



**Riunga v Nairobi City County & 2 others (Miscellaneous Civil Application
E005 of 2023) [2024] KEELC 1560 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E005 OF 2023**

**JO MBOYA, J
MARCH 14, 2024**

BETWEEN

SUSAN WANJIKU RIUNGA APPLICANT

AND

**COUNTY PLANNING COMMITTEE, NAIROBI CITY COUNTY 1ST
RESPONDENT**

SUTTON HOLDINGS LIMITED 2ND RESPONDENT

DAVID ZINNY WEYUSIA 3RD RESPONDENT

RULING

1. The Applicant herein took out and or filed Chamber Summons Application [Reference], dated the 23rd October 2023; brought pursuant to the provisions of Rule 11(2) of The [Advocates Remuneration Order 2009](#); and in respect of which the Applicant has sought for the following orders[verbatim]:
 - i. This Honorable court be pleased to set aside the decision delivered by Honorable Isabellah Barasa on 18th August 2023; in respect of the assessment of instruction fees under item number 1 of the 2nd Respondent's Party and Party bill of costs dated the 30th November 2022 and the consequential certificate of taxation.
 - ii. That this Honorable court be pleased to remit the 2nd Respondent's Party and Party bill of costs dated 30th November 2022; to another Taxing officer other than Hon Isabellah Barasa for taxation.
 - iii. That in the alternative, this Honorable court be pleased to exercise its inherent Jurisdiction and re-tax item number 1 relating to instruction fees of the 2nd Respondent's Party and Party bill of costs dated 30th November 2022.



- iv. That costs of the Reference be awarded to the Applicant.
- v. That this Honorable court do issue such other orders as it may deem fit and just.
2. The instant Application is premised and anchored on a plethora of grounds, which have been enumerated in the body thereof. Furthermore, the Application has been supported by the affidavit of one Mercy Musau, namely, the Advocate for the Applicant herein.
3. Upon being served with the instant Application, the 2nd Respondent filed Grounds of opposition dated the 13th February 2024; and wherein the 2nd Respondent has contended, inter-alia, that the subject Application is misconceived, premature and otherwise legally untenable.
4. Furthermore, the 2nd Respondent has also contended that the instant Reference/Application, constitutes and/or amounts to an abuse of the due process of the court and hence same ought to be dismissed.
5. First forward, the Application beforehand, came up for hearing on the 14th February 2024; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions, to be filed and exchanged within circumscribed timeline[s].
6. Pursuant to the foregoing agreement, the Parties herein thereafter proceeded to and filed their respective submissions, which submissions forms part and parcel of the record of the court.

Parties' Submissions:

7. Suffice it to state that the advocates for the Applicant and the 2nd Respondent, respectively proceeded to ad filed written submissions wherein same highlighted and canvassed various pertinent issues for determination by the Honourable court.
8. For good measure, the written submissions that have been canvassed by and on behalf of the respective Parties forms part of the record of the court and same shall thus be taken into account whilst crafting the subject Ruling.
9. Finally, even though the court has not rehashed the salient features of the written submissions filed by and on behalf of the respective Parties, the failure to do so is not informed by contempt or at all.
10. Conversely, the court is hugely grateful as pertains to the written submissions that were filed by and on behalf of the respective Parties insofar as same [written Submissions], have shed light on the pertinent issues, which the court shall presently proceed to determine.

Issues for Determination:

11. Having reviewed and appraised the Application beforehand and the Response vide Grounds of Opposition thereto; and upon taking into account the submissions filed by and on behalf of the Parties, the following issues do arise and are worthy for determination;
 - i. Whether the Application/Reference beforehand is premature, misconceived and legally untenable.
 - ii. Whether the Applicant herein has established and/or demonstrated any scintilla of improper exercise of discretion of the taxing officer or at all.



Analysis and Determination:

Issue Number 1

Whether the Application/Reference beforehand is premature, misconceived and legally untenable.

