kshs. 1,500,000 for the counterclaim (item 20) and based instruction fees on the suit and counterclaim on a value unknown and undisclosed to the court. That they contested this claim and filed submissions in response and argued that the principles of taxation were settled and the court could not rely on undisclosed subject matter value to calculate costs. In response, the Defendant agreed that the value of the subject matter was not disclosed and that as per the Advocates Remuneration Order, the instruction fees was Kshs. 28,125 which they urged the court to enhance on the basis that the suit properties were located in Embakasi and that a decision of the court (on a case for compulsory acquisition) had placed a property similarly situated at the value of Kshs.128,915,000.
5. The Plaintiff averred that the Taxing Master delivered her decision on the 26<sup>th</sup> April 2023 by only reading the awarding of the sum of Kshs. 10,842,427.50 as costs of the suit and counterclaim. Consequently, the Plaintiff wrote on 27<sup>th</sup> April 2023 and 15<sup>th</sup> May 2023 requesting for a detailed taxation decision but it received no formal response hence its inability to file the reference within the time prescribed by law.
6. The Plaintiffs contended that the Honourable Taxing Master totally disregarded their submission and the Defendant's admission and decided fundamentally in error of principle. That the Taxing Master erred in principle by failing to identify the specific legal provisions to be relied on in calculating the instruction fees; disregarding application of Schedule VI Paragraph 1 (Other Matters) and Paragraph I(b) of the Advocates Remuneration Order ; proceeding to use a subject matter value proposed by the Defendants to arrive at the instruction fees; failing to first determine the calculable instruction fees on the basis of the correct legal provision before enhancing the instruction fees; failing to give cogent reasons why she enhanced the instructions fees from 28,125 recognized in law to Kshs. 20,000,000 and Kshs. 1,500,000; failing to specify the reasons why she arrived at a manifestly excessive sum as instruction fees; and basing the calculation of the instruction fees on the acreage and location of the suit properties.
7. The Plaintiffs further contended that the period between 26<sup>th</sup> April 2023 and 18<sup>th</sup> May 2023, is not so inordinate as to cause harm which cannot be compensated by an award of costs and in addition, the reference could only be filed upon the availing of the detailed decision of the Taxing Master.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents opposed the Plaintiffs/Applicant application vide replying affidavit sworn on 21<sup>st</sup> November 2023 by Rafique Badrudin Ebrahim, a director of the 1<sup>st</sup> Defendant Company. The Respondents stated that decision of the Taxing Master delivered on 26<sup>th</sup> April, 2023 in presence of both the parties contained detailed reasons for the decision thus it was not necessary for the Plaintiff to seek reasons for the said decision as purportedly done.
9. They contended that in contrary to Rule 11(1) of the ARO, the Plaintiff's letter dated 27<sup>th</sup> April 2023 failed to speak to the items that the Plaintiff was objecting to. Thus, the alleged failure by the Taxing Master to respond to it cannot be a basis for asking the Court to extend time for filing a reference having been filed outside the prescribed fourteen days after the delivery of the decision.
10. The Respondents outlined the foundation of the bill of costs and the assessment that is subject of this reference, starting with the filing of the Plaint and the application for injunction and the Respondents'



replying affidavit to the application for injunction, an application to discharge the temporary order of injunction granted to the Plaintiffs and also statement of defence and counterclaim. They added that the subject matter of the suit and the counterclaim were not only very prime properties located at Embakasi next to the Jomo Kenyatta International Airport in Nairobi but also related to proceedings that were very important to the parties and of high commercial value.

