



Macharia & 2 others v Macharia & another (Environment and Land Appeal 84 of 2023) [2024] KEELC 4293 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 84 OF 2023
YM ANGIMA, J
MAY 23, 2024
(FORMERLY NYAHURURU ELCA NO. 16 OF 2010)**

BETWEEN

**JANE WANGUI MACHARIA 1ST APPELLANT
ALICE WAMBUI MUIGA 2ND APPELLANT
MARY WANGUI MACHARIA 3RD APPELLANT**

AND

**RUTH MOHAGI MACHARIA 1ST RESPONDENT
CATHERINE WANGECHI MUGO 2ND RESPONDENT**

RULING

A. Appellants' Application

1. By a notice of motion dated 22.09.2023 expressed to be grounded upon Sections 3 & 3A of the *Civil Procedure Act* (Cap.21), Rule 11 of the Advocates Remuneration Order (the Order), Order 21 Rule 9A of the *Civil Procedure Rules* (the Rules) and all other enabling provisions of the law the Appellants sought an order for the setting aside of the taxation of the 2nd Respondent's bill of costs and all consequential orders. In the alternative, they sought an order for the said bill of costs to be taxed afresh before a different taxing officer. They also prayed for costs of the application.
2. The reference was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Jane Wangui Macharia on 22.09.2023 and the annexures thereto. The Appellants contended that the sum of Kshs.230,365/= which was taxed and allowed by the taxing officer was excessive and in contravention of the Order; that they only became aware of the said taxation on 08.09.2023 after notice to that effect was served upon them; and that, in any event, the 2nd Respondent's costs had already be paid through allocation of an additional plot.



B. 2nd Respondent's Response

3. The 2nd Respondent filed a replying affidavit sworn by her advocate on record, Fred M. Ratemo, on 01.02.2024 in opposition to the application. It was contended that the Appellants' advocates were duly served with a bill of costs and notice of taxation but they failed to appear during taxation before the taxing officer. It was further contended that the 2nd Respondent had denied payment of any costs and that the Appellants had not provided any evidence of payment. Finally, it was contended that the reference was incompetent since no notice of objection to taxation was given specifying which items the Appellants were objecting to and no reasons for taxation on those items from the taxing officer have been filed as required under paragraph 11 of the Order. The court was consequently urged to dismiss the application with costs.

C. Directions on Submissions

4. When the application was listed for inter partes hearing, the parties were directed to canvass the same through written submissions. As a result, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the 2nd Respondent filed written submissions dated 25.03.2024 whereas the Appellants' submissions were not on record by the time of preparation of the ruling.

D. Issues for Determination

5. The court has considered the Appellants' notice of motion dated 22.09.2023, the 2nd Respondent's replying affidavit as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Appellants' reference is incompetent.
 - b. Whether the Appellants are entitled to the reliefs sought in the reference.
 - c. Who shall bear costs of the reference.

E. Analysis and Determination

a. Whether the Appellants' reference is incompetent

6. The court has considered the material and submissions on record on this issue. The 2nd Respondent submitted that there was no competent reference before court because the Appellants had failed to comply with the requirements of paragraph 11(1) of the Order. In particular, it was submitted that they had failed to give a notice of objection to the taxation. It was further contended that they had also failed to avail the reasons of the taxing officer on the items they were objecting to as required under paragraph 11(2) of the Order. The 2nd Respondent cited the cases of *Machira & Co. Advocates -vs- Arthur K. Magugu & Another [2012]* eKLR and *Dennis K. Magare & Ben Musundi t/a Magare Musundi & Co. Advocates -vs- Parminder Singh Manku & Another [2021]* eKLR in support of that submission.
7. The court has noted that the Appellants did not file any further or supplementary affidavit to confirm or deny that they did nor did not give the relevant notice of objection to the taxing officer. They did not also file any affidavit to respond to the issue of their failure to exhibit the taxing officer's reasons for taxation on the objected items.



8. In the case of *Machira & Co. Advocates -vs- Arthur K. Magugu & Another* (*supra*) which was cited by the 2nd Respondent, it was held, inter alia, that:

“ 12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects”. As the trial judge correctly found, the Respondents notice of 1st August, 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.

13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeal or review was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August, 2001 was fatally defective. It follows that the Respondents’ reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

14. 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 Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master’s reasons for his decision.”

9. Paragraph 11(1) & (2) the Order stipulates 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.

10. The court is satisfied that the Appellants did not comply with the requirements of paragraph 11(1) & (2) of the Order before instituting the instant reference. There is no notice of objection on record as required under paragraph 11(1) and there are no reasons for taxation to objected items as required under paragraph 11(2) of the Order. In the premises, the court finds and holds that the Appellants’ reference is incompetent and a non-starter. As a consequence, the same is a perfect candidate for striking out.

b. Whether the Appellants are entitled to the reliefs sought in the reference

11. The court has already found and held that the instant reference is incompetent for contravention of paragraph 11 of the Order. The same is liable to be struck out for that reason.



12. The court has noted that the Appellants' allegation of having settled the 2nd Respondent's costs was not supported by any credible evidence. There was no evidence that the 2nd Respondent had agreed to be paid her costs in kind. Moreover, there was no credible evidence to demonstrate that the alleged plot was ever transferred to her. On the contrary, the 2nd Respondent denied any form of payment. In the circumstances, the court is of the view that the Appellants are not entitled to the reliefs sought in the reference or any one of them.

c. Who shall bear costs of the reference

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 2nd Respondent shall be awarded costs of the reference.

F. Conclusion and Disposal Orders

14. The upshot of the foregoing is that the court finds no merit in the Appellants' reference. The court finds and holds that the same is incompetent hence liable to be struck out. As a consequence, the court makes the following orders for disposal thereof:

- a. The Appellants' notice of motion dated 22.09.2023 be and is hereby struck out for being incompetent.
- b. The 2nd Respondent is hereby awarded costs of the reference.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 23RD DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Appellants

N/A for the 1st Respondent

Mr. Omare for the 2nd Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

