



**Randolph Tindika t/a Tindika & Company Advocates v Mudachi
& 5 others (Environment and Land Miscellaneous Application
E033 of 2023) [2024] KEELC 5385 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E033 OF 2023
SM KIBUNJA, J
JULY 24, 2024**

BETWEEN

**RANDOLPH TINDIKA T/A TINDIKA & COMPANY
ADVOCATES APPLICANT**

AND

**ANTHONY MUTEKE MUDACHI 1ST RESPONDENT
RICHARD KALUNDU MUDACHI 2ND RESPONDENT
ELIJAH K. KIMANTHI 3RD RESPONDENT
SAMUEL KATETEI 4TH RESPONDENT
WILLIAM MUDACHI 5TH RESPONDENT
LAUCADAI N. MUTEKE 6TH RESPONDENT**

RULING

1. The 1st respondent, being dissatisfied with the taxation ruling of Hon. J.M Nyariki delivered on 11th October 2023 filed a reference vide a chamber summons application dated 27th October 2023 seeking the following orders:
 1. Spent.
 2. That there be a stay of execution of the taxing master’s ruling delivered on 11th October, 2023 with respect to the Applicant’s Advocate/Client Bill of Costs dated 7th June 2023.
 3. That the ruling of the taxing master Hon. JM Nyariki delivered on 11th October 2023 with respect to the Applicant’s Advocate/Client Bill of Costs dated 7th June 2023 be set aside in its entirety.



4. That the costs of this application be provided for.
2. The said application is supported by 7 grounds on its face and supported by the affidavit sworn by the 1st defendant on even date as the application wherein he deposed inter alia that he is apprehensive that before the reference is heard and determined, the applicant/advocate, to wit Messrs Randolph Tindika t/a Tindika & Co. Advocates, might proceed with execution of the taxed costs and render the said reference nugatory; that he had valid objections including that the taxing master erred in principle by failing to ascertain the correct value of the subject matter; and that the taxing master committed an error in principle by awarding costs which are manifestly excessive.
3. The applicant/advocate filed a replying affidavit sworn by Randolph M. Tindika Advocate/applicant, on 14th December 2023, inter alia deposing that the bill of costs emanated from ELCC No. E222 of 2021, filed by Mary Musuki Mudachi and Immanuel Mutua Mudachi seeking for various prayers against the 1st and 2nd respondent and the 3rd to the 5th respondents were interested parties; that among the prayers was that the purchase price of Kshs 75,400,000 be shared equally among nine beneficiaries; that upon the 1st and 2nd respondents giving him instructions, he entered appearance, and filed a notice of preliminary objection for the 1st and 2nd respondents; that he thereafter filed a notice of appointment for the 1st to 4th & 6th interested parties; that subject matter was determined by schedule 6 of the Advocates Remuneration Order 2014; that even though in the said bill of costs there were three properties in issue, the taxing master relied only on L.R 28164, which had been sold at Kshs. 75,400,000 and taxed Kshs.1,331,000; that the respondents have not demonstrated that they gave notice in writing to the taxing master within fourteen days after the delivery of the said ruling, and the reference has no basis and should be dismissed.
4. The 1st respondent filed a further affidavit sworn on the 2nd February 2024 inter alia deposing that ELCC No. E222 of 2021 was settled by consent dated 17th December 2021, and Emmanuel Mudachi was paid Kshs. 900,000 and Mary Mudachi was paid 4,538,150; that the taxing erred in principle by awarding instruction fees of Kshs, 1,331,000, based on the value of Kshs. 75,400,000, instead of Kshs. 5,438,150; that the value of the three aforementioned parcels of land to wit L.R 28164, plot Mariakani/Kawala 'B'/10 and Mariakani/Kawala 'B'/310 did not amount to Kshs. 135,000,000 and that the applicant/advocate has not disclosed that he is holding Kshs. 11,180,015, on his behalf.
5. The applicant/advocate filed a further replying affidavit sworn on 2nd May 2024 deposing inter alia that Kshs.5,438,150 was the amount paid to the plaintiffs but the total paid to all beneficiaries was Kshs, 75,400,000; that the taxing master was alive to the requirements of the law and appreciated that the value of the subject matter was derived from the pleadings; that the instruction fees is earned upon receipt of instructions from clients, and that he is not holding Kshs. 11,180,000 on behalf on the 1st respondent; that the 1st respondent owes him fees for services he offered his cousin, Mwanzia Mtaji, in CMCC 153 of 2013 and ELCA No. 10 of 2017 of Kshs.157,793 and 310,195 respectively, which he undertook to pay; the 1st respondent also owes him Kshs.270,965 which he undertook to settle for services offered to his wife, Damaris N. Muthusi, in the purchase of Kilifi/Mariakani/Kawala 'B'/16; that the 1st respondent is not being honest and is misleading the court and that there is no valid reference before the court.
6. The learned counsel for the respondents filed their submissions dated the 15th February 2024, while that for the advocate/applicant filed their submissions dated the 14th December 2023 and 1st May 2024 respectively, which the court has considered.
7. The issues for the court's determinations are as follows:



- a. Whether the respondents have established the taxing master misapplied the principles on taxation in determining the instruction fees.
 - b. Whether the reference dated the 27th October 2023 has merit.
 - c. Who pays the costs in the suit?
8. The court has after considering the grounds on the application, the affidavit evidence by the parties, submissions by learned counsel, superior courts decisions cited thereon come to the following determinations:

- a. The applicant/advocate raised issue with the validity of the reference which the court ought to deal with first, as it has the potential consequence of summary determination. As rightly put, a reference is provided under rule 11 (2) of the *Advocates Remuneration Order* which states:

“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.”

