



**Macharia v Muses & 2 others (Environment & Land Case
30 of 2014) [2024] KEELC 4669 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 30 OF 2014
NA MATHEKA, J
JUNE 13, 2024**

BETWEEN

SAMUEL KAMAU MACHARIA APPLICANT

AND

ALI KHAN ALI MUSES 1ST DEFENDANT

ESTATE SONRISA LIMITED 2ND DEFENDANT

**LAND REGISTRAR KWALE (SUED THROUGH THE ATTORNEY
GENERAL) 3RD DEFENDANT**

RULING

1. The application is dated 25th October 2023 and is brought under Rules 7 and II (1) and (2) of the *Advocates Remuneration Order*, 2009 and 2014, Section 51 (2) of the *Advocates Act* Cap 16, Section IA & AB of the *Civil Procedure Act*, Order 21 Rule 9 (1) seeking the following orders;
 1. This Reference against the decision of Honourable Nyariki J. Deputy Registrar made on 11th October 2023 be and is hereby allowed;
 2. The entire Ruling delivered by the Taxing officer on 11th October 2023 dismissing the Objector's/Applicant's Bill of Costs dated 05th May 2023 against the 2nd Respondent be and is hereby set aside.
 3. The Honourable court be pleased to make a determination that the applicant/objector is entitled to costs against the 2nd defendant/respondent.
 4. The Honourable court does tax the bill of costs dated 5th May 2023 against the 2nd defendant/respondent.



5. The Honourable Court be pleased to make a determination that the applicant/objector is entitled to costs from the 2nd defendant, the case stated by the 2nd defendant having been dismissed with costs.
2. This application is based on the plaintiff's discontentment with the ruling of Honorable J. Nyariki of 11th October 2023 where the learned magistrate absolved the 2nd defendant of the costs in the bill of costs dated 5th May 2023. Iwona Strzelecka on behalf of the 2nd defendant put in a response stating that the judgment made by this court had held that the costs between the plaintiff and the 2nd defendant would abide by the determination of a surveyor of the question of who has encroached the other's land. Further that in the court of appeal's judgment in C.A 14 & 32 of 2016 (consolidated); each party was made to bear its own costs. She also averred that it is the plaintiff who owed the 2nd defendant costs after the plaintiff's application dated 24th July 2021 was dismissed. She also relied on her submissions in opposition of the plaintiff's bill of costs which caused the aforementioned ruling of Hon. J. Nyariki. M/s Iwona Strzelecka stated that the plaintiffs intended to mislead the court by attaching the ruling in Kwale ELC Misc No. EOO1 of 2021 and she finally concluded by opposing items 8 to 72 in the afore mentioned bill of costs.
3. The plaintiff swore a further affidavit and alleged that the 2nd defendant's response is misleading as it conceals the material facts in the judgments of both C.A. 14 and 32 of 2016 and this suit. The plaintiff further explained that the court of appeal only set aside the issue of demolition and costs of survey. He also averred that the court of appeal awarded costs to the plaintiff after the land registrar of Kwale county had established the extent to which Kwale/ Galu Kinondo/48 (2nd defendant's property) had encroached onto Kwale/Galu Kinondo/50 (suit property). He attached a report by the registrar showing that the 2nd defendant's property had encroached the suit property.
4. That after the said report showing encroachment by the 2nd defendant's property, the plaintiff demolished the structures encroaching on his land causing the 2nd defendant to file ELC E001 OF 2021 challenging the said report and the said suit was dismissed. The plaintiff concluded by stating that the taxing officer erred in principle and fact by sitting as an appellate court against judgment of the court of appeal as the learned magistrate had no power absolving the 2nd defendant from costs.
5. In their submissions counsel for the plaintiff reiterated the plaintiff's facts above and emphasized that the court of appeal only set aside the costs of the survey exercise and not costs of the suit. Counsel for the 2nd defendant also reiterated the 2nd defendant's facts in their submissions and emphasized that no costs were awarded by virtue of this suit and C.A 14 and 16 of 20216. Furthermore, counsel submitted that this court does not have jurisdiction to entertain the afore mentioned bill of costs as prayed for by the plaintiff and relied on rule 10 of the Advocate Remuneration Order as well as case laws. Counsel also disputed that the afore mentioned bill of costs was not drawn to scale and went deep into discussing the various items together with authorities.
6. I have considered the application and the replies and the submissions and authorities filed and I have found that the issue for determination whether the 2nd defendant owes costs to the plaintiff?
7. This court however has jurisdiction to listen to references as provided by rule 11 (2) of the *Advocate Remuneration Order*. When it comes to references the court in *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus;

