KTK Advocates v Nairobi County Government (Miscellaneous Cause E056 of 2020) [2024] KEELC 5467 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5467 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CAUSE E056 OF 2020

AA OMOLLO, J

JULY 25, 2024

BETWEEN

KTK ADVOCATES ..... DECREE HOLDER

AND

NAIROBI COUNTY GOVERNMENT ..... JUDGMENT DEBTOR

RULING

1. The subject matter of the instant application is the Notice of Objection dated 22nd February, 2014 against the ruling of the taxing officer dated 10th May, 2022 with regards to the Advocate's Bill of Costs dated 1st October, 2020. Annexed to the objection is a chamber summons application dated 22nd May, 2024 where the Applicant/Judgement Debtor seeks the following orders:

    a. Spent

    b. That this Honourable Court be pleased to refer the matter back for re-taxation of the Bill of Costs dated the 1st day of October, 2020;

    c. That in the alternative to prayer (b) above, the Honourable Court do exercise its inherent jurisdiction and be pleased to re-assess, re-tax the Bill of Costs dated 1st October, 2020 afresh and/or make such order or further orders as regards to the Bill of Costs;

    d. That the costs of this Application be in the cause.

2. The application was supported by the grounds listed in the chamber summons and the depositions in the affidavit sworn by one Christine Ireri, the Acting County Attorney of Nairobi City County.

3. In the affidavit she depones that the County Government instructed the firm of Miller & Co. Advocates to represent it in the taxation of the Bill of Costs by the decree holder dated 1st October 2022. That the parties canvassed the Bill by way of written submissions and on the 10th of May, 2022

the same was taxed at K.Shs. 1,338,011,582.76. The Applicant contends that the taxing master erred in failing to consider the record of pleadings in particular the Plaint dated 11th May, 2012 and relied on the value of the subject matter as K.Shs. 61,500,000,000 while tabulating the instructions fees in item number one. That the value was an alternative prayer to two prior prayers that had been sought in the Plaint. st June, 2016 which indicated that the parties entered into a prior legal fees agreement and that the letter was never disputed by the decree holder, their only argument being that the same had not been adduced using a replying affidavit.

The Applicant deponed further that there existed a letter dated 21

4. While relying on Article 159(2)(d) of *the Constitution*, the Applicant deponed that it is very clear that justice shall be administered without undue regard to technicalities and as such the taxing master should have considered the totality of the letters submitted in the said bill of costs. That the Applicant will suffer substantial loss and damage if the orders are not granted considering the fact that they had already paid the judgement debtor K.Shs. 110,000,000 towards the legal fees as agreed by parties. That the letters marked 'CI-5' and 'CI-6' are agreements and as such it should be in accordance to section 45(6) that the costs of an advocate shall not be subject to taxation nor to section 48.

5. The Applicant urged this court to grant the prayers sought in the application.

Decree Holder's Case

6. In response to the Objection and the application, the Decree Holder filed its Replying Affidavit deponed by Donald B. Kipkorir on the 28th of February, 2024. He depones that the supporting affidavit did not set out or establish the principles of law that the taxing master violated in her ruling especially because the subject matter of the suit and what was being contested was the suit property L.R No. 11344 measuring 3,078.12 acres which was valued at K.Shs. 61,500,000,000 at the time of filing the material suit. That the prayer in the suit was for surrender of the land and or compensation in lieu of K.Shs. 61,500,000,000. He deponed further that no fees agreement was ever reached between the parties and that the exhibits 'CI-5' and 'CI-6' cannot be introduced at this stage and that the Pending Bills Committee lacks jurisdiction to determine advocates' fees.

7. He continued deponing that the reference is an application for review and ought to be rejected because it doesn't establish legal or factual basis to interfere with the decision of the taxing master. That once judgement pursuant to section 51(2) of the *Advocates Act* has been entered and decree issue, the Reference is no longer an available remedy to a client. He urged this Court to find that the Reference is an extreme abuse of the Court process solely aimed at frustrating him from realizing the fruits of his judgement. That the application should be dismissed.

8. The Decree Holder also filed a preliminary objection dated 11th March, 2024 to the Applicant's application on the grounds that:

    a. There is no substratum to the Notice of Motion as the material Ruling of 15.02.24 granting leave to the Client to file reference out of time is void;

    b. Once judgment is entered pursuant section 51(2) of the *Advocates Act*, application of Rule 11 of the Advocates (Remuneration) Order is no longer available for Reference;

    c. Once decree has issued pursuant Judgement under section 51(2) of the *Advocates Act*, Reference is no longer available;

    d. The material Ruling of 15.02.24 granting leave to file the Reference was made without jurisdiction is null and void ab initio;

e. The Notice of Motion is belated and desperate attempt to cure a fatal defect in the procedure;

f. The Supporting Affidavit of Christine Ireri deposed on 22.02.24 is fatally defective and is for striking out;

g. The annexures to the Supporting Affidavit of Christine Ireri are fatally defective and are for striking out;

h. The Notice of Motion has no factual and legal basis and is for dismissal;

i. The Reliefs sought are without legal or factual basis;

j. The Notice of Motion is incurably flawed and defective;

k. The Notice of Motion is an extreme abuse of the Court process to undermine the Advocate's quest to execute the decree.

Submissions

9. Both the preliminary objection and the application were canvassed by way or written submissions. The Applicant's submissions are dated 7th May, 2024. It submitted on the following issues for determination:

a. Whether this Court has jurisdiction to set aside the judgement delivered on the 21st of September, 2023;

b. Whether this Court should set aside the judgement entered on 21st September, 2023 as against the Judgement Debtor/Applicant herein pending hearing and determination of the Reference;

c. Whether the Advocate/Decree Holder will suffer any prejudice;

d. Costs.

10. On the first issue, the Applicant submitted that this Court is clothed with the requisite jurisdiction to grant the orders sought having being established under Article 162(2) of *the Constitution*. That the judgement entered by this Court on the 21st of May, 2023 was pursuant to an application by the Respondent who invoked this Court's powers under the *Advocates Act* and specifically section 51(2). The Applicant submitted that once a party has requested for judgement to be entered by the High Court, they invoke the jurisdiction of the High Court in as far as section 25 and Order 21 of the Civil Procedure Rules and Act are concerned. They dissuaded this Court from applying the argument espoused in the case of Machira & Co. Advocates Vs. Magugu as the same can only apply in terms of the reference proceedings proper where one relies on the Rules and not the Civil Procedure Rules. They relied on the case of Nyandoro& Co. Advocates Vs. Kcb Group Ltd (Misc Civil Application No. 241 of 2019) where Majanja J opined that it is indeed within the powers of the Court to set aside a judgement once the same is prayed for and this sets the stage for the hearing of the reference.

11. They placed full reliance on the *Civil Procedure Act* and the Civil Procedure Rules in particular Order 10 Rule 11 and section 3B.

12. On the second issue, the Applicant submitted that the fact that a judgement remains in place and this places a legal hurdle to the Reference is it is successful and upon re-taxation it would lead to a different amount varying the certificate of the Taxing Master. That the Decree holder has ensured that a decree is in place and has publicly stated that he has instructed auctioneers to levy distress amid the confusion of execution process against the Government. That the setting aside is to ensure that no party takes

an action that would render the proceedings in terms of the reference an academic exercise. That a conditional order was given before the decision to allow the Client to file its reference out of time and that although the conditional order has already been overtaken by events, it is still trite to set aside the judgement and consequential decree to at least give the parties the belief that they will have a fair hearing and to ensure that the Court is dealing with the issue with an open mind. They relied on the High Court case in Kaduna in Econet Wireless Limited Vs. Econet Wireless Nigeria And Another (FHC/KD/CS/39/208) where the Court stated that:

> " A consideration of some collateral circumstance and perhaps in some cases inherent matters which, may, unless the order of stay is granted, destroy the subject matter or foist upon the Court....a situation of complete hopelessness or render nugatory any order of the...Court or paralyse in one way or the other, exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo."

