



**Njoroge ((Suing as the Personal Representative of Angelo Kanyuanjohi Macharia))  
v Nyingi & another (Sued as the Legal and Personal Representatives of the Estate  
of the Late Tirus Nyingi Ngahu – Deceased) (Environment and Land Miscellaneous  
Application E006 of 2023) [2024] KEELC 4041 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4041 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023**

**LN GACHERU, J**

**MAY 9, 2024**

**BETWEEN**

**GABRIEL MACHARIA NJOROGE ..... APPLICANT  
(SUING AS THE PERSONAL REPRESENTATIVE OF ANGELO  
KANYUANJOHI MACHARIA)**

**AND**

**STACY WAMBUI NYINGI ..... 1<sup>ST</sup> RESPONDENT  
LYDIA NJOKI MAGUTA ..... 2<sup>ND</sup> RESPONDENT  
SUED AS THE LEGAL AND PERSONAL REPRESENTATIVES OF THE ESTATE  
OF THE LATE TIRUS NYINGI NGAHU – DECEASED**

**RULING**

1. *Vide* a Chamber Summons Application dated 14<sup>th</sup> November 2023, brought under Rules 2 and 11 of the [Advocates Remuneration Order](#), Rules 2 and 11 of the [Advocates Act](#) and Article 159 of [the Constitution](#) of Kenya, the Applicant brought this Reference, and sought for the following reliefs: -
  1. That there be a stay of execution of the Ruling delivered on 31<sup>st</sup> October 2023, on the Bill of costs dated 16<sup>th</sup> May 2023, taxed at Kshs. 744,805/=, pending the hearing and determination of this Reference.
  2. That this Honourable Court be pleased to set aside the decision of the taxing master delivered on 31<sup>st</sup> October 2023, in so far as the same relates to the reasoning and determination pertaining to the taxation of the Bill of costs dated 16<sup>th</sup> May, 2023.



3. That this Honourable Court be pleased to refer the matter back for re-taxation of the Bill of Costs and/or with proper directions thereof.
  4. That in the alternative to prayer 4, the Honourable Court do exercise its inherent jurisdiction and be pleased to re-tax the bill of costs dated 16<sup>th</sup> May, 2023 afresh and/or make directions to a fresh taxation.
  5. That this Honourable Court be pleased to grant any such orders as it may deem fit and just to grant.
  6. The Costs of this Application do abide the outcome of the Reference herein”.
2. This Reference is premised on the grounds stated on the face of it and on the Supporting Affidavit of Gabriel Macharia Njoroge, dated 14<sup>th</sup> November, 2023. This Court issued a Judgment on 27<sup>th</sup> February, 2020, in Murang’a ELC No. 47 of 2017, and dismissed the Applicant’s suit with costs to the Respondents herein.
  3. The Respondents filed their amended Bill of Costs on 16<sup>th</sup> May, 2023, which was taxed by the taxing master on 31<sup>st</sup> October, 2023. Aggrieved by the Ruling of the Deputy Registrar of this Court delivered on 31<sup>st</sup> October, 2023, the Applicant filed the instant Reference.
  4. It is the Applicant’s case that the taxing master exercised her discretion wrongfully and committed an error of principle during the taxation of the Respondents’ Bill of Costs dated 16<sup>th</sup> May, 2023. He averred that the amounts awarded by the taxing master as Court Attendance Fees and Instruction Fees in respect to the Respondents’ Bill of Costs dated 16<sup>th</sup> May 2023, are erroneous, exorbitant and in breach of the provisions of the Advocates Remuneration Order (2014).
  5. He further contended that the taxed/assessed Bill of Costs dated 16<sup>th</sup> May 2023, is unconscionable and calls for re-taxation. He stated that the Taxing Master failed to tax each item on its own merit thereby, arriving at an exorbitant figure. He added that the Taxing Master disregarded his submissions opposing the itemized amounts appearing on the Bill of Costs dated 16<sup>th</sup> May 2023, resulting in an error of principle.
  6. The Application is opposed by the Respondents through the Replying Affidavit sworn by Daniel Mulani (advocate) on 8<sup>th</sup> December, 2023. The Deponent averred that the subject Reference is defective in law having been filed on 16<sup>th</sup> November, 2023, whereas the Ruling of the taxing master was issued on 31<sup>st</sup> October, 2023. The Respondents contended that Rule 11(2) of the Advocates’ Remuneration Order provides for fourteen (14) days for the filing of References challenging a Ruling by the taxing master, and that fourteen (14) days from 31<sup>st</sup> October 2023, lapsed on 15<sup>th</sup> November, 2023. Further, it is the Respondents’ contention that the Applicant did not seek leave of Court to enlarge the time for the filing of the current reference.
  7. The Respondents faulted the subject Reference on grounds that it offends the provisions of Section 27(1) and Section 34(1) of the Civil Procedure Act, because Reference is a separate suit from the original suit namely, Murang’a ELC No. 47 of 2017, and is seeking a stay of execution of the costs awarded in the original suit.
  8. It was the Respondents’ averment that any question pertaining to the costs awarded in the original suit need to be determined in the original suit, and not through separate proceedings. They added that the subject Reference does not constitute a proper Reference according to the provisions of Rule 11(2) of the Advocates’ Remuneration Order. It was further argued that the Applicant is non-suited pursuant to the provisions of Section 34(1) of the Civil Procedure Act.