“I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of



principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference. [emphasis added]”

8. In *Peter Muthoka & Anor v Ochieng & 3 Others* [2019] eKLR the court of appeal stated as follows;

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with”

9. Similarly, in *First American Bank of Kenya v Shah and Others* [2002] 1 E.A. 64 at 69 by Ringera J. (as he then was) stated as follows;

“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”

10. Counsel for the plaintiff claims that the learned magistrate erred in principle and in fact by ruling that the 2nd defendant was to pay costs. The court has to refer to the judgment of this suit dated 13th October 2014 and look at it as a whole to get the context. Paragraph 22 states as follows:

“.....The beacons between land parcels Galu/Kinondo/50 and Kwale/Galu Kinondo/48 should be fixed by a surveyor as per the *Land Act* taking into account the area shown on the respective title deeds. The survey fees shall be paid by the owners of the said properties equally. Any party found to have encroached on the other parties land shall have sixty days to demolish all structures that might have been erected therein and move and vacate therefrom.....The cost of such demolition shall be borne by the party that has so encroached....”

Paragraph 24 reads as follows:

“The plaintiff shall have costs of this suit in as far as it relates to the 1st defendant. The costs between the plaintiff and the second defendant shall abide with the boundary determination by the surveyor as to who have encroached on whose land and after such determination is filed in court and adopted by this court.”

11. In the court of appeal judgement this is what the court said:

“The only part of that order that we do not, with respect, agree with is where the judge directed that “any party found to have encroached onto the other parties land shall have



sixty days to demolish all structures that might have been erected therein and move and vacate therefrom”. By that order, the Judge jumped the gun because the Registrar had, first to conduct the proceedings to determine the extent of the parties’ respective parcels, and cause to be defined by survey, the precise position of the boundaries in question.”

12. The appeal court held that only after determination of the boundaries can parties move to challenge a Registrar’s report under section 86 of the [Land Registration Act](#). The appeal was dismissed but each party was told to bear its own costs. The only part of the court’s judgment that was not supported was the above stated and was instead substituted with the Land Registrar to establish the extent of encroachment. Hence, this means that the decision of this court on costs stood.
13. The Land Registrar conducted the exercise as directed by the appellate court and made a report dated 2nd July 2021 where he acknowledges that the 2nd defendant’s property encroached onto the suit property. The 2nd defendant was aggrieved and took the advice of the court of appeal and stated a case ELC E001 of 2021 before the learned judge Dena J. who dismissed it with costs for the plaintiff on 13th June 2022 after a notice of preliminary objection by the same. The ruling had held that the plaintiff ought to have stated the case in this suit and not file a fresh suit. This is where the trail ends and this where the determination lies. As it stands, there is no case as has been properly stated against the Registrar’s report and since the 2nd defendant property was found to have encroached, the court has to revert to its said judgment which stated that the costs “shall abide with the boundary determination by the surveyor as to who have encroached on whose land”.
14. The court finds that the 2nd defendant has to pay costs of this suit only. However, in [4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan v Misnak International \(UK\) Limited; Total Link Logistics & 2 others \(Interested Parties\)](#) [2021] eKLR the court held that:

“I also wish to add that where a Judge comes to a conclusion that the taxing officer has erred in principle in reaching his decision, 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. I also reiterate that it is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he/she should refer the bill back for taxation.”

15. In the upshot I find the court finds that the 2nd defendant has to pay costs of this suit that the instant application is merited and I grant the following orders;
 1. The entire Ruling delivered by the Taxing officer on 11th October 2023 dismissing the Objector’s/Applicant’s Bill of Costs dated 5th May 2023 be and is hereby set aside.
 2. The file be and is hereby remitted back to a different taxing master for taxation.
 3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

