



**Republic v National Land Commission; Board of Management Sitatunga
Secondary School & another (Interested Parties) (Environment and Land Judicial
Review Case 1 of 2017) [2025] KEELC 753 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2017
FO NYAGAKA, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

**THE BOARD OF MANAGEMENT SITATUNGA SECONDARY
SCHOOL INTERESTED PARTY**

CHRISTOPHER MUKHWANA INTERESTED PARTY

RULING

1. The Ex Parte Applicant filed a Chamber Summons dated 29th September 2017 at the Constitutional and Judicial Review Division in Nairobi. He was granted leave to file a Judicial Review application, which he did. It was later transferred to the Environment and Land Court (ELC) in Nairobi and later to this Court wherein it was registered as the present Judicial Review matter. It then proceeded to hearing and judgment was delivered by my learned brother Judge on 20th March 2018. While agreeing with the Interested Parties that the issue between the parties was basically a boundary dispute, he dismissed the Notice of Motion dated 23rd October 2017 with costs to the Respondent and the Interested Parties. Needless to say, the parties herein have never changed: they remained who they were all along.
2. The Ex Parte applicant preferred an appeal on 3rd April 2018, through the filing of a Notice of Appeal dated the same day and lodged the same day. On 4th April 2018, he filed a Notice of Motion dated 4th April 2018. By it the National Land Commission, the Respondent, sought the enforcement and/ or execution of the notice of eviction it issued, dated 27th July 2017. The record bears that the appeal was prosecuted in the Court of Appeal sitting in Eldoret.



3. By a judgment delivered by the Court of Appeal on 19th February 2021, the Court set aside the judgment of the ELC. It issued orders of mandamus and certiorari against the National Land Commission and ordered that both the Commission and the Interested Parties pay costs of both the High Court (sic) and the Appeal. It was upon the order that the Ex parte Applicant filed a Bill of Costs herein dated 14/10/2021.
4. The record bears that the Bill of Costs was placed before the Deputy Registrar, Hon. Kesse, on 7/12/2021 when it was taxed and a ruling date on the same given. Present on were learned counsel Mr. Bett holding brief for counsel for the Ex Parte Applicant and Mr. Rotich holding brief for Leting for the Interested Party. The record shows that the Respondent/now Applicant was absent: it was not Represented. Further, learned counsel for the Ex parte Applicant reported to Court that the Respondent had served them with submissions. Counsel indicated that they too had filed and served. But learned counsel holding brief for the Respondent indicated to the Court that Respondent had not been served. The Ex Parte Applicant stated that they had sent the Bill on 29th October 2021.
5. Despite these unclear circumstances, the Taxing Master fixed the Bill of Costs for Ruling on 01/02/2022. On the said date the Ruling on the Bill of Costs was delivered, with the Court taxing the Bill at KShs. 22,554,537/=. Further, the record does not bear any reasons for the determination. Also, it appears the ruling was delivered in the presence of Bett Advocate for the Ex Parte Applicant and one Kuo Advocate for the Interested Party. While the record shows that counsel for the National Land Commission was absent during the delivery of the Ruling, it does not show for which of the Interested Party learned counsel Kuo was present.
6. Further, the court record does not bear any evidence by way of Affidavit of Service to show that the notice of taxation of the Bill of Costs was served on the parties for the taxation that took place on 07/12/2021
7. By an Application dated 22nd February 24, the Respondent moved this Court under Section 11(4) of the Advocates Remuneration Order, Section 1A, 1B and 3A of the Civil Procedure Rules and what it termed as “all the enabling provisions of the law.” It sought the following prayers:-
 1. That this honourable court enlarges the time within which to file a reference against the decision of the taxi officer delivered on 1st February 2022.
 2. That in the alternative to prayer 1, this court be placed to set aside/ remove/ quash and or vacate the decision and all consequential orders of the taxing master delivered on 1st February 2022 in so far as the same relates to the taxation of the Bill of Costs dated 14th December 2021.
 3. That in the alternative to prayer 2 above, this honourable court exercises its inherent jurisdiction and be pleased to re-tax the bill of costs dated 14th October 2021.
 4. That in the alternative to prayers 2 and 3 above, the honorable court exercises its inherent jurisdiction and refer the bill of costs dated 14th October 2021 to another taxing officer for re-taxation or make directions to a fresh taxation.
 5. That this honorable court does make such further orders and or directions as it may deem necessary in the circumstances in order for the ends of justice to be met.
 - 6 That's the costs of this application we provided for.
8. The application was based on four grounds being that the Ex Parte Applicant's bill of costs was taxed in the absence of the applicant. It is imperative that the instant application be heard before the certificate of costs dated 19/052022 is executed. The applicant was never accorded a fair hearing in regard to the



