



REPUBLIC OF KENYA



County Government of Meru v Mwirigi Kaburu & Co Advocates (Environment and Land Miscellaneous Application E016 of 2024) [2024] KEELC 5037 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEELC 5037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2024**

**CK NZILI, J
JUNE 26, 2024**

BETWEEN

COUNTY GOVERNMENT OF MERU PLAINTIFF

AND

MWIRIGI KABURU & CO ADVOCATES DEFENDANT

RULING

1. This ruling relates to an application dated 19.3.2024, seeking for stay of execution of the ruling delivered on 26.2.2024, pending a hearing of and determination of the reference. The second prayer is for setting aside, reviewing or varying the said ruling in terms of item numbers (1) and (2) of the advocate client bill of costs dated 16.6.2023, to a sum reasonable and the sum on taxation of VAT to abide by the subsequent figures.
2. The application is supported by the grounds on the face and in a supporting affidavit of Irah K. Nkuubi, an acting county attorney sworn on 19.3.2024. The applicant avers that the respondent was instructed to take over Meru ELC No. E022 of 2021, given that the applicant had already filed the defence and raised triable issues.
3. It is averred that pursuant to the said instructions, the respondent filed an amended defence and counterclaim on 10.11.2022, and that filed on 17.4.2023, the firm of Mutuma Gichuru & Associates was instructed to take over the matter from the respondent, following which the respondent filed an advocate, client bill of cost.
4. The applicant deposed that there was an objection to the bill of cost and filed written submissions following which was taxed vide a ruling of 26.2.2024 at Kshs.82,176,731/=. The said documents are attached as annexures 1KN – 1 -5, respectively.
5. The applicant deposed that item No. 1 of the bill as taxed was colossal or excessive, bearing in mind that there was no valuation report of the subject matter and the matter before the court was an ordinary



- land dispute. The applicant faults the trial court for failing to consider various cited authorities for guidance on the taxation of bills where the value of the subject matter is unascertainable.
6. The application is opposed through a replying affidavit of Mwirigi Kaburu Advocate sworn on 7.5.2024, who admits that his instructions to act in the matter were indeed terminated without any reasons by the applicant and that the applicant is not saying that the service rendered doesn't attract payments. The respondent terms the chamber summons as incompetent for failure to adhere to Rule 11 of the Advocates Remuneration Orders 2014. Further, the respondent avers that the court has no jurisdiction to hear the claimed sum.
 7. It is not in dispute that the respondent was instructed to in Meru ELC Case No. E027 of 2021 Waso Trading Co. Ltd and another vs Joseph Kalapata Guyo and others where the dispute was against ownership of L.R Nos 32589, 32970, 32971 32972, and 32973. (formerly unsurveyed plots Nos. A, B, C, D and E Meru). The reliefs sought were declaratory orders of ownership in the alternative payment of the current market rate of Kshs.3,123,000,000/= and mesne profits
 8. Upon instructions to defend the suit, it is not disputed that the respondent filed an amended defence and a counterclaim on behalf of the applicant seeking declaratory orders that parcels No. 1998/7/D3, 1998 7 D13, 73230/23, 78/230/29 is community land held in trust by the applicant for the benefits of the local communities ordinarily reserved in Igembe North and Igembe Central permanent order of injunction restraining the 1st and 2nd defendants in the counterclaim from dealing with the plots described above, cancellation of the title deeds and survey plans, part development plans and tests plans in favour of the applicant as per the amended defence and counterclaim dated 10.11.2022.
 9. There is also no dispute that the applicant terminated the services of the respondent on 17.4.2023, following the filing of the amended defence and counterclaim, which was also defended, and after undertaking various interlocutory activities as per items 1 – 35 of the itemized advocate client bills of costs dated 16.6.2023. In the High Court of Kenya at Meru Misc application No. 54 of 2023. In the said bill, the respondent attached an affidavit by Dr. David Mugambi sworn on 16.3.2022. The amended statement of defence and counterclaim, which in paragraph 31 indicated the value of the suit is Kshs.6,000,000/= for the estimated 32,000 acres of the land.
 10. Further, the respondent attached letters showing that it participated in two interlocutory applications, one of which was an application for an injunction by the applicant, prompting the filing of a notice of appeal to the Court of Appeal. The applicant filed an objection to the bill of costs dated 26.6.2023 stating that the plaintiff's suit sought an injunction and declaratory orders with no particular monetary value attached to the subject matter, yet to be heard and determined, and therefore, instruction fees fall under other matters. Specifically, the applicant urged the taxing master to tax item No. (1) at Kshs.75,000/=, and item No. (2) to be pegged at Kshs.37,500/=, which is half of the item No. (1).
 11. The applicant relied on written submissions dated 5.7.2023, while the respondent relied on written submissions dated 19.6.2023. In a ruling dated 26.2.2024, the learned taxing master on item No. (1) & (2) relied and said that paragraph 24(c) of the amended plaint dated and filed on 7.3.2023 referred to the current market rate of the subject matter as Kshs.3,123,000,000/=, while the applicant amended defence and counterclaim dated 10.11.2022, had a figure of Kshs.6,400,000,000/=. The taxing master chose the figure of Kshs.3,132,000,000/=:, hence reaching at Kshs.47,180,000/= and Kshs.23,590,000/= for item No. (2)
 12. The trial court took the view that full instructions fees arise once a defence was filed guided by the case law of First American Bank of (K) vs Shah & others (2002) *Tononoka Steels Ltd vs Eastern and Southern Africa Trade & Development Bank* (1999) eKLR and *Dr. Njogu & Co. Advocate vs Panafriic Engineering Ltd* (2006) eKLR.



13. This court is urged by the applicant through an application dated 19.3.2024 to set aside, review and or remit the bill for re-taxation by another taxing officer, given the taxing officer misapplied the law and the principals under the [Advocates Remuneration Order](#). The deponent to the supporting affidavit terms item number (1) and (2) as colossal and excessive, given there was no valuation report provided, the suit regarded an ordinary land case whose value was unascertainable, and the hearing had not taken off.
14. After a certificate of taxation is issued, an aggrieved party to it has to make a reference against the ruling to a judge in chambers; otherwise, under Section 51(3) of the [Advocates Act](#), the court may enter a judgment for the sum certified to be due with costs. See [Lubutlellar & Associates Advocates vs N.K Brothers Ltd](#) (2014) eKLR and Section 11 of the [Advocates Act](#).
15. The principles to be applied by this court were set out in [Ptendi Ruich Ltd & another vs Quarry Services of East Africa Ltd & another](#) (1972) EA 162 and [Joreth Ltd vs Kigano & Associates](#) (2002) 1EA 92. They include:
 - (1) Error of principle
 - (3) Manifestly excessive or high fees likely to confine access to court to the wealthy.
 - (4) The successful litigant ought to be fairly reinstated for incurred costs.
 - (5) Consistency in the awards
16. Rule 11 of the [Advocates Remuneration Order](#) provides that any aggrieved party by the taxing master's decision has to write to the taxing master on the items of taxation to which he objects and who shall give reasons for his decision.
17. The objector has 14 days to apply to a judge by way of chamber summons setting out the grounds of objection. The chamber summons in this case was filed on 28.3.2024 against a decision made on 26.2.2024. The value of the subject matter is one of the reasons why the applicant objects to the taxed amount in item number. (1). In [Peter Muthoki & another vs Ochieng & others](#) (2019) eKLR, the court said where the value of the subject matter is neither reasonable nor determinable from the pleadings judgment, settlement as the case may be, the taxing master has the discretion to assess instruction fees in accordance to what he considers just. Part B of the [Advocates Remuneration Orders](#) 2014 deals with instruction fees.
18. The discretion of the taxing master was set in [Vipul Premchand Haria vs Kilonzo and Co. Advocates](#) (2020) eKLR. It is a judicial one to be exercised judiciously. That discretion can only be interfered with by this court only if there was an error in ascertaining the fees as held in [Kipkorir Titoo & Kiara Advocates vs Protest Protection Fund Board](#) (2005) eKLR and or where there was a failure to ascertain the correct subject matter, the figure is manifestly excessive or was arrived at using wrong principles as held in [Ramunyo & Co. Advocates vs Development Bank \(K\) Ltd](#) (2015) eKLR. In [Joreth Ltd vs Kigano & Associates](#) (supra), the court said the value of the subject matter is to be ascertained from the pleadings, judgment or the settlement as the case may be.
19. In this matter, the plaintiff had put a figure of Kshs.3,132,000,000/= which he was claiming as in the body of the amended plaint. The applicant, on the other hand, set the value of the 32,000 acres of land to which the plaintiff in the suit land was claiming a portion as LR No's 32969, 32970, 32971, 32972, and 32973, at a value of Kshs.6.4 billion.
20. The applicant pleaded and submitted before the taxing master that the subject land was unascertainable, in the pleadings, and therefore, fell under other matters. In this application, the



- deponent to the supporting affidavit has deposed that by the time the respondent was instructed, there was already a statement of defence filed.
21. From the pleadings attached to the reference, the discernable facts from the court file do not support what the deponent has stated on oath before this court. An amended statement of defence and counterclaim was filed on 18.11.2022 by the respondent, where the counterclaim for subject land is said to have been 32,000 acres worth Kshs.6.4 billion. There were seven reliefs sought in the counterclaim seeking, among other things, to recover the land illegally allocated to the 1st and 2nd defendants by the 3rd – 6th defendants. The suit also included three interested parties.
 22. The applicant was asserting that the suit lands were held in trust for the residents in the sub-counties of Igembe Central and North. Dr. Rufus Miriti, the County Secretary of the applicant, had verified the contents of the amended defence and counterclaim. Dr David Mugambi, the Chief Officer Department of Agricultural Development and Fisheries on his part swore a replying affidavit in the interlocutory application showing the immense development plans the applicant had lined up for the land in dispute in the (CIDP)
 23. Therefore, in my view, the deponent to the application herein is estopped in law from denying the contents of its earlier pleadings and annexures, showing the weight and the value of the suit lands as indicated by senior county officers conversant with the suit lands, its value and the intended use.
 24. A counterclaim is a stand-alone suit independent from the primary suit. It succeeds or falls on its own regardless of the outcome of the primary suit. See *SH Jag Mohan Chawla & another vs Dera Radha Swami Satsang & others* on 7th May 1996. It is provided for under Order 7 Rule (3) *Civil Procedure Rules*. It relates to the original subject matter of the suit. See *County Government o Kilifi vs Mombasa General Ltd* (2017) eKLR. It is not affected by a withdrawal of the main suit. See *Beatrice Mumbi's Wamabio vs Mob Oil (K)* 2011) eKLR.
 25. Instructions fees to defend the main suit and file a counterclaim must, therefore, be assessed both on the statement of defence to the main suit and for the filing of a counterclaim. See *Macharia Njeru T.A Macharia Njeru Advocates vs London Distillers (K) Ltd* (2019)eKLR. In *Kenyariri & Associates Advocates vs Salama Beach Hotel Ltd & others* (2014), eKLR the court held that where taxation is for a matter which has not been determined, instruction fees should be on the basis of the pleadings. In *First Imperial Bank (K) vs Shah & another* Supra) the court said total instruction fees are an entitlement to an advocate the moment the defence is filed, and the subsequent progress of the matter is not relevant.
 26. In this matter, the applicant does not dispute that the respondent amended the defence previously filed on 28.9.2021 to introduce paragraphs 10 (a), (b), (c), (d), (e), (f), (g) and (h) and a counterclaim. The counterclaim was drawn by the respondent, who earned and is entitled to instructions fee the moment the counterclaim was filed on 18.11.2022
 27. To add on counterclaim contained new averments that the plaintiff had not made in the primary suit or which were not included in the earlier defence filed in person by the applicant. It was, therefore, a separate suit in which the respondent expended legal expertise. New issues were introduced upon coming on board to entitle him to earn instructions fees. See *Kenyariri & Associates Advocates vs Salama Beach Hotel* (supra). In *Mumias Sugar Co. Ltd vs Tom Ojienda & Associates Advocates* (2021), eKLR, an issue has instructions fees for a counsel who takes over a matter from another counsel. The court cited *KTDA Ltd vs J.M Njenga & Associates* (2008) eKLR, that a client who changes advocates should expect to pay the total instructions fees as many times as he pleases to change advocates. The court said that the instruction fees due to the advocates would be equal to the instruction fees awarded to the company for the amended counterclaim.