13. They further relied on the Nigeria Court of Appeal Case of United Cement Company Of Nigeria Vs. Dangote Industriees Ltd & Minister Of Solid Mineral Development (CA/A/165/2005) where the Court stated that:

> " Appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

14. That unless this Court intervenes, the reference will be rendered nugatory should the judgement remain in force as the Decree Holder will be at the liberty of executing the same. That the Court in RWW VS. EKW (2019) emphasized the importance of stay of execution.

15. On the failure to annex the letters to the Replying Affidavit, the Applicant submitted that it is a general principle that an applicant should not suffer due to a mistake of its Counsel as was held in the case of Lee G. Muthoga Vs. Habib Zurich Finance (k) Ltd & Another, Civil Application No. Nairobi 236 of 2009. They placed further reliance on the case of Kimani Vs. Mc Conmell (1966) EA 545.

16. On the third issue, the Applicant submitted that the Decree Holder is not going to suffer any prejudice if the judgement is stayed because this will give the Judgement Debtor an opportunity to be heard on merit and in the likely event of success, the Reference will not be rendered nugatory. That in fact the Decree holder had already been awarded costs pursuant to the earlier reference filed out of time and as such they have been adequately compensated. They urged this Court to allow the application with costs.

17. The Decree Holder's submissions are dated 29th April, 2024. He began by quoting the locus classicus case of Owners of the Motor Vessel "lillian S" Vs. Caltex Oil (kenya) Limited Mombasa Civil Appeal No. 50 of 1989 (1989) KLR and submitted that the exclusive code for all disputes relating to Advocate/Client Bill of Costs does not provide for the setting aside of a judgement pursuant to taxation and that in th absence of applicable law, the Client cannot conjure up a vehicle to set aside a validly entered judgement. That the application is based on unknown law and is without substratum and it should therefore fail.

18. The Decree Holder continued to submit further that Rule 11 of the Advocates (Remuneration) Order is mandatory in its wording, tenor and effect and there is no room for ambiguity. They relied on the following cases:

a. Indian Appellate Tribunal case in Mahanagar Reality & ORS Vs. Ajit Jain & Ano. Appeal No. AT0050000000021283 where the Court held that:

> "The Hon'ble Supreme Court has settled the principle that a Statute has to be interpreted in the context in which the words are used in that particular statute....Therefore as per literal rule of interpretation also the Tribunal is needed to go by the wording of provisions mandating pre-deposit which provide no exception for its compliance..."

b. Supreme Court in Moses Mwicigi & Others Vs. Iebc & Others Supreme Court Petition No. 1 of 2015 (2016) EKLR stated that:

> "The Court has on a number of occasions remarked upon the importance of Rules of Procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent..."

19. The Decree Holder concluded by submitting that if the framers of the Advocates (Remuneration) Order wanted a judgement pursuant to the said Orders then they would have provided the applicable provisions. That the application is without any legal and statutory substratum and therefore should be dismissed and/or struck out with costs to the advocate.

Analysis and Determination

20. The Preliminary Objection and the Application raise the following issues for determination:

a. Whether this Court has jurisdiction to deal with the application to set aside the decision of the taxing master dated 21st September, 2023;

b. Whether the decision of the Taxing Master should be set aside and the Bill of Cost dated 1st October, 2020;

c. Who should pay for the costs of this cause.

21. The Decree Holder in his preliminary objection has challenged the jurisdiction of this Court making it the first issue to be dealt with. In Owners of the Motor Vessel "Lilian S" Vs. Caltex Oil (kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

> "Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

22. The Environment and Land Court derives its jurisdiction from Article 162(2)(b) of *the Constitution* which provides that this Court shall have jurisdiction over disputes relating to the environment, the

use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

> "(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land."

23. The Decree Holder has submitted that this Court has no jurisdiction to set aside the Taxing Master's decision. Rule 11 of the Advocates Remuneration Order provides as follows:

> 1. Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
>
> 5. 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."

24. The Order gives the High Court jurisdiction to handle applications therein and although it does not exclusively mention this Court, the new Constitutional dispensation introduced the ELC and the ELRC as Courts of equal status to the High Court. This Court therefore has the relevant jurisdiction to handle the instant application.

25. While dealing with a similar application in the High Court, Justice PJO Otieno in the case of *Monyo & 2 Others Vs. Ngige (miscellaneous Civil Application E07 Of 2020)* [2023] KEHC 817 (KLR) (10 February 2023) (ruling) held that the High Court lacked jurisdiction to deal with a reference that emanated from the ELC. He stated that:

> "21. On jurisdiction, it is of note that the proceedings giving rise to the current application were conducted before the Judge sitting and presiding over Environment and Land Court. The jurisdiction of this court is never expected to extend and overlap to the other court.
>
> 22. Even though under the *Advocates Act*, the court is defined as the high Court, with the advent of *the Constitution* 2010, and section 7 of the 6th Schedule, the definition of the court under the *Advocates Act* must be construed with adaptations, alterations, qualifications and exceptions necessary to bring into conformity with *the Constitution*.
>
> 23. For purposes of taxation of party and party costs, that must be conducted in the suit in which costs were awarded, the act must be construed to vest the jurisdiction upon the judge of the Environment and Land Court to hear reference and even entertain application for extension of time so that the court take full charge of all disputes before it and the related and incidental disputes emanating and flowing therefrom. Like in this matter, there is a prayer for stay of the certificate of taxation. That certificate was issued in the Environment and Land Court file. To issue an order of stay in this matter would not only affront section 34 of the *Civil Procedure Act* but equally go against the dictates of article 162 (5) of *the Constitution* and paint the court as being bent on usurping the jurisdiction of that other court. On the basis that the taxation sought to be challenged was conducted and concluded in the Environment and Land Court file, the court determines that it has no jurisdiction to entertain the matter. (emphasis mine)"

26. The second issue is whether the decision of the Taxing Master of 23rd September, 2023 should be set aside/reviewed or referred for retaxing. AT 69 by Ringera J. (as he then was) who delivered himself thus;

> The applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in First American Bank of Kenya Vs Shah and Others [2002] 1 E.A. 64
>
> > "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".

27. The Court of Appeal in Joreth Ltd Vs Kigano & Associates (2002) 1 EA 92, held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

28. The matter of contention between the parties was twofold: the award of K.Shs. 1,338,011,582.76 as the instructions fees by the Taxing Master being the percentage of the value of the subject matter. The second part is whether there was fee agreement that ought to have been taken into consideration. The Client/Applicant contends that the of Kshs 61,500,000,000 attached to the subject matter was LR No. 11344 measuring 3,078.12 acres was an alternative prayer and so the taxing master erred in using the said amount in tabulating the instructions fee.

29. I have perused a copy of the Plaint which was attached to the current application and noted in paragraph 9 thereof, it is pleaded that;

> " The Plaintiff's claim against the 3rd Defendant is for rescission of the said allocation and delivery up of vacant possession of the said land and or in lieu of payment of the market value being Kshs 61,500,000,000"

30. A plain reading of this pleading states that the Plaintiff had put the market value of the suit land at K.Shs. 61,500,000,000. There is no document annexed from the original file which challenged the value pleaded or which gave an alternative value to justify the submission that the taxing master erred. Other than pleading and submitting that the figure of Kshs 61,500,000,000 should not have been used for tabulating the instructions fee, the Client/applicant has not submitted in the event the value used was correct then the amount awarded taxed was not within the renumeration order.

31. Odunga J (as he then was) in the case of Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries LTD, [2014] EKLR held thus:

> " Taking cue from the above decision, a decision which I associate myself with, it is my view and I hold that in judicial review, constitutional applications and in public electoral matters, the amount in dispute is not necessarily the determinant factor in deciding the quantum of costs payable though the same may be taken into account in considering the interest and importance of the matter to the parties. As was rightly submitted by the Respondent, the matter never went to trial and the amount of instructions fees awarded was much more than 100%. Therefore, it was not possible to determine the exact time that was expended in the matter."

