



**Karingo v Attorney-General & another; Ngunu & 3 others (Interested Parties) (Environment & Land Case 1404 of 2004) [2024] KEELC 6653 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1404 OF 2004**

**MD MWANGI, J**

**JULY 23, 2024**

**BETWEEN**

**JEPHTHAH NJAGI KARINGO ..... PLAINTIFF**

**AND**

**ATTORNEY-GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SAMUEL NGUNU ..... INTERESTED PARTY**

**MAAKA MUKUHI MUG ..... INTERESTED PARTY**

**JOHN NGANGA NJUGUNA ..... INTERESTED PARTY**

**JOSVIR TRADERS AND AGENCIES ..... INTERESTED PARTY**

**RULING**

**Background**

1. By way of Chamber Summons dated 26th March, 2024 the Applicant sought for the following orders, that: -
  - a. Spent
  - b. The decision of the Taxing Officer delivered on 14th December 2023 in as far as the same relates to taxation of item 1 and 2 of the Party and Party Bill of Costs as read on 24th November 2020 be set aside.
  - c. This Honourable Court be pleased to refer the matter to another Taxing Officer for re-taxation of items 1 and 2 of the Bill of Costs herein.



- d. The costs of this application be provided for.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of Jephthah Njagi Karingo, the Plaintiff herein deposed on the 26th March, 2024. The Applicant avers that Counsel for the Respondents herein (the 3rd and 4th Interested Parties) filed a Party & Party Bill of Costs dated 24th November, 2020 claiming a sum of Kshs. 6,887,997/=. The Bill of Costs was taxed on the 14th December, 2023 and a Certificate of Taxation subsequently issued on the 4th March, 2024.
3. The deponent avers that the firm of Gitobu Imanyara Advocates acted for him in the main suit. However, following the dismissal of the suit, he had a fallout with the said firm and has not heard from them after judgement was entered on 26th March, 2014. He avers that he only came to know of the taxation proceedings on the 19th March, 2024 when the said Counsel sent him the Certificate of Taxation via email. He states that he was disappointed to learn that his erstwhile Counsel had not responded to the Bill of Costs and left him in the dark despite the matter being of very great interest to him. He accuses his former Counsel of gross negligence and unprofessionalism by letting the matter proceed unopposed thus burdening him with a huge debt of Kshs. 6,887,997/=.
4. In reference to Items 1 and 2 of the Bill of Costs, the Applicant averred that the same are not only exorbitant but also unjustifiable for the reasons that the Interested Parties had limited stake in the case as there were no orders sought against them. The Interested Parties were not the primary parties to the suit hence the fees awarded had no basis. Further, that having been joined the proceedings voluntarily, getting-up fees is not payable.
5. He asserts that it is manifestly unjust that the Bill of Costs was taxed without him being afforded an opportunity to oppose the same. The amounts awarded are manifestly high which pose a threat of substantial and irreparable damage if enforced.

### **Interested Party's Grounds of Opposition**

6. In their grounds of opposition dated 8th April, 2023, the Interested Parties argue that the application is incompetent and incurably defective for hearing having been brought in contravention of the express provisions of the *Civil Procedure Act*. Further, that the application has been brought in total discard of the provisions in law on the mode of challenging a taxation of Bill of Costs.
7. They assert that the application is misconceived as the Applicants grievances against his Advocate are not grounds upon which the decision of a taxing master can be set aside. They assert that the Applicant slept on his rights 'for a decade' and as such, equity does not aid the indolent but the vigilant. Therefore, the application should be dismissed with costs.

### **Court's Directions**

8. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The Plaintiff/Applicant's submissions are dated 18th April, 2024 whereas the Interested Parties' submissions are dated 29th April, 2024. The court has had occasion to read the submissions which now form part of its record.

### **Issues for Determination**

9. Having perused the Application, the Supporting Affidavit, the Replying Affidavit and the Submissions filed by the parties herein, the issues for determination in my view are:
  - a. Whether the claim for costs by the 3rd Interested Party abated.



- b. Whether the Plaintiff/Applicant was duly represented during the Taxation proceedings;
- c. Whether the Certificate of Taxation issued by the Taxing Master in this matter should be set aside as prayed for by the Plaintiff/Applicant.

### **Analysis and Determination**

#### **a. Whether the claim for costs by the 3rd Interested Party abated.**

10. The first issue for determination has been informed by the Plaintiff's assertions in his submissions. The Plaintiff/Applicant has sought a number of orders in his submissions, some of which are not stated in the application. The additional prayers sought in the submissions include;
  - i. That the Certificate of Costs dated 14th December, 2023 and issued on 4th March, 2023 is null and void due to the abatement of the suit following the death of the 3rd Interested Party and the failure to substitute his estate within the prescribed period.
  - ii. That the Taxing Master lacked jurisdiction to determine the taxation of costs following the abatement of the suit, as there were no active legal proceedings upon which to base such a determination.
  - iii. That an order of prohibition to prohibit the estate of the 3rd Interested party from filing any future Bills of Costs, given the abatement of the suit concerning them.
11. The Plaintiff/ Applicant submits that it has become apparent that the 3rd Interested Party died on the 12th December, 2020 and the Certificate of Taxation was issued on the 4th March, 2024. They argue that the Taxing Master lacked the jurisdiction to pronounce himself on the Bill of Costs.
12. As noted by the Plaintiff/Applicant in his submissions, the orders stated in the submissions were not sought in the application. It is settled law that submissions do not constitute pleadings or evidence. They are simply arguments that parties use to market their idea or issue to the Court. They cannot take the place of evidence.
13. The Court of Appeal in *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* [2014] eKLR, stated that:

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented”.
14. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 the court stated as follows:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.”



15. From the above decisions, it is evident that submissions do not constitute pleadings or evidence. Therefore, this Court cannot grant an order sought in the submissions which has not been sought in the application as is the case here. Parties are bound by their pleadings and therefore the court can only determine issues as contained in the pleadings; in this case, the application.
16. In any event, I agree with the holding in the case of *Mueni Kiamba -vs- Mbiti Kimeu Kimolo* [2017] eKLR, where the court was explicit on the two options open to a person wishing to execute where a decree holder is deceased. Referring to Order 24 rule 10 of the *Civil Procedure Rules* the Court held as follows:

“I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties. This goes a long way in ensuring the overriding objective of the *Civil Procedure Act* and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit....”

**b. Whether the Plaintiff/Applicant was condemned unheard during the Taxation Proceedings;**

17. The Plaintiff/Applicant does not dispute that the firm of Gitobu Imanyara Advocates was on record and acted for him in the proceedings. He however states that after delivery of the judgement, he had a fallout with the said firm and never heard from them till the 26th March, 2024 when the law firm sent him the Certificate of Taxation via email. He states that he was disappointed to learn that his erstwhile Counsel had not responded to the Bill of Costs and left him in the dark despite the matter being of very great interest to him. The Plaintiