



**Oraro & another v Jabelu (Environment and Land Appeal
E010 of 2020) [2024] KEELC 3498 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E010 OF 2020
SO OKONG'O, J
APRIL 25, 2024**

BETWEEN

GEORGE ORARO 1ST APPELLANT

CHRISTINE ORARO 2ND APPELLANT

AND

JUMA OYIENDE JABELU RESPONDENT

RULING

Background

1. The Appellants filed an application by way of a Notice of Motion dated 30th October 2020 seeking leave to appeal out of time against the decision of the lower court made on 24th April 2020 at Winam Law Court and for their memorandum of appeal dated 13th July 2020 and filed on 27th October 2020 to be deemed to have been filed and served within the time so enlarged. The application was opposed by the Respondent through grounds of opposition dated 1st February 2021 and a replying affidavit sworn on 10th March 2021. The application was argued by way of written submissions. The Appellants filed their submissions on 22nd March 2021 while the Respondent filed his submissions on 15th April 2021. The application was dismissed with costs on 5th May 2021.
2. On 25th August 2022, the Respondent filed her party and party bill of costs dated 18th August 2022 for taxation. The bill of costs which had 19 items was drawn in the sum of Kshs. 135,380/-. The parties were directed to argue the bill of costs by way of written submissions. From the record, none of the parties filed submissions. The bill of costs was taxed by the taxing officer Hon. M. Shimenga on 13th April 2023 at Kshs. 130,380/-. In her assessment of costs, the taxing officer taxed items 1(a) and 1(b) as drawn, item 1(c) at Kshs. 2000/-, items 1(d), 2, 3, 4, 5, 6, 7, 8, 9, and 10 as drawn, item 11 was taxed off, items 12, 13, 14, 15, 17(a), 18 and 19 as drawn, and items 16 and 17(b) were taxed off. The Appellants



filed a Notice of Objection on 26th April 2023 objecting to taxation of items 1(a), 1(b), 1(d), 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the bill of costs.

The application before the court

3. The Appellants were dissatisfied with the taxation of items 1(a), 1(b), 1(d), 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the bill of costs and challenged the same through this reference which was brought by way of Chamber Summons dated 12th June 2023 under Rule 11 of the *Advocates Remuneration Order* (ARO). In the application, the Appellants sought the following orders;
 1. That the court be pleased to vary and/or set aside the ruling of the taxing officer delivered on 13th April 2023 on items 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the bill of costs dated 18th August 2022, or in the alternative, the said bill of costs be remitted back for taxation before another taxing officer with appropriate directions on the question of assessment.
 2. That the costs of the application be awarded to the Appellants.
4. The application was based on the grounds set out on the face thereof. The Appellants contended that the taxing officer erred in taxing item 1(a) of the bill of costs as drawn on the basis that the instruction fees was for defending the appeal. The Appellants contended that the instruction fees should have been for defending the application dated 30th October 2021 that was dismissed by the court. The Appellants averred further that the taxing officer erred in taxing item 1(b) as drawn for getting up for the hearing of the appeal while the appeal was neither admitted nor heard. The Appellants averred that the taxing officer erred in taxing item 3 as drawn yet no grounds of opposition was filed and served. The Appellants averred further that the taxing officer massively overestimated items 5, 6, 7 and 8(b) while items 8(a), 9, 10, 12 and 13 were non-existent.
5. The Respondent opposed the reference through a Notice of Preliminary Objection dated 4th July 2023. The Respondent contended that the Appellants' notice of objection to the taxation was filed out of the time provided in paragraph 11(i) of the *Advocates Remuneration Order* (ARO) without leave of the court and as such the reference that was based thereon was irregular. The Respondent contended further that the Appellant's reference itself was also filed out of time without leave of the court. The Respondent contended further that the reference was bad in law for not having been supported by an affidavit. The Appellants filed a replying affidavit sworn by Baron Ndolo on 3rd August 2023 in response to the Respondent's Notice of Preliminary Objection.
6. The application was argued by way of written submissions. The Appellants filed submissions dated 22nd December 2023 while the Respondent filed submissions dated 23rd November 2023. I have considered the Appellants' application and the Respondent's Notice of Preliminary Objection filed in opposition thereto. I have also considered the Appellants' affidavit in response to the Notice of Preliminary Objection and the submissions by the advocates for the parties.
7. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the court stated as follows:

On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”



8. In *Kamunyori & Company Advocates v Development Bank of Kenya Limited* Civil Appeal No. 206 of 2006, [2015] eKLR, the court stated as follows:

.. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside”

9. In *Joreth Limited v Kigano & Associates*, Civil Appeal No. 66 of 1999, [2002] eKLR_____ the court stated that:

...We would at this stage point out 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 judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances...

