



REPUBLIC OF KENYA



Mutai t/a Mutai Kipemoi Advocates v Murei (Environment and Land Miscellaneous Application E020 of 2023) [2024] KEELC 3554 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E020 OF 2023**

MC OUNDO, J

APRIL 11, 2024

BETWEEN

**JOSHUA KIPKEMBOI MUTAI T/A MUTAI KIPEMOI
ADVOCATES APPLICANT**

AND

PATRIC KIPLANGAT MUREI RESPONDENT

RULING

1. Before me for determination is an Application by way of Notice of Motion dated 2nd October 2023, brought pursuant to the provisions of Sections 1A, 3, 3A 63E & C, 38 and 40 of the [Civil Procedure Act](#), Order 40 and 51 of the Civil Procedure Rules and all enabling provisions of the law wherein the Applicant seeks orders to set aside the taxation issued on the 20th September 2023 and thereafter the court to tax the Advocate Client Bill of Costs.
2. The application was supported by the grounds thereto as well as the supporting affidavit sworn by the Applicant on 2nd October 2023 to the effect that the ruling of 20th September 2023 granting the Advocate-Client Bill of costs at Ksh.668,008/= had been done without either service of a notice, the input of the Applicant or his Advocate.
3. That he had been seeking specific performance against the Defendant in ELC Suit No 56 of 2017. That after the exchange of pleadings, parties had agreed to settle the matter out of court wherein a consent had been record to the effect that he was to be paid Ksh. 2,172,500/= within 30 days failure to which he was to sell two parcels of land registered to the Defendant.
4. That despite the order not having been executed, the Respondent filed his Advocate Client Bill of Cost and was awarded Ksh. 668,008/= which amount was manifestly excessive, unreasonable and unjustified and more so without an explanation as to how the said figure had been arrived at. That the suit was not ripe for taxation as the Advocate/Respondent had not prosecuted the Applicant's case



conclusively and neither had he taxed his Party and Party Bill of Costs before filing his Advocate Client Bill which would have assisted the Taxing Master in determining the instruction fees.

5. In response to the application, the Respondent vide his Replying Affidavit of 9th November 2023 deponed that the said application was frivolous and vexatious. That he had filed his Bill of Costs on 1st May 2023 and served the same upon the Applicant together with a mention date for taxation on 20th June 2023, on which day the Applicant had appeared in person and had sought for 30 days to enable him get legal representation. The matter was fixed for 18th July 2023 wherein the Applicant's Counsel had sought for time to respond to the Bill of Costs. On the 25th July 2023, there had been no appearance by either the Applicant or his Counsel wherein a ruling was set for 19th September 2023 and Notice served to that effect.
6. That he had not filed a Party to Party Bill of Cost because the Applicant had sought to sort out the issue with the party in the suit but had later turned hostile and refused to pay the Bill thus forcing the Respondent to tax the Bill against him. That he had represented the Applicant and got him as good settlement wherein in turn he had decided to frustrate his effort to get his fee. That he was aware that the Detrital amount of Ksh. 2,172,500/- had been paid to the Applicant upon settlement.
7. That the application was an afterthought as the Applicant had time to raise the same but chose not to take any steps but to file an application at the eleventh hour in a bid to escape from paying for the services rendered to him.
8. The application was canvassed by way of written submissions to which the Applicant framed his issues determination as follows;
 - i. Whether the Respondent Advocate has completed the work assigned to him by the Applicant.
 - ii. Whether the suit is right for taxation.
 - iii. Whether the taxing master committed a principal error in the taxation.
9. On the first issue for determination, the Applicant submitted that it was a well settled principle that once work is given to Counsel, they should act diligently and complete the same before making demands for payment. That the Respondent was still on record and had not ceased acting for the Applicant yet he had failed to enforce the judgment entered in ELC 56 of 2017. That the Respondent had taken advantage of his absence and had failed to complete his assignment. He relied on the decision in Gicuki King'ara & Co Advocates vs. Mugo construction & Engineering Limited [2010] eKLR to submit that the Respondent ought to have completed his assignment before filing his Bill for taxation.
10. As to whether the Taxing Officer had committed a principle error in the taxation, the Applicant had submitted that the Taxing Officer had not given the reasons he had relied upon to award the Respondent an excessive, unreasonable and unjustified the sum of Ksh. 668,008/= while the Party to Party Bill of costs had not been filed, which would have helped him reach a just determination.
11. That it was clear from schedule VI and part B of the Advocates Remuneration Order that instructions fee for Advocates and client costs would be one half of the party and party costs or as ordered by the court or as agreed by the parties. The Applicant sought that his application be allowed.
12. In opposition to the application, the Respondent submitted that in deed in the Environment and Land Court Suit No. 56 of 2017, the Applicant had been the Plaintiff, wherein the said suit had been concluded via consent which had been recorded and adopted in the open court on 2nd May, 2018. An order dated the 8th February 2019 had then been issued wherein the Defendant in the matter had been ordered to pay the Plaintiff a total of Ksh.2,172,500/= within 30 days from the date of issuance