9. The Respondents refuted the Applicant's claim that the amount awarded by the taxing master was excessive. They averred that the taxing master considered the value of the subject-matter in the original suit, and the proceedings arising therefrom during the process of taxation of the Bill of Costs dated 16<sup>th</sup> May, 2023. They cited Schedule 6 Paragraph 7(d) of the *Advocates' Remuneration Order*, in support of the contention that they are entitled to costs in respect of Court and Registry attendances.
10. The Respondents further contended that the Applicant did not annex the taxing officer's Ruling, showing how the Instruction Fees were taxed, and thereby failed to demonstrate to the Court the way in which the taxing master exercised her discretion wrongfully.
11. The Respondents' further argued that the parties herein were involved in the original suit, which was commenced in year 2014, and that litigation must come to an end.
12. The Reference was canvassed by way of written submissions.
13. The Applicant filed written submissions on 13<sup>th</sup> February, 2024, through the Law Firm of Triple N. W & Co Advocates LLP, and reiterated his submissions filed before the Taxing Master dated 8<sup>th</sup> November, 2022, to the effect that the subject-matter of the suit being an unliquidated claim, the taxing master was not required to derive the value of the suit property from the amount of the loan facility taken out by the Respondents using the suit land as security.
14. He further submitted that the said value was biased, and did not reflect the market value of the suit land, for the reason that the loan in question was granted from the Parliamentary Service Commission, and Members of Parliament, by virtue of their position, had the privilege of securing exorbitant loans on the strength of a nominal security.
15. It was also submitted that the taxing master was misguided as to the true value of the subject-matter of the suit land. The Applicant stated that the purchase price of the suit land at the time the suit was commenced was Kshs. 2,400,000/= and not Kshs.17,000,000/=, which value was applied by the taxing master from the loan amount secured using the suit property. Further, that applying Kshs.2,400,000/= as the correct value of the suit land, the taxing master ought to have awarded Kshs.148,000/- as Instruction Fees and Kshs.49,333/33 as Getting-up Fees.
16. He faulted the taxing master for awarding excessive amounts to the Respondents in respects to Items 3, 4, 10, 11, 12, 17, 18, 19, 20, 21, 22 and 23 in the Bill of Costs dated 16<sup>th</sup> May, 2023, for flouting Schedule Vi of the *Advocates Remuneration Order*, which prescribes an amount of Ksh. 5,000/= for Court attendances for purposes of a hearing. Furthermore, he submitted that the Taxing Officer did not comply with the Provisions of Schedule Vi of the *Advocates Remuneration Order* in awarding Kshs. 10,000/= in respect of items 5, 6, 7, 8, 9, 13, 14, 15, 16, 24, 25 and 26 of the aforesaid Bill of Costs in respect of Court attendances for purposes of mentions, whereas the law stipulates Kshs.2,2000/- for each mention.
17. The Applicant relied on the holding of the Court in the cases of *Sophie Chirchir Vs Africa Merchant Assurance Co. Ltd* [2022]eKLR; *Makula International Vs Cardinal Nsubuga & Another* [1982] HCB 11; and, *Nyangito and Co. Advocates V Doinyo Lessos Creameries Ltd* [2014]eKLR in support of the foregoing submissions.
18. On their part, the Respondents filed their written submissions on 14<sup>th</sup> February 2024, through the Law Firm of MJD Associates Advocates, and identified the following issues for determination by the Court:
  - a. Whether the instant application is competent.