11. The Respondents contended that the Court should decline the Plaintiff's application to set aside the decision of the Taxing Master on the grounds that no justifiable reason has been tendered to explain the delay in filing the present application. Further, in arriving at the assessment of items number I and 20 in the bill of costs, the Taxing Master took into account relevant factors under the ARO that included the nature and importance of the matter, the interest of the parties, the complexity of the issues involved as well as the urgency and the general conduct of proceedings.
12. Further, that in assessment of instruction fees where the value of the subject matter is neither defined in the pleadings, judgment nor settlement is an exercise of judicial discretion which ought not to be interfered in absence of a demonstration that the discretion was not exercised correctly and that the said assessment of costs under items 1 and 20 in the bill of cost was not a mathematical exercise but a matter of opinion based on the experience of the Taxing Master who possessed considerable knowledge and experience in such matters.
13. Also, that the Plaintiff has not demonstrated the existence of an error of principle or that the fees that was awarded is manifestly excessive to justify an inference that it was based on an error of principle. It is asserted by the Respondents that whereas the value of the subjected matter was neither disclosed in the pleadings or consent order, the Taxing Master was enjoined to use her discretion in the assessment of instruction fees which she correctly did owing to the fact that the suit was of a complex nature noting that it related to a parcel of land measuring 49.32 acres situated at Embakasi next to Jomo Kenyatta International Airport in Nairobi.
14. That the subject matter in the suit was a very prime property, therefore important to the parties plus the counterclaim related to prime properties, to wit, L.R Nos. 209/13998, 209/14000, 209/1 4001, 209/14002, 209/14004 and 209/14005 measuring approximately ten (10) acres situated at Embakasi in Nairobi which is very important to the Defendants.
15. They contended that instruction fees is an independent and static item which is not dependent on the stage that the suit has reached. While assessing the instruction fees for the suit and counterclaim, the Taxing Master's decision was not to be pegged on the stage of the suit but the factors under schedule 6 of the ARO. That the Taxing Master correctly exercised her discretion in enhancing the instruction fees under items I and 20 of the bill of costs given the urgency in which the Defendants responded to the proceedings to avert their imminent eviction on the basis of orders that had been issued based on fraudulent documents.
16. Further, they contended that allegation that the Taxing Master used the value of the subject matter as proposed by the Defendants to assess instruction fees is legally and factually incorrect because they merely urged the Taxing Master to assess items number 1 and 20 in the bill of costs as drawn. The Defendants relied on *Modern Coast Builders & Contractors Limited v National Land Commission* [2021] eKLR where the Environment and Land Court (Eboso J) decided that the value of a 3.7 acres parcel of land in Embakasi was Kshs. 128,915,000.00.
17. The Respondents also stated that allegation that the Taxing Master failed to identify the specific legal provision in calculating instruction fees is not true because in the ruling which the Plaintiff exhibited shows that the Taxing Master correctly stated that assessment of instruction fees was done under schedule 6 of the Advocates Remuneration Order, 2015.



## Determination:

18. The Respondents averred correctly that the procedure for contesting a ruling on taxation as governed by the provisions of Rule 11 of the Advocates Remuneration Order. In the instant application, the Applicant did a letter dated 27<sup>th</sup> April, 2023 seeking reasons for the decision but which letter the Respondents argue did not identify the items objected to facilitate the giving of the reasons. The said letter at paragraph 2 stated the plaintiff was dissatisfied with the taxation. At paragraph 3, it stated thus;
- “Kindly favour us with written reasons thereof noting the taxation of 22<sup>nd</sup> April, 2023 only spoke of a global figure of Kshs.10,842,427.56 as the taxed costs. If you are satisfied that the reasons are contained in the ruling, a note to that effect will suffice.”
19. The letter in my view was self-explanatory in terms of asking the taxing master to give reasons for her ruling or whether she relied on the reasons provided for in the body of the ruling. It thus complied with the requirements of Rule 11(1) of Advocates Remuneration Order.
20. In paragraph 1 of the Chamber Summons, the Applicant sought for extension of time to file a reference out of time. The ruling to be appealed was rendered on 26<sup>th</sup> April, 2023 and so time for filing any reference was to expire on 10<sup>th</sup> May, 2023. Whether or not to grant an order of extension of time is a discretion of the court. In considering whether to extend time or not, the court is required to consider the extent of the delay and the reasons for delay. The Supreme Court of Kenya in the case of Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) laid down the principles to be considered for extending time to include;
- i. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
  - ii. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
  - iii. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
  - iv. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court
  - v. whether there would be any prejudice suffered by the respondents if the extension was granted;
  - vi. whether the application had been brought without undue delay
21. The extent of delay here is a period of 8 days which cannot be treated as inordinate. The reasons for delay is explained in paragraph 9 of the grounds in support of the application to wit “there has been no formal response to its inquiries of their letter of 27<sup>th</sup> April, 2023 and 15<sup>th</sup> May, 2023.” Although the Respondents contest no reasons have been given for the delay, I have perused the court file and did not find any reply to the Applicants letter. The Respondent have not annexed any correspondence from the court in their Replying Affidavit to prove the contrary. In any event, no prejudice will be suffered by the Respondent which cannot be cured by an award of costs or an opportunity to defend the reference. Therefore, I proceed to grant the prayer for extension of time.