Bill of Costs hence was not able to challenge the same. In the event, the application is not heard and orders granted, it would occasion great injustice to the applicant.

9. The application was supported by the Affidavit of Brian Ikol, learned counsel for the Respondent. He deposed that he was the Director, Legal Affairs and Alternative Justice System for the Respondent. The respondent was an Independent Commission established under Article 67(1) of *the Constitution* of Kenya and *Act No. 5 of 2012*. The taxation of the Ex Parte Applicant's Bill of costs was taxed in absence of the applicant. The applicant was never served with the bill of costs nor the taxation notice requiring them to attend and challenge Bill of Costs dated 14th October, 2021. It only came to learn of the same when the certificate of costs was served on them. The applicant was never afforded an opportunity to challenge the Bill, hence the taxation and all consequential orders should be set aside.
10. The Court awarded costs against both the Respondent and the Interested Parties. The Applicant did not seek the Court's direction as to who would or how meet the costs awarded. The honorable court should be pleased to grant leave to the Applicant to challenge the bill of costs. The applicant should not be condemned unheard. It was imperative that the application be heard before the certificate of costs executed. In the event that the application was not heard and the orders sought granted, it would occasion injustice to the Respondent. The respondent risked suffering irreparable harm. The Respondent would not suffer any prejudice if the taxation was set aside, and the Bill of Costs taxed afresh.
11. The Respondent opposed the application through a Replying Affidavit sworn by him, Benson Wekesa Milimo on 27th May 2024. He deposed that taxation was conducted under a special regime of law with strict timelines. This court had no jurisdiction to handle the matter as presented and the application was incurably defective and incompetent.
12. He had previously been represented by a different law firm. The current ones filed a Notice of Change of Advocates dated 23rd May 2024. It was accompanied by a consent letter dated 13th March 2024. Further, his previous advocates instructed one Isabella Bett to hold brief and pursue costs arising from the proceedings on his behalf. Isabella now practiced in the law firm of his advocates currently on record. The Bill of costs that proceeded for taxation was dated 14th October 2021. It was served through a process server one Isaiah Birundu on 20th October 2021. He annexed a copy of an e-mail dated 2nd November 2021 and a copy of the Bill of Costs and the Notice of Taxation. He added that the service was affected upon nlc.legal@landcommission.go.ke which was the same e-mail appearing on the Respondent's Chamber Summons in the instant suit. On 3rd November 2021, the Respondent acknowledged the Bill of costs and a taxation notice dated 20th October 2021. He attached a copy of the acknowledgement receipt dated 3rd November, 2021. He added that the Applicant's deposition that it was neither served with the bill of costs nor the taxation was false.
13. The taxation notice dated 20th October 2021 indicated that the bill of costs would proceed on 23rd November 2021. On that date, the court did not sit. Learned counsel rescheduled and took the date of taxation of 7th December 2021. He deposed at paragraph 16 of the Replying Affidavit that learned counsel, Isabella, issued another notice dated 23rd November 2021. It was sent on 6th December 2021.
14. When the taxation came up on 7th December 2021 counsel for the Respondent was absent, as informed by learned counsel Isabella. But counsel for the Interested Parties sought time to file the submissions and a ruling date was given for the 1st of February 2022, while the interested party was granted leave to file written submissions. By 7th December 2021, the Respondent had not lodged any response nor stated that it would contest an item on the Bill of costs. On 16th December 2024 the former Advocates sent out a notice for the ruling date through E-mail, notifying the parties of the