- of the order and in default the Plaintiff be at liberty to dispose of land parcels LR. No. Kericho/Chemoiben/2078 and Kericho/Chemoiben/2125 both registered in the name of the Defendant.
13. The said Defendant defaulted and they proceeded to execute the order through Hegeon Auctioneers who had served notice of attachment and sale of the property L.R. No. Kericho/Chemoiben/2420 which was the only remaining property registered to the Defendant. When payment of the valuation fee of the same was sought from the Applicant, he had become reluctant and hostile to a point that the relationship between him and the Advocate/ Respondent had been strained.
 14. That the Respondent then applied to court to change the mode of execution of the decree so as to have the Defendant committed to civil jail upon which the Applicant had informed him that they had resolved the issue with the Defendant, and were now in good terms with him. That the Respondent should not tax their Bill against the Defendant.
 15. That the Respondent had then been forced to file the impugned Advocate-Client Bill of Costs on 1st May 2023 wherein he had served the same upon the Applicant together with the Mention Notice for taxation which was slated for 20th June 2023. There had been no appearance by either the Applicant or his newly appointed Counsel despite them having sought for more time to respond to the Bill of Cost.
 16. The Respondent framed their issues for determination as follows;
 - i. Whether due process was followed in the taxation of the Advocate/Respondent's Bill of costs.
 - ii. Whether the Taxing Master erred in taxation of the Advocate-Client Bill of Costs.
 - iii. Whether the assessed amount was excessive.
 17. On the first issue for determination, the Respondent submitted that the Applicant had been fully aware of the pending Bill in court wherein he had personally appeared and had sought for leave to seek representation. Therein after, his newly appointed Counsel had also appeared in court. That secondly, the suit had been concluded through recording of a consent by all parties.
 18. On the second issue for determination, the Respondent had submitted that the Applicant had failed to show how the Taxing Master had committed the alleged principal error. He placed reliance on the decision in the First American Bank of Kenya vs. Shah & Others [2002] EALR.
 19. As to whether the assessed amount was excessive, the Respondent submitted that the guiding rules for taxation of a bill of costs were found in Schedule 6 the Advocates Remuneration Order which was greatly referred to by the Taxing Master. Reliance was also placed on the decision in Joreth Limited vs Kigano & Another [2002] EA 90 and in Lubullellah & Associates vs Baranyii Brokers Limited & 2 Others [2014] eKLR to submit that the Applicant merely stated that the costs awarded were excessive without giving any valid reason. The Respondent sought for the application to be dismissed with costs and for the execution to proceed.

Determination.

20. I have considered the application, the response, the submissions and the cited authorities herein based upon which, I find the issues for determination as herein under;
 - i. Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.
 - ii. Whether the Taxing Officer had committed any errors of principle while taxing the bill of costs.



21. From the analysis of the issue at hand it is not disputed that the ELC Suit No 56 of 2017 did not proceed to full hearing but was compromised by consent which had been adopted by the court on 2nd May, 2018 and an order dated the 8th February 2019 issued to the effect that the Defendant in the matter pays the Plaintiff a total of Ksh.2,172,500/= within 30 days from the date of issuance of the order and in default the Plaintiff be at liberty to dispose of land parcels LR. No. Kericho/Chemoiben/2078 and Kericho/Chemoiben/2125 both registered in the name of the Defendant. The Defendant had defaulted and the Respondent herein proceeded to execute the Decree and it was during this process that the Applicant and the Respondent, who had represented him fell out. The Respondent had proceeded to tax the impugned Advocate Client Bill of Costs which was taxed on 20th September 2023 at Ksh.668,008/=.
22. On the first issue as to whether the Application herein as filed by the Applicant is incompetent before the Court, paragraph 11(1)(2) of the Advocates Remuneration Order provides as follows:
 - “(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.”
23. The Applicant has filed his Application dated the 2nd October 2023, pursuant to the provisions of Sections 1A, 3, 3A, 63E & C, 38 and 40 of the *Civil Procedure Act*, and order 40 and 51 of the Civil Procedure Rules and all enabling provisions of the law challenging the Taxing Master’s taxation of 20th September 2023 seeking that the Court do set aside it aside and stay execution and any other consequential orders arising out of the said taxation.
24. It is trite that an order by the Taxing Master concerning taxation of an advocate/client/Bill of Costs can only be challenged before a Judge by way of a Reference initiated by way of a Chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order and not under the provisions of the Civil Procedure Rules.
25. I find that the Application having been filed by way of Notice of Motion under the Civil Procedure Rules when there are clear procedures under the *Advocates Act* was incompetent in limine.
26. On the second issue for determination, it is clear that rule 11 (1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his Reference within 14 days from the date of the receipt of the reasons. I note that the Applicant did not annex a copy of the ruling of the Taxing Master but what had been annexed was a taxed Bill dated the 20th September 2023 wherein there had been no reasons given for the Taxing Master’s decision as taxed. As provided by the law herein above stated, there having been no reasons given by the Taxing Master on the taxed Bill, it behooved the Applicant to seek further reasons by giving notice in writing to the Taxing Officer for the said decision and within fourteen days after the decision, before filing Reference to this court. The Applicant failed to comply with the set down procedures.
27. The often cited case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64 sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can interfere with the Taxing Officer’s exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in Premchand Raichand Limited vs. Quarry Services of East Africa Ltd (No.



- 3) [1972] EA 162 and Arthur vs. Nyeri Electricity Undertaking [1961] E.A 492. The said principles were also re-affirmed by the Court of Appeal in Joreth Limited vs. Kigano & Associates [2002] 1 E.A 92. These principles include
- i. “That the Court cannot interfere with the Taxing Officer’s discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;
 - ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
 - iii. if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 - iv. it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
28. As was held in the decided case in Paul Imison & Another vs Jodad Investments Limited [2014] eKLR that the Applicants could only pursue the Reference only with regard to those items which they had given notification in writing that they were objecting to and no more. To do otherwise would amount to sneaking into the Reference items which were outside the objection.
29. Indeed the Court of Appeal in Machira & Co Advocates – vs - Arthur K. Magugu & Margaret Wairimu Magugu CA 199/2002 [2012] eKLR, held that:-
- “Having not specified the items objected to and sought reasons for their taxation, the Respondent’s notice of 1st August 2001 was fatally defective. It follows that the Respondent’s reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.
- Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master’s decision was received is immaterial and does not avail the Respondent...”
30. I find the Application dated the 2nd October 2023 is thus incompetent before this court and I proceed to strike it out with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 11TH DAY OF APRIL 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