28. Further, in *Rachuonyo & Rachuonyo Advocates vs Kenya National Capital Corporation Limited* (2022) KEHC 3224 (KLR), the court cited *Bank of Uganda vs Banco Araba Espano* Civil Application No. 29 of 2019 that a judge should only interfere with a taxing master's decision if satisfied that the errors substantially affect the decision on quotation and the upholding of the amount would cause injustice to one of the parties. The court said that the value of the subject matter for purposes of instruction fee is what the parties have pleaded in their pleadings in the judgment or settlement.
29. In this matter, I have looked at the decision of the taxing master. It substantially relied on and complied with the guiding principles as set in the cited case law. The taxing master looked at the pleadings and opted to go by the value set in the plaintiff's pleadings as opposed to the figure in the counterclaim, which was higher or almost double the value ascertained by the applicant. The reasons are apparent, given that the plaintiff's parcels of land, as claimed, were of smaller sizes compared to the counterclaimed sizes of 32,000 ha.
30. The applicant had pleaded and made specific prayers for the cancellation of the five titles held by the 1st and 2nd defendants to the counterclaim. So, the respondent was instructed to file, defend and prosecute a counterclaim for the land worth Kshs.3,142,000,000 Billion held by the plaintiff in the primary suit.
31. Therefore, it cannot be true that the taxing master fell in an error of principle since the value of the subject matter was ascertainable, as pleaded by the plaintiff in the primary suit and the applicant as the plaintiff in the counterclaim. There was, therefore, no requirement for a valuation report to ascertain the pleaded value. The nature, importance and interest of the subject matter to the applicant were already pleaded.
32. The general conduct of the defence and counterclaim was explicit to the applicant. This is why the respondent had been instructed to secure interim injunctive orders against the primary plaintiff. See *Joreth Ltd vs Kigano & Associates* (*supra*).
33. In *Nguruman Limited vs Kenya Civil Aviation Authorities & others* (2014) eKLR, the court observed that receiving instructions from a client was a separate exercise from drawing pleadings or preparing the documentation for filing. In *Jeremiah Muku vs Methodist Church of Kenya (K) Registered Trustee & another* (2015) eKLR, the court held that failing to consider other factors was an error of principle.
34. In this matter, the applicant terms the figure assessed as colossal and excessive. For this court to interfere, there must be a demonstration that the taxing master fell in an error of principle and based items numbers 1 and 2, on a value of the subject matter that was alien or unascertainable from the pleadings.
35. In *Nyangoto & Co. Advocates vs Doinga Lesso Creameries Ltd*, the court said that if there was misdirection by the taxing officer, the court could interfere with its discretion.
36. In my considered view, there is no injustice visited upon the applicant with the taxation based on the pleaded values of the subject matter both in the amended plaint and the amended statement of defence and counterclaim. In *Kangethe & Co. Advocates vs Kenya Pipeline Company Ltd* (2011) eKLR, the court said that what counsel gives to clients are skilled services in consideration of fees.
37. In this matter, the respondent was instructed to use his skilled service to recover land worth over Kshs.6,400,000,000 billion for the applicant, over and above what the primary plaintiff had sued the applicant for. The applicant has shown no justification that the taxed sum is manifestly excessive or colossal. The court finds no misapprehension or misapplication of the legal principles applicable in the taxing master decision where the value of the subject matter was ascertainable or discernable from the pleadings. See *Lubulellah & Associates Advocates vs N.K. Brothers Ltd* (*supra*) and *Rachuonyo Company Advocates vs Development Bank (K) Ltd* (*supra*)



38. The upshot is that I find the application dated 19.3.2024 lacking merit. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 26TH DAY OF JUNE, 2024**

In presence of

C.A Kananu/Mukami

Kaumbi for the applicant

Mr. Kaburu for respondent

HON. C K NZILI

JUDGE