- ruling date of 1st February 2021. He annexed a copy of the Affidavit of Service sworn on 15th January 2022 to that effect on 16th December 2021. The Respondent acknowledged receipt of the notice.
15. Further, if the Respondent wanted to raise any complaint in respect of the taxation proceedings, it had ample time to do so before the date of the ruling. He deposed further that by acknowledging the ruling notice and not raising complaints, the Respondent confirmed that it was contented with the manner of taxation proceedings, and it was estopped from raising complaints between the period covering the filing of the bill of costs and the date of delivery of the ruling. Therefore, the complaints the applicants raised in the instant application were an afterthought, hollow, frivolous, and vexatious. The Respondent could not have its cake and eat it. By failing to object to the manner of taxation proceedings yet the Respondent was aware of the ruling date they cannot turn around and start claiming that the proceedings went on ex parte. They should not seek to restart the clock by setting aside the taxation proceedings. They could not come to court alleging that they were denied the right to be heard whereas they were the ones who squandered every opportunity to be heard. The conduct of the Respondents found the basis of setting aside the taxation.
 16. The Ruling was made on 1st February 2022, and the court record shows that the Respondents did not attend court. This fact of failure to attend court on 1st February 2022 was conclusive proof of a litigant disinterested in the outcome of the taxation despite being aware of the ruling date.
 17. The Applicants took two years to file the instant application. The delay of two years was unreasonable, inordinate and amounted to an abuse of the court process. It was a false claim that they were not aware of the taxation proceedings. The period of two years was enough to prevent the court from interrogating the Respondent's application further. The application was an afterthought designed to frustrate the recovery of costs after previous efforts to secure a settlement did not bear fruit. He annexed to the affidavit a copy of a demand letter dated 14th March 2024.
 18. Further, the Respondent/Applicant approached the court with dirty hands, having anchored the application on falsehoods and unreasonable delay. The present case could only favor to prevent the Respondents from further abusing the Court force is using the instant application. The Respondent could not successfully invoke the inherent jurisdiction of the court. The intent to restart the taxation proceedings or another legal battle was serving no purpose after two years. The attempt to reopen the taxation proceedings after the period was unjust and could not be compensated by any award of costs because he would suffer injustice, having incurred a heavy expense as legal fees besides the trauma and the agony of the pendency of the proceedings herein.
 19. The Ex Parte Applicant filed a Supplementary Affidavit sworn by him on 5th July 2024. He deposed that he placed reliance on annexure BWM2 running from pages 3 to 13. On 19th June 2024 his current advocates discovered, when perusing the file handed over to them by the previous ones, that the file had a document referred to as "Respondent's Written Submissions." It was dated 18th November 2021. He inquired from the previous advocate whether it would be possible to retrieve the e-mail that forwarded the document to them. The Advocates were able to retrieve an e-mail sent on 19th November 2021. Further, it was evident from the record that during the proceedings of 7th December 2021, Miss Bett Advocate holding brief for Mr. Ombati drew attention to the court that the Respondents had filed written submissions. Therefore, it was not true that the taxation proceeded ex parte. He annexed to the Affidavit and marked BWM2 a copy of the "Respondent's Written Submissions" and a page of the two Emails, sent on 16/12/2021 at 17:12 PM and 19/11/2021 at 13:15 PM.
 20. The Applicant filed a Further Affidavit sworn on 19th July 2024 by Brian Ikol. He deposed that the alleged service of the Bill of costs on the 2nd November 2021 was done through the firm of Milimo Muthomi and Company Advocates, yet the said law firm came on record for the Ex Parte Applicant



- on 25th May 2024. He cited and reproduced the provisions of Order 9 Rule 9 of the Civil Procedure Rules that unless a Notice of Change of Advocates is duly filed and served, an advocate on the record for a party remains the one on the record subject to removal from there at the instance of another party under Rule 12 of the Order 9 or the withdrawal of the Advocates under Rule 13.
21. He added that on 14th May 2024 counsel from the law firm previously on record appeared and stated that they were neither acting alongside nor had they signed a consent allowing them to come on the record. Therefore, the firm of Milimo Muthomi & Co. Advocates were strangers to the suit and could not have served as was purported to be on 2nd November 2021. In any event, if service was affected then it was improper.
 22. The applicant was never served with the Bill of costs nor the taxation notice requiring them to attend on the date of taxation. The applicant was never served with the bill of costs and only learnt of the same when they were served with the certificate of costs. The applicant was a stranger to the annexure marked BWM2 in the Supplementary Affidavit. The e-mail print-out attached to the Affidavit showing it was from the applicant it did not show to whom it was addressed to as opposed to how an Email printed-out to be.
 23. Further, the instant matter was conducted initially by Miss Njuguna and not Mr. Enock Karanja. Annexure BWM2 did not form part of the court record. The document was never referred to or considered by the taxing master. The applicant would suffer great injustice if the application was not heard. It was made with utmost good faith.
 24. The application was disposed of by way of written submissions. The Respondent Applicant filed its dated 29/7/2024 while the Ex parte Applicant/ Respondent filed its dated 3/8/2024, and a List of Authorities dated the same date. It contained twelve decisions.
 25. This Court has considered the application, the law and the submissions by the rival parties. It is of the considered view that only two issues lie for determination. Further, the Court has given due consideration of the detailed submissions especially by the Ex Parte Applicant. The first one is whether the application is merited. Secondly, who to bear the costs of the application.
 26. The procedure for taxation of Party and Party bills of costs is provided for under the Advocates Remuneration Order read with the *Advocates Act*, Chapter 16 of the Laws of Kenya. On the merits of the instant application, several issues flow from it. These are whether the Applicant was served with the Bill of costs dated 14th October 2021 and the Notice of Taxation thereof. Further, if it was served with the said Bill and Notice, whether it was given opportunity to participate in the taxation and whether it was given opportunity to request for the reasons for the determination of the taxation in order for it to object to any items that may have been awarded.
 27. This Court is called upon to set aside a decision of the taxing master. It is a discretionary power to exercise. But the Court is alive to the legal unction that the discretion, including that of extending time is to be exercised judiciously and not whimsically or out of sympathy or on caprice. This was emphasized in *Paul Wanjohi Mathenge vs Duncan Gichane Mathenge (2013) eKLR*. Further, a Judge should not interfere with the taxing master's decision unless it was based on an error of principle or the award was so manifestly excessive as to justify an inference. This was the holding by Ringera J in *First American Bank of Kenya vs. Sahn & another (2002) 1 E. A 64*. Thus, this Court will proceed with extreme caution in the instant application.
 28. Under the Advocates' Remuneration Order, the jurisdiction of taxation of bills of costs is reserved to the taxing officer, who is the deputy registrar of the High Court and courts of equal status. The Judge ought not to be drawn into the arena of taxation. However, he/she may get into it when his/



her jurisdiction is invoked by way of a reference from a decision on taxation made under Rule 11 of the Advocates Remuneration Order. In summary, the Rule provides that where a party who wishes to object to the decision of a taxing officer he as, within 14 days after the decision, to give notice in writing to the taxing officer of the items he objects. When the taxing master receives the notice he/she is tasked to deliver them within the shortest time possible. Upon receipt of the reasons, if dissatisfied, the party is required to apply, within fourteen (14) days, by chamber summons to the Judge a reference setting out the grounds of his objection, and it has to be served upon all the parties concerned.

29. Of reasons by the taxing master, the Court held, in *Bernard Gichobi Njiru vs. Kanini Njira Kathendu & another* (2015) eKLR, that a magistrate is allowed and or mandated by law to assess or tax costs payable in a given case. And where the reasons for the taxing master's decision are already contained in the decision there no need to seek further reasons, as was held in *Ahmed Nassir vs NBK Ltd* (2006) E. A.
30. In applying the principles enunciated above, the contention herein is the Respondent was not served with the Bill of Costs. It only got to learn of it when served with the Certificate of Costs. The Ex Parte applicant laments at this contention. He stated that service was effected and that it was that the Respondent was indolent and did not want to participate in the taxation.
31. This Court notes that the record shows that the numerous incidents of service herein was basically through electronic mail. This was in the wake of the amendment to the Civil Procedure Rules regarding such service.

32. Order 5 Rule 22B (1) and (2) provides on service via electronic mail that,

- “(1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
- (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.”

Order 5 Rule 22C (1) and (3) provides regarding service through Mobile enabled service that,

- “(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.”