The applicant/advocate argues that the respondents did not seek reasons for taxation and that the ‘purported’ reference was filed out of time. Although counsel for the 1st respondent did not address the issue of reference being filed out of time, Rule 11(1) required the 1st respondent to have sought for reasons on the taxation within 14 days after delivery of the ruling, while under Rule 11(2) the 1st respondent ought to have filed the reference/chamber summons application within 14 days after receipt of the reasons from the taxing master. I have looked at annexure AMM-3 to the further affidavit and it is the ruling of the taxing master. The ruling is sufficiently detailed in its reasoning.

- b. In the case of Kipkorir, *Titoo & Kiara Advocates v Deposit Protection Fund Board* Civil Appeal No. 220 of 2004; [2005] eKLR, where the Court of Appeal held:

“...It is true that the taxing officer did not record the reasons of the decision on the items objected to after the receipt of the respondent’s notice. It seems that the taxing officer decided to rely on the reasons in the ruling of taxation dated 24th February, 2004. That ruling at least indicated the formula that the taxing officer applied to access the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

Further in the case of *Abmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited* (2) [2006] 1 EA 5 the court similarly, held as follows:

“Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed



items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the *Advocates Remuneration Order* demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed.”

In this matter, despite the respondents requesting for reasons through a letter dated 27th October 2022, the ruling delivered on 11th October 2023 had already given the reasons for each item, including the item in contention which is the instruction fees. That the chamber summons application/reference having been filed on 27th October 2023, was not unduly delayed, and I find it was filed within time.

- c. In the case of *Peter Muthoka & Anor v Ochieng & 3 Others* [2019] eKLR it was 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”

Similarly, in the case of *Republic v Minister For Agriculture & 2 Others Ex Parte Samuel Muchiri W'njuguna* [2006] eKLR the court expressed itself inter alia as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other. The 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 manifestly excessive as to justify an inference that it was based on an error of principle.”

The respondent claims that the instruction fees was based on the wrong figure of Kshs. 75,400,000, instead of the consent figure of Kshs. 5,438,150, and that it is manifestly excessive.

- d. The court in the case of *Joseph Kiplangat Cheruiyot v M/S Weldon Ngetich & Co Advocates* [2021] eKLR cited with approval *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 At 99 and held:

“where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the Pleadings, Judgment or Settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers



just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. 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 should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.”

In the case of *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others* [2014] eKLR, the court observed that the taxing officer was right in awarding the instructions fee based on the amount that was allowed by the Court, and not what had been pleaded. The court stated:

“(26) If an advocate taxes his bill of costs before a matter is determined, then the taxing officer is supposed to base the instruction fees on the basis of the pleaded amount in the pleadings. However, once an award has been made by the court, then the taxing officer is supposed to use the figure awarded by the court in calculating the payable instruction fees while taking into account the other perimeters in increasing such fees, if at all.”

In the instant matter, the award had been made by the court by the time the taxation exercise was taking place. I therefore find the taxing master erred in principle by tabulating instruction fees based on the pleaded value of the properties of Kshs.75,400,000, as opposed to the already determined value, albeit by consent, of Kshs.5,438,1150. The taxing master’s ruling delivered on the 11th October 2023, is hereby set aside and referred back for re-taxation before a different taxing officer.

- e. Order 42 rule 6 (1) of the *Civil Procedure Rules* provides on stay of execution orders pending appeal. That as reference is a pathway for an aggrieved party in respect of taxed costs, or the Certificate of Cost, issued by the taxing master, the principles in that provision applies herein Mutatis Mutandis. In the case of *County Government of Tana River v Miller and Company Advocates* [2021] eKLR the court held that:

“The Court has considered numerous cases laid down for the exercise of judicial discretion. The guiding principles for determining whether or not to stay execution are;

- i. Where special circumstances of the case so requires;
- ii. There is proof of substantial loss that may otherwise result;
- iii. There is substantial question of law to be adjudicated upon by the appellat court;
- iv. Where if the stay is not granted, the appeal is successful, would be rendered nugatory. See for example;- *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another*[2015]Eklr, *Reliance Bank Ltd(In liquidation) v Noriake Investments Ltd, Rep v Kenya Anti-Corruption Commission & 2 Others*[2009]KLR 31, *Carter & Sons Ltd v Deposit Protection Fund Board & 2*



Therefore, having found that the taxing master erred in tabulating the instruction fees based on the wrong figure and having set aside the taxing officer’s ruling, I find there is nothing remaining in the form of taxed costs that can be subject of a stay of execution order.

- f. Under Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, the costs follow the event unless where there is a good reason to depart from the general rule. As the 1st respondent has succeeded in his application, I find no basis of departing from the general edict on costs, and is awarded the costs to be paid by the applicant/advocate.
9. Flowing from the foregoing, the court finds for the 1st respondent in the reference dated the 27th October 2023, and orders as follows:
- a. That the 1st respondent’s chamber summons dated 27th October 2023 is with merit and is allowed, and the taxing master’s ruling delivered on the 11th October 2023 is hereby set aside.
- b. That the bill of costs dated 7th June 2023 be re-taxed before a different taxing master.
- c. The 1st respondent’s Costs for the application to be borne by the applicant/advocate.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JULY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence of:

1st Respondent : Mr Chege for Mwanzia

Applicant/advocate : No appearance

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