22. The reference disputes the items on instructions fee awarded on the suit and on the counter-claim. In the ruling delivered by the taxing master, the Hon. Deputy Registrar is assessing the instructions fee stated thus;

“I have considered the interest of the parties evident in the pleadings, proceedings and documents on the court record. I have also considered the effort employed by counsel in this matter in the prosecution of their respective client’s cases. I have also considered the nature of the suit property which is 19.96 Hectares or 49.32 acres and is situated in Embakasi, Nairobi. I am of the considered opinion that an instructions fees of Kshs.20,000,000/= if fair and reasonable for the claim and Kshs.1,500,000/= for the counter-claim. Item 1 is taxed at Kshs.20,000,000/=, Kshs.935,000/= is taxed off. Item 20 on the counter-claim is taxed at Kshs.1,500,000/=, Kshs.831,250/= is taxed off.

23. The honourable taxing master thus got into the value of the property when she mentioned the size of the land and their location in concluding that the reasonable instruction fee is Kshs.20,000,000/= and Kshs.1,500,000 for the counter-claim. The Defendant/Respondent at paragraph 22 of their submissions averred as follows;

“The suit that is subject to the taxation was defended. Premises on the provisions of the Advocates Remuneration Order, 2014, the basic instruction fees payable is half of Kshs.75,000/= less 25% pursuant to paragraph 1(b) of Schedule 6 of the Advocates Remuneration Order, 2014. This brings the basis instruction fee payable on account of defending the suit to Kshs.28,125.00/=. As submitted above, the court has jurisdiction to increase this amount depending on among others; -

- i. The interest of the parties
- ii. The general conduct of proceedings
- iii. The complexity of the case and its urgency.”

24. Further at paragraph 10 of the Defendant’s submission, they invited the court to assess instruction fee for defending the plaintiffs suit at Kshs.20,935,000/=. The Defendants went further to admit that the value of the property L.R No. 25469 had not been stated in the pleading although it wanted the court to consider the size of the land and its location. The Defendant cited the case of Jorethe Limited v Kigano & Associates [2002] eKLR which held as follows;

“where the value of the subject matter of a suit is not determined from the pleadings, a taxing master was entitled to use his discretion in assessing the instructions fee and in so doing, the factors to be taken into account included the nature and importance of the cause, the interests of the parties, the general conduct of the proceedings ...”

25. In assessing the instruction fee, the Deputy Registrar did not first point out that the instructions fee where the value of the property is not pleaded was Kshs.75,000/= (according to schedule 6 of ARO) which she then enhanced to Kshs.20,000,000 for the reasons stated in her ruling. Thus, the taxing master did not exercise her discretion judiciously by first stating the instruction fees provided for in the ARO and then increasing.

26. My opinion is that, had the taxing master noticed that the instruction costs applicable in this matter was for Kshs. 75,000, she may have realized that, on its face, enhancing the abovementioned amount to Kshs. 20,000,000 and 1,500,000 is outrageous. This is because the subject was resolved without



holding a hearing, so the complexity issue was avoided. I therefore find that the reference is merited and is allowed in terms of prayers 1, 3,4 and 5 of the application. The bill of costs dated 12<sup>th</sup> October 2022 is referred back for taxation on the instructions fee (item 1) on the suit and the counter-claim (item 20) by any taxing officer other than Hon Isabel Barasa.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. OMOLLO**

**JUDGE**