33. It is beyond doubt from the above provisions that it is not enough to send process or notices or documents in a bid to serve. One has to obtain a delivery receipt thereof. There is no shortcut to this. For emails, this Court has stated before that the process server has to obtain an Email header which details the path the email followed until it was delivered to the recipient's Internet Protocol (IP) address. That would show when it was delivered and even read. For service via Mobile, the delivery message “info” has, when pressed slightly longer than tapping, details of the time the delivery was made and the message read. These two are critical evidence one needs besides the requirement to discharge the burden that the Email or Mobile number belongs to the recipient because there are instances when emails are abandoned, closed or full and will not be in use, or when an “owner” of a mobile number gives it up and the service provider allocates it to another person. Thus, there is much more in service than just sending the documents via email or mobile. Injustice is often meted by parties convincing the Courts that the mere sending of an email or message is enough. It is not and courts should be firm in implementing the law while ensuring no abuse of the process of technological advancement.



34. From the annexures in the Replying Affidavit and the Further Affidavit both by the Ex parte Applicant, I am not convinced that there was proper service of court process upon the Applicant. First, the email dated 3rd November, 2021 sent at 13:32 from the firm of Milimo Muthomi & Co. Advocates does not have any attachment to it as to show that indeed the documents referred to it as “Notice of Taxation” and “party and party Bill of Costs” were annexed to the email, if indeed it was sent to the Respondent/ Applicant. Secondly, the email was sent by a stranger in the name of Isaiah Birundu of Milimo Muthomi & Co. Advocates because the said law firm was not on record at the time. It does not show any relationship with the Ex parte Applicant at the time. Lastly, the purported service did not comply with Order 5 Rule 22B(2) of the Civil Procedure Rules because it did not have a delivery message to show that indeed it was ever delivered, even to date. In any event, there is no explanation as to why the service was effected physically on the Attorney-General and not on the Respondent. Also, there is no evidence of service on the other interested party - Christopher Mukhwana on all the occasions.
35. Even the email purportedly sent out on 06/12/2021 at 16:04 PM from M/S Kefa Ombati & Co. Advocates, it only listed two documents, namely, “List of Bundle of Authorities” and “Ex parte Submissions”. There were no attachments to it. There was no reference at all to a hearing notice.
36. Similarly, the emails referred to in the annexure BWM2 sent from the Ex Parte Applicant’s then Advocates on 16 December, 2021 at 17:12 and that one sent out on 19 December 2021 at 3:15 PM do not contain attachments. They do not show that they were ever delivered.
37. All the above purported service instances were denied. There is no reason for this court to be convinced that service that does not comply with the law was effective. In all these, the Ex parte Applicant did not file any Affidavit of Service to prove that indeed he had effected service. All counsel holding brief did every time she got to the taxing mater was to submit or ‘prove’ from the Bar that she had service. In any event the court record shows that indeed the Ex parte Applicant seems to have had a field day before the taxing master to the detriment and prejudice of the other parties in regard to the taxation that took place. Critical of all this was the purported service that ‘took place’ on 06/12/2021. It was a purported service for the taxation which took place the following day, 07/12/2021. That was a notice of less than fourteen (14) hours since it was effected at 17:12 PM. Even if it could have been effective, was it sufficient notice. Emphatically it was not.
38. Lastly, the taxing master did not give any reasons for determination on the various items awarded, as required by law. This is even more appalling regarding the instructions fees awarded, with no explanation as to why they would be that colossal for opposing a Judicial Review application.
39. The upshot is that the application is merited. It is hereby allowed in terms of prayer 2 and 4 to the effect that the decision of the taxing master made on 1st February 2022 and all consequential orders are hereby set aside. The Bill of Costs dated 14th October, 2021 to be served on all the parties, within the next seven days. The Ex parte Applicant to invite all the parties to attend before another taxing master than the one who taxed the Bill of Costs herein on 07/12/2021 and delivered a Ruling on 01/02/2022, on 13th March, 2025 for fixing a convenient date for fresh taxation.
40. The Respondent/ Applicant only, that is to say, the National Land Commission, shall have the costs of this Application.
41. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 20TH DAY OF FEBRUARY, 2025.



HON. DR. IUR NYAGAKA,
JUDGE

RULING: KITALE ELC JR. NO. 1 OF 2017 - D.O.D. - 20/2/2025	0
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