



**Kenya Anti-Corruption Commission v Frann Investments Limited & 6 others (Environment & Land Case 215 of 2009) [2024] KEELC 4798 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4798 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 215 OF 2009  
SM KIBUNJA, J  
JUNE 19, 2024**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**FRANN INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS GITHUI WAHOME ..... 2<sup>ND</sup> DEFENDANT**

**ANNE GATHONI ..... 3<sup>RD</sup> DEFENDANT**

**VICTOR WAHOME ..... 4<sup>TH</sup> DEFENDANT**

**EDWARD KAGUME ..... 5<sup>TH</sup> DEFENDANT**

**DAVID MWANGI ..... 6<sup>TH</sup> DEFENDANT**

**WILSON GACHANJA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> defendant filed the notice of motion dated 20th December, 2023 seeking for the following prayers:
  - a. Spent.
  - b. That the ruling that the Taxing officer of this Honourable Court delivered herein on 6th December 2023 allowing the plaintiff's party and party bill of costs in the sum of Kenya Shillings Eight Hundred and Fifteen Thousand, Three Hundred and Twenty Eight and Sixty Seven Cents (Kshs 815,328.67/-) be reviewed and set aside.



- c. That the Honourable Court be pleased to tax the Plaintiff's Party and Party Bill of Costs dated 6th February 2023 afresh taking into account the objection raised by the seven defendants vide the supporting affidavit and the written submissions dated 3rd November, 2023.
- d. That costs of this application be provided for.

The application is based on the seven (7) grounds on its face and supported by the affidavit of Gikandi Ngibuini, counsel on record for the 1<sup>st</sup> defendant, sworn on the 20<sup>th</sup> December 2023, deposing to inter alia that vide the ruling of 6th December 2023, the court awarded the plaintiff costs of Kshs 815,328.67; that prior to the delivery of the said ruling, the defendants had filed an objection to the bill of costs through an affidavit and submissions dated 3rd November 2023; that the objection raised was whether instructions fees was recoverable considering Mr. Murei, who handled the matter was an in-house advocate employed by the plaintiff; that the court overlooked to consider that ground when making its ruling delivered on 3<sup>rd</sup> November 2023; that where a court has not determined an issue that was meant to be conclusively determined, then the cure would be a review and setting aside; that it is in the interest of justice that the application be granted.

2. The plaintiff opposed the application vide the ten (10) grounds of opposition dated 19th January, 2024 summarized as follows:
  - a. That the court does not have jurisdiction to entertain the application.
  - b. That the application is fatally defective, without merit, misconceived and should be struck out, in limine.
  - c. That the 1<sup>st</sup> defendant made the erroneous assumptions that the cost taxed by the deputy registrar is due to the Plaintiff's advocate.
  - d. That the application failed to consider the implications of section 32A of the *Advocates Act* which allows litigants to utilise the services of in-house counsels, and to appreciate that for the entire period the case has been in court (over ten years) the Plaintiff has always been represented by qualified advocates duly licensed to practise law.
  - e. That the expenses of such in-house counsel constitute costs, and it would be unjust, a violation of the plaintiff's right to equal protection of the law, and unconscionable to deny costs to the plaintiff.
3. On the 22<sup>nd</sup> January 2024, the court directed parties to file and exchange submissions. During the subsequent mention of 8th April 2024, counsel for the 1<sup>st</sup> defendant notified the court that both counsel had filed and exchanged submissions but that the matter should have been mentioned before the Deputy Registrar. Mr Murei, counsel for the plaintiff, informed the court that he had on the 19<sup>th</sup> January 2024, filed a notice of preliminary objection as the application had indicated it was to be placed before the judge, and had already submitted on it. Mr. Kabebe for the 1<sup>st</sup> defendant then applied for, and was granted leave to file further submissions on the preliminary objection in three (3) days. A ruling date was then fixed.
4. The learned counsel for the 1<sup>st</sup> defendant and plaintiff filed their submissions dated the 30th January, 2024 and 11th March 2024, respectively. The counsel for the 1<sup>st</sup> defendant also filed further submissions dated the 12<sup>th</sup> April 2024.
5. The following issues that are relevant for determination by the court in the instant application:



- a. Whether the court is with jurisdiction to hear and determine the application dated 20th December 2023.
  - b. Whether the 1<sup>st</sup> defendant has met the threshold for review and or setting aside order to issue as sought.
  - c. What orders are just to issue in this application.
  - d. Who bears the costs?
6. The court has carefully considered the grounds on the notice of motion dated 20th December 2023, affidavit evidence, grounds of opposition dated 19<sup>th</sup> January 2024, submissions by the learned counsel for both parties, superior courts decisions cited thereon, and has come to the following determinations:
- a. I have perused the manual and Case Tracking System record in respect of this suit and I have not seen the notice of preliminary objection reportedly filed by the plaintiff on the 19<sup>th</sup> January 2024. The court cannot make any reference or determinations on non-existent preliminary objection, whether or not counsel have submitted on it. The court will therefore take the grounds of opposition referred to above as the only response by the plaintiff to the 1<sup>st</sup> defendant's application.
  - b. On the face of application by the 1<sup>st</sup> defendant dated the 20<sup>th</sup> December 2023, is clear that it was brought pursuant Order 45 Rule 1 of the [Civil Procedure Rules](#) and section 80 of [Civil Procedure Act](#) chapter 21 of Laws of Kenya. Order 45 Rule 1 provides as follows:

“(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The word decree is defined in section 2 of the [Civil Procedure Act](#) as follows:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- (a) any adjudication from which an appeal lies as an appeal from an order;
- or



(b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

c. In Blacks law Dictionary, 2<sup>nd</sup> edition, the word "decree" has been described as –

"...the judgment of a court of equity, and is, to most intents and purposes, the same as a judgment of a court of common law. A decree, as distinguished from an order, is final, and is made at the hearing of the cause, whereas an order is interlocutory, and is made on motion or petition."

Section 2 of the [Civil Procedure Act](#) defines an "order" as follows:

"Order" means the formal expression of any decision of a court which is not a decree, and includes a rule nisi;"

From the above, a taxation ruling does not fall within the above definition, as it does not deal with issues raised in the suit. Taxation is the preserve of the matter after the court has conducted its duty of hearing a suit and delivered a judgment. If the drafters of the [Civil Procedure Act](#) had intended to include the taxation ruling to be among the orders and or decrees defined above, it would have stated so.

d. In the case of [Kimani Wanyoike v Electoral Commission of Kenya](#) CA 213/95 (un reported), the Court of Appeal held:

"Where there is a law prescribed by either a Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed."

In the case of [Speaker of the National Assembly v Karume](#) (2008) 1 KLR 425 the Court of Appeal reiterated its earlier decision in Kimani Wanyoike case (*supra*) that:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed."

e. The superior courts decisions cited by the 1st defendant are essentially on appeals/references save for the case of [Nation Media Group & another v Awale Transporters Limited](#) [2022] eKLR which however, dealt with review of a judgment, and not a taxation ruling. The said Superior Courts decision are of no relevance to the instant matter.



f. The procedure for challenging taxation ruling has been provided in Rule 11 of the [\*Advocate Remuneration Order\*](#) which states 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.
- (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.”

In the case of [\*Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation\*](#) [2015] eKLR the court held as follows:

“In my view, the applicant was required to file a reference to this court to challenge the decision of the taxing officer and not an application for review under Order 45 of the [\*Civil Procedure Rules\*](#) and Section 80 of the [\*Civil Procedure Act\*](#).

Further, the advocate would only be so entitled to apply to this court for review or appeal, under Section 80 of the [\*Civil Procedure Act\*](#) and Order 45 of the Civil Procedure Rules if he was able to satisfy the court that the decision rendered by the taxing officer was the kind of decision that can be appealed to this court, under Section 79G of the [\*Civil Procedure Act\*](#) or reviewed as provided by Section 80 and Order 45 of the [\*Civil Procedure Act\*](#) and Rules respectively.

Under the said Paragraph 11, of the [\*Advocates Remuneration Order\*](#), an “appeal” against the decision of a taxing officer in a taxation matter is not provided for. The only procedure provided for an “appeal” or “review” against the decision of a taxing officer is by way of a reference.

In my view, the applicant cannot invoke the [\*Civil Procedure Act\*](#) and Rules made there under to circumvent the procedure provided under the [\*Advocates Act\*](#) and the [\*Advocates Remuneration Order\*](#) in regard to review of a decision of the taxing officer in an advocate/client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the [\*Advocates Remuneration Order\*](#) and NOT in his capacity as the Deputy Registrar of this court.



The Deputy Registrar exercises his jurisdiction in accordance with the powers given to him under the *Civil Procedure Act* and the Rules made there under. The two roles of the said officer of the court are separate and distinct. The two jurisdictions and their separate procedures are mutually exclusive. One procedure cannot be substituted for the other. The procedure adopted by the advocate applicant in this matter was therefore in my view, an abuse of the court process and procedures.”

The court further held:

“The advocate’s Notice of Motion creates a presumptions that he had a right of appeal pursuant to Section 79G of the *Civil Procedure Act* and therefore Sections 65 and 75 of the *Civil Procedure Act* on orders and Decrees that are appealable as a matter of right or with leave of the court making the order comes into play. Perhaps that is the reason why upon the ruling being delivered on 27th July 2012, he sought leave to appeal against the decision of the taxing officer.

In cases where there is a right of appeal, whether by way of obtaining leave or automatic right, then Order 43 of the *Civil Procedure Rules* apply. Equally, under Section 80 of the *Civil Procedure Act* and Order 45 (1) of the Civil Procedure Rules, the latter being the hand maiden to Section 80 comes into play, as an alternative to an appeal under Section 79G of the *Civil Procedure Act*.

In the instant case, where the Deputy Registrar is exercising the special jurisdiction as taxing officer, a decision whether made on the actual items of the itemized bills or striking out of the bills or striking out of the bill of costs altogether, is a decision of the taxing officer in that capacity and therefore it is my humble view that there is no provision for an ‘appeal’ or “review” per se under the *Advocates Act*, which is the legal regime governing taxation of costs whether party and party or Advocate/client.

The *Advocates Act*, in my most considered view, is a complete statute in itself on matters of taxation of costs and as such, a party cannot invoke the provisions of the *Civil Procedure Act* or Rules made there under for purposes of challenging any decision of the taxing officer.”

- g. In the case of *Machira & Company Advocate v Arthur K. Magugu* (2012) eKLR the Court of Appeal held that:

“Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions kin to those of Section 80 of the *Civil Procedure Act*, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”

The court further held:

“10. The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in *Machira v Magugu* (1)



that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decisions, through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

Similarly, in the case of *Karuturu Networks Ltd & another v Dally Figgis Advocates*, Nairobi Court of Appeal CA No 293 of 2009, the court held that:

“... it is a basic principle of procedural law that appeals to the High Court only lie where a right of appeal has been conferred by statute. Secondly, I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to appoint a law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the *Advocates Remuneration Order*.....

The appeal that they have purported to file from the decision of taxing officer by way of an appeal by chamber summons as provided under Order XLV111 Rule 5(5) of the Civil procedure Rules is not contemplated by the *Advocates Remuneration Order*. It is therefore, on the face of it, incompetent and a nullity in law.”

In the case of *Mugambi & Company Advocates v John Okal Ogwayo & another* (2013) eKLR the court held as follows:

“The jurisdiction of a taxing officer is provided for in the Advocates Remuneration Order. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration order where there is no dispute as to retainer, or where costs have been duly awarded by an order of court. See paragraphs 2,10,13 of the Remuneration Order, where the very fundamental issue whether or not an advocate was duly retained and thus entitled to any costs arises before a taxing officer, that issue ought first to be determined by the court.”

There is no reference as contemplated under paragraph 11 of the *Advocates Remuneration Order*, challenging the decision of the Taxing Officer, that has been filed in this suit. For the reasons set out above, the court's jurisdiction to consider whether or not to grant the prayers for review/setting aside, and fresh taxation has not been properly invoked. In the circumstances, this court cannot exercise its discretion in favour of the 1<sup>st</sup> defendant, who has not lodged a competent reference to this court from the decision of the taxing officer.

- h. That the one thread that flows from the various superior courts decisions I have referred to above, is that taxation has procedures laid down by the Advocate Remuneration Order, which the 1<sup>st</sup> defendant is trying to circumvent, by taking a route different from the one prescribed by the laws and rules. The application is fatally defective, without merit, misconceived and should be dismissed and or struck out.
- i. The general rule on costs is that it follows the event unless where there is a good reason for the court to direct otherwise. In this instance, there is no reason to depart from that general direction, and the plaintiff is awarded costs in the application.

5. The court, having come to the determinations set out above, finds and orders as follows:



- a. That the notice of motion dated 20th December 2023 is fatally defective and is hereby struck out.
- b. Costs of the said application to be borne by the 1<sup>st</sup> Defendant.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr. Mirei

Defendants : M/s Gwahala For Gikandi For 1<sup>st</sup> Defendant.

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