...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.”

10. The Appellants had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court. From the facts giving rise to the present application that I have set out above, it is my finding that the taxing officer erred in her taxation of the Respondent's bill of costs dated 18th August 2022. I am in agreement with the Appellants that that the taxing officer erred in awarding the Respondent a sum of Kshs. 75,000/- to defend the appeal while the appeal was not before the court since leave to file the same was refused by the court. The taxing officer committed the same error when she awarded the Respondent a sum of Kshs. 25,000/- for getting for the trial of the appeal. The purported appeal was a non-starter and the same was never heard. There was therefore no basis for the getting up fees. In any event, as correctly submitted by the Appellants, getting up fees on appeal could only be awarded if the court had issued a certificate under Paragraph 3 of Schedule 6 of the *ARO*. Since the appeal was never heard, no such certificate could be issued and none was issued.
11. I have seen on record grounds of opposition dated 1st February 2021 filed on the same date by the Respondent in opposition to the Appellants' application dated 30th October 2020. The taxing officer did not therefore err in taxing item 3 of the bill of costs as drawn. The other error I have noted is in respect of court attendance (items 4 and 8 of the bill) which were taxed by the taxing officer on a higher scale without an order of the court made under Paragraph 50A of the *ARO*. Apart from the items I have highlighted, I have not found any error in respect of the other items whose taxation were objected to by the Appellants.
12. In the final analysis and for the foregoing reasons, it is my finding that the taxing officer committed errors of principle, first, in awarding instruction fees and getting up fees for an appeal that never was, and secondly in awarding fees on a higher scale for attendance without an order from the court made for that purpose under Paragraph 50A of the *ARO*.



13. With regard to the Respondent's Notice of Preliminary Objection, I find no merit in the same. The taxing officer's ruling on taxation was delivered on 13th April 2023. On 26th April 2023, the Appellants filed a notice of objection to taxation and requested for the reasons for the taxation of the items objected to. From the record, the notice was received by the court on 27th April 2023. After a series of correspondence, the taxing officer informed the Appellants in a letter dated 6th June 2023 that the reasons for the taxation of the items that were the subject of their objection were contained in the ruling of the taxing officer dated 13th April 2023. Following that information, the Appellants filed the reference herein on 15th June 2023. It is my finding that both the notice of objection to taxation and the reference were filed within the prescribed time. I also find no merit on the limb of the Notice of Preliminary Objection challenging the competency of the reference on account of want of a supporting affidavit. The Appellants had no obligation to support their application with an affidavit if the same was unnecessary. For the foregoing reasons, the Respondent's preliminary objection to the reference is overruled.
14. In *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board*(*supra*), the court stated as follows:
- And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”
15. In *First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 EA 61 the court stated that:
- I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”
16. I am of the view that it would serve no useful purpose remitting the Respondent's bill of costs for taxation a fresh by the taxing officer. I have found errors in the taxation of four items only. It would save the parties time and cost if I deal with this matter with finality.

Conclusion

17. In conclusion, the orders made by the taxing officer, Hon. M. Shimenga in her ruling delivered on 13th April 2023 in respect of items 1(a), 1(b), 4 and 8 of the bill of costs dated 18th August 2022 are set aside. The said items are taxed as follows;
- a. The sum of Kshs. 75,000/- and Kshs. 25,000/- claimed under items 1(a) and 1(b) respectively in the bill of costs dated 18th August 2022 are taxed off.
 - b. The sum of Kshs. 100/- is taxed off from the sum of Kshs. 1,900/- claimed under item 4 in the bill of costs dated 18th August 2022.
 - c. The sum of Kshs. 100/- is taxed off from the sum of Kshs. 1,900/- claimed under item 8 in the bill of costs dated 18th August 2022.
 - d. The taxation by the taxing officer of the other items in the bill of costs dated 18th August 2022 remains undisturbed.



- e. The taxation of the bill of costs dated 18th August 2022 at Kshs. 130,380/- is set aside.
- f. The bill of costs dated 18th August 2022 is taxed at Kshs. 30,180/-
- g. The taxing officer shall issue a fresh certificate of costs to the Respondent.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2024.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ndolo h/b for Mr. Otieno D. for the Appellant/Applicant

Ms. Akinyi for the Respondent/Respondent

Mr. Oguta-Court Assistant