12. It is common ground that the Applicant herein filed and/or lodged an appeal before this Honorable court, namely, ELC Appeal No E058 of 2022; and wherein the Applicant sought for certain orders against the Respondents.
13. Suffice it to point out that the appeal beforehand, [ELC Appeal No E058 of 2022] was thereafter heard and disposed by this court, whereupon the court proceeded to and dismissed the said appeal with costs to the Respondents.
14. Arising from the Judgment of the court, the 2nd Respondent proceeded to and filed Party and Party Bill of costs for taxation before the Taxing officer, which bill of costs was ultimately taxed vide Ruling rendered on the 18th August 2023.
15. It is the said Ruling which has since aggrieved the Applicant herein and thus provoked the filing of the current reference. Nevertheless, it is not lost on the court that a Party aggrieved by the ruling and taxation of a bill of costs, is obligated to first and foremost lodge a Notice of Objection to taxation within 14 days from the date of the delivery of the impugned Ruling.
16. Furthermore, it is important to observe and underscore that the Notice of objection to taxation, which underpins by the provisions of Rule 11(1) of the *Advocates Remuneration Order* emphasizes the necessity by the Applicant to articulate, itemize and/or enumerate the items on taxation which are intended to be challenged vide the reference.
17. Other than the foregoing, it is explicit that upon the lodgment of the Notice of Objection to taxation and incidental request for reasons for the taxation, the Applicant is obliged to await the provisions of the reasons of taxation [copy of ruling] and thereafter the Applicant is under obligation to file the reference within 14 days from the date of provision of the reasons of taxation [certified copy of the ruling].
18. Notwithstanding the foregoing, the position obtaining in respect of the instant matter are quite peculiar and curious.
19. To start with, the Applicant contends that upon delivery of the impugned Ruling, same [Applicant] lodged a Notice of objection to taxation; as well as the request for reasons for taxation, but the Applicant contends that as at the time of filing the reference beforehand, same had neither been availed the reasons for taxation [certified copy of the ruling]. See paragraph 3 and 4 of the supporting affidavit.
20. To the extent that the subject reference was filed prior to and or before the reasons for taxation [certified copy of the ruling] being availed to the Applicant, the question that must be answered and or resolved is whether the reference herein accords with the provision of Rule 11(2) of The *Advocates Remuneration Order*.
21. For ease of reference, it suffices to reproduce the contents of Rule 11(2) of the *Advocates Remuneration Order*.
22. Same are reproduced as hereunder;

“ 11.



- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - (3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
23. Suffice it to point out that the wording, import and tenor of Rule 11(2) [*supra*] are crystal clear and in particular, same envisage a reference being lodged and/or mounted within a set timeline, albeit upon a receipt of the reasons for taxation [certified copies of the ruling] by the taxing officer.
 24. However, in respect of the instant matter, the Applicants concedes and admits that the subject reference was filed long before the Applicant had sight of the reasons for taxation.
 25. Arising from the foregoing, the question that then comes to mind is what then is the Applicant challenging by way of a reference, which is synonymous with an appeal, save for the manner in which same [Reference] is filed.
 26. Put differently, can the Applicant herein be heard to be challenging the taxation of the 2nd Respondent’s bill of costs, on the basis of speculation, conjecture and hypothesis.
 27. In my humble view, a reference is tailor-made to challenge the decision of the taxing officer, albeit on the basis of the reasons that were deployed and espoused by the taxing officer in arriving at the designated items which are being challenged and/or impugned.
 28. Premised on the foregoing, it is my finding and holding that the reference beforehand which was filed contrary to and in contravention of the provisions of Rule 11(2) of the Advocates Remuneration Order is not only premature and misconceived, but same is stillborn.

Issue Number 2

Whether the Applicant herein has established and/or demonstrated any scintilla of improper exercise of discretion of the taxing officer or at all.

29. Having come to the conclusion that a reference/application beforehand is premature, misconceived and legally untenable, it would have appropriate to strike out the reference and terminate the Ruling at the close of issue number one [1] herein.



30. Nevertheless and for the sake of completeness, it is worthy to venture forward and interrogate whether the reasons being espoused by the Applicant to constitute the basis for the reference are indeed legitimate and meritorious.
31. To start with, the Applicant herein contends that the learned taxing officer erred in law in failing to make reference to (sic) various documents which were filed by the Parties for purposes of appreciating the nature of the appeal that was filed before the Environment and Land Court.
32. Similarly, the Applicant herein contends that the Learned taxing officer failed to appreciate and uphold the principles that parties pursuing public interests litigation [PIL] should not be deterred for fear of being condemned to pay costs.
33. In my understanding, the complaint by the Applicant herein borders on a contention that the taxing officer ought to have sat on appeal on the decision of a Judge of the Environment and Land court; and thereafter to find and hold that Parties pursuing Public interests litigation ought not to be condemned to pay costs.
34. Notably, by the time the taxing officer was undertaking the exercise of taxation, the Appeal which had hitherto been filed by the Applicant herein and had long been heard and dismissed by the Judge and an order for payment of costs was made.
35. To the extent that the Judge had made an order for the payment of costs, the Learned taxing officer had no mandate and/or jurisdiction to review such an order by the Judge or at all; and come to (sic) a position that the Applicant should/ ought not have been condemned to pay costs.
36. Surely, such an invite and proposition [like the one being espoused by the Applicant herein] would be tantamount to creating a legal absurdity and anarchy. Such an invitation has no place within our Jurisprudence.
37. Furthermore, the contention by and on behalf of the Applicant's counsel that litigants pursuing public interests litigation should never be condemned to pay costs, is not only skewed and slanted, but based on a deliberate misunderstanding of the relevant position of the law.
38. For coherence, it suffices to draw the attention of the Applicant and her able counsel to the dictum of the Supreme Court of Kenya [the apex court] in the case of *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment), where the court held as hereunder;
 61. The legal principles that guide the grant of costs have been well settled by this court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR where we held that, ordinarily, costs follow the event. However, we further went on to hold that costs should not be used to penalize the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. It was our finding in that regard that: "... there is no prescribed definition of any set of "good reasons" that will justify a court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs."
 62. It is also trite law that an award on costs must be judiciously exercised by invocation of the discretion of the court on a case by case basis and it is the practice that, where suits involve genuine public interest, courts are slow to award costs as against the losing party. Courts have,



in addition, found that condemning an unsuccessful party to pay costs in genuine public interest litigation can act as a deterrent factor preventing parties from instituting proceedings that benefit the public generally for fear of being condemned to pay costs. The general rule on costs is therefore not immutable and although deeply entrenched, certain specific circumstances and considerations may necessitate non application of the principle.

39. In view of the foregoing decision, what comes to light is that despite the fact that the award of costs is an exercise of discretion, however, there are instances where person[s] who purport to pursue Public Interests litigation, albeit for selfish benefit; are to be ordered to bear costs.
40. On the other hand, it is important to point out that where a court is addressing and dealing with a reference [like the one beforehand], it behooves the Applicant to place before the Honourable court evidence of improper exercise of discretion.
41. However, the Applicant herein who proceeded to file the Reference long before same had sight of the reasons for taxation has neither exhibited nor displayed any scintilla/ iota of improper exercise of discretion by the Taxing officer.
42. To underscore the circumscribed scope of the Jurisdiction of a Judge in interfering with the exercise of discretion of a Taxing officer, it suffices to take cognizance of the decision/holding of the Court of Appeal in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, where the court held as hereunder;

It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in *Mbogo v Shah* (Supra), then the decision though discretionary, may properly be interfered with. See also *Attorney General of Kenya v Prof. Anyang' Nyong'o & 10 others*, EACJ App. No 1 of 2009.

It has long been the law as was stated in *Arthur vyeri Electricity* (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases. What we now have to decide is whether there was an error of principle which would have called upon the learned Judge to interfere with the taxing masters' decision.

43. Before departing from the issue herein, it is also important to point out that prior to a Judge interfering with the exercise of the discretion of a taxing officer, which is a perspective of Judicial discretion; the Judge must address his/her mind to the established dictum in the case of *Mbogo v Shah* (1968) EA page 93; in which DE Lestang VP [as he then was] observed at page 94.

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.



It would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision have been different.

44. In a nutshell, there is no gainsaying that the Applicant herein has failed to establish, espouse and/or demonstrate any scintilla of improper exercise of discretion by the Learned taxing officer, to warrant an interference with the exercise of discretion by same [taxing officer].
45. At any rate, it is common ground that the question of quantum, is a technical issue which falls within the scope and mandate of the Taxing officer and hence a Judge is obligated to offer deference to the quantum arrived at by the Taxing officer, unless the circumscribed conditions highlighted in Peter Muthoka [*supra*] are met and/or established.

Final Disposition:

46. From the foregoing analysis, there is no gainsaying that the reference [Application] by the Applicant herein, other than being misconceived and pre-mature; does not espouse any tenable basis [foundation] to warrant interference with the Certificate of taxation by the taxing officer, either as sought or otherwise.
47. Consequently and in the premises, the Reference beforehand be and is hereby dismissed with costs to the 2nd Respondent. Furthermore and to avoid the filing of supplementary bill of costs, the costs of the reference be and are hereby certified in the sum of Kshs 30, 000/= only to be borne by the Applicant.
48. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF MARCH 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant

Mr. Mercy Musau for the Applicant

Mr. Marvin Gitau for the 2nd Respondent

N/A for the 1st and 3rd Respondents