- b. Depending on the answer on (a) above, whether this court should set aside the Ruling and Orders of the Taxing Master made on 31<sup>st</sup> October, 2023.
19. It was submitted that by the subject Reference, the Applicant is seeking to challenge the execution of the decree issued in the original suit which would result in this Court playing an oversight role with respect to the proceedings in the original suit. They reiterated that the Applicant is unsuited and also added that the subject Reference ought to have been filed in the original suit and not as separate proceedings.
20. Reliance was placed on the following cases; - *Eunice Grace Njambi Kamau and Another Vs Kenya National Highways Authority and 3 others* [2022]eKLR; and, John Muthee Ngunjiri and 4 Others Vs Attorney-General and 3 Others; Kenya Power and Lighting Company Ltd and Another (Interested Parties) [2021] eKLR.
21. . The Respondents reiterated their submission that the instant Reference was filed out of time and the Applicant has not sought this Court’s leave to enlarge the time for filing the same. They cited the holding of the Court in the cases of *Robinson Onyango Malombo t/a O.M. Robinson & Co. Advocates Vs County Government of Mombasa* [2019]eKLR and *KCB Bank Limited & Another V Yeswa Antony Joseph* [2022]eKLR, in support of their submissions.
22. . On the issue of the costs in respect of Court attendances, the Respondents relied on the case of *First American Bank of Kenya Vs Shah and others* [2002] eKLR. On the question of Instruction Fees reliance was placed in the cases of: *Delmonte Kenya Ltd V Kenya National Chamber of Commerce and industry (KNNCI) Murang’a Chapter and 2 other* [2021] eKLR; *Joreth Limited v Kigano & Associates* [2002] eKLR *Chege Vs Pewaki Enterprises Limited* (Civil Appeal no. 518 of 2018) [2023] KEHC 21362 (KLR) (Civ).
23. The Respondents further submitted that the Applicant failed to demonstrate to the Court how the taxing master committed an error of principle. They relied on the decision of the Court in the case of *Mohammed Vs Abas* ELC Misc. Appl. No. 64 of 2022) [2023] KEELC 20065 (KLR); and, *Republic Vs Minister for Agriculture & 2 Others ex-parte Samuel Muchiri W’Njuguna* (2006) eKLR , for a definition of an “error of principle” with regard to taxation of Bills of Costs.
24. Further, the Respondents submitted that the Applicant’s contention that the taxing master failed to consider his submissions was a non-starter for the reasons that submissions do not constitute either pleadings or evidence. They cited the holding in the cases of *Board of Trustees Kiambu Institute of Technology Vs Nicholas Kinyua & 50 others* [2022] eKLR; and, *Daniel T. Arap Moi Vs Mwangi Stephen Muriithi & Another* [2014] eKLR to buttress the preceding position.
25. The above being the Pleadings and the rival written submissions, this Court has carefully considered the same and finds the issues for determination are; -
- I. Was the current Reference filed out of time?
  - II. Is the current Reference competent?
  - III. Is the Applicant entitled to the Orders sought?



**i). Was the current reference filed out of time?**

26. The Respondents' contended that the subject Reference lacks merit as it was filed outside the 14 days stated in the *Advocates' Remuneration Order* Rule 11 of the *Advocates' (Remuneration) Order* which provides an elaborate process of objection to taxation of costs as follows:

- “ 11. Objection to decision on taxation and appeal to Court of Appeal.
- (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 subsection (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.”

27. In the case of *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 1 EA 5, the Court held as follows:

“Although 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, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the *Advocates Remuneration Order* demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed.”

28. The taxing master issued her Ruling on 31<sup>st</sup> October 2023, while the subject Reference was filed by the Applicant on 16<sup>th</sup> November 2022. It is trite that observance of the stipulated rules of procedure



is a requirement of the law, and is not a mere technicality. The Supreme Court of Kenya in the *Nick Kiptoo Arap Salat Vs IEBC and 7 others* [2014]e KLR, held as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”

29. The Applicant did not seek leave of court to file the suit outside the stipulated 14 days, period. The Applicant did not offer any explanation for filing the instant Reference out of time. Consequently, the Court is unable to exercise its discretion to enlarge the time for filing this Reference in the absence of an explanation from the Applicant for non-compliance with the requirements of Rule 11 of the *Advocates’ (Remuneration) Order*.

30. . For the above reasons, it is the finding and holding of this Court that the instant Reference offends the relevant provisions of the law, and the Applicant having not offered a plausible explanation for the delay in filing the same out of time, the Court declines to allow the instant Reference.

## **ii). Is the current reference competent?**

31. . The Respondents argued that this Reference is a non-starter as it is not brought under the original suit, but was filed as a separate suit thereby, rendering the Applicant non-suited. The original suit from which the Bill of Costs dated 16<sup>th</sup> May, 2023, arises was filed as Murang’a ELC Case No. 47 of 2017. It is clear that the current suit constitutes a separate suit as it bears a different file number. In the case of *Mwangi Keng’ara & Company Advocates V Invesco Assurance Company Ltd* [2016] the court held as follows:

“The Application ought to have been filed in those other matters. Permitting it to proceed here can only cause confusion or other mischief”.



32. Therefore, it is the finding and holding of this Court that the subject Reference if allowed is likely to occasion mischief to the Respondents, as it is a separate suit from the original suit. Further, the instant Reference is also hereby disallowed.

**iii). Is the Applicant entitled to the Orders sought?**

33. Having found that the instant Reference was filed out of time, and it was filed as a separate suit, instead of filing it in the original suit, this court finds and holds that the instant Reference is incompetent and therefore, the Applicant is not entitled to the orders sought.

34. For the above reasons, this Court finds and holds that this Reference is not merited and thus proceeds to dismiss the entire Reference dated 14<sup>th</sup> November 2023, with costs to the Respondents.

It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MURANG'A THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**L. GACHERU**

**JUDGE.**

**9/5/2024.**

**Delivered online in the presence of;**

Joel Njonjo - Court Assistant

Absent for the Applicant

Mr. Oyancha for the Respondents.

**L. GACHERU**

**JUDGE.**

**9/5/2024.**