32. The Applicant contends that the Taxing Master failed to put into consideration the Legal Fee Agreements entered into between the parties that stipulated the fees to be paid to the Advocate/Decree Holder. The Decree Holder submitted that the letters were never part of the record in Court or before the taxing master and as such could not introduced be at this juncture. The Applicant in its rebuttal blames its former advocates for not including the letters as part of their record before the taxing master.

Introduction of new evidence at the reference stage has been shunned upon by Courts. In Otieno Ragot & Company Advocates Vs. National Bank Of Kenya Limited (2020) EKLR Asike Makhandia JA observed that:

> " It is common ground that a reference is an appeal from the decision of the taxing officer. Therefore, for a party to adduce additional evidence on appeal, leave ought to be granted by the said court. In the present appeal the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A

of the Advocates Remuneration Order and on reference, the judge only deals with what was on record before the taxing officer. In the case of Wanga & Co Advocates (supra), the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law. The two courts below were not given an opportunity through the proper channels to strike a fair balance. By allowing the new evidence on account of inadvertent mistake, the learned judge opened a door to litigants to introduce all sorts of material which should have been properly placed and considered by the taxing officer and not before the first appellate court. Having discussed elsewhere in this judgment and concluded that the application for review was not merited, I find that the learned judge erred in allowing the said evidence." (emphasis mine)

33. I have looked at the proceedings before the Deputy Registrar and noted that once the bill was filed and fixed for hearing, the Applicant through its advocates on record did not raise objection to the taxing of the bill because of an existing agreement. It is a matter which ought to have been raised before the taxing master determine the validity or otherwise of the bill filed on the basis of the fee agreement between the parties. The record only shows attempts to negotiate the bill and the parties did not reach a settlement.

34. In fact, the Deputy Registrar in her ruling stated that what was included in the bundle of documents was an unsigned letter from the Advocate decree-holder dated 21st June 2016 which cannot constitute the so-called agreement. She said thus "this court is not convinced that there existed a retainer agreement between the parties. It is moreover quite unfortunate that no proof has been tendered to show that there existed a retainer agreement between the parties other than the unsigned letter of 21.6.2016 from the Applicant firm."

35. Looking at the two letters annexed that are referred to as agreement on fees, they all emanate from the Respondent addressed to the sitting Governor of the Applicant. They were referred in the impugned ruling and so they are not new documents. One of them dated 21.6.2016 which the taxing master referred to stated that the client had agreed to pay a certain sum of money as his fees. The second letter is reminding the client to pay him his deposit of Kshs 400000. There is no letter exhibited from the Client/Applicant confirming receipt of this letter and that it constituted an agreement between the parties. An agreement means that parties have agreed and signed a document as anticipated in section 45 of the *Advocates Act*.

36. Consequently, I hold that the value of the land in dispute was ascertainable from the pleadings and this was the figure/value that the Taxing Master relied on in calculating the instruction fees. I find no error on the amount taxed as instructions fee. As stated, the issue of agreement of fees was never taken up before the taxation (for the deputy registrar to determine if the bill could proceed to taxation). Neither has the Applicant demonstrated under this reference that the bill should not have been filed. I therefore find no substantial evidence to justify interference with the Taxing Master's undoubted exercise of her discretion in awarding the instruction fees.

37. The Applicant also invited this court to exercise her jurisdiction to re-assess or re-tax the bill. There is no proof place before the court that would warrant re-taxation. The documents annexture 6 evidencing some form of payment of the Respondent's fee are not intended at disputing the taxation but whether the amount taxed can be reduced from what was already paid. As stated in the case of Otieno Ragot & Co Advocates versus National Bank of Kenya supra, this court cannot admit new evidence that was not tendered before the taxing master. Even exercise of discretion must be exercised judiciously i.e within the parameters of the law.

38. The upshot of the foregoing is that:

a. The Preliminary Objection dated 11th March, 2024 has not been proved and as such it is dismissed;

b. The Chamber Summons dated 22nd February, 2024 is also dismissed;

c. Each party shall bear their costs of this application and the P.O.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH OF JULY, 2024.

A. OMOLLO

JUDGE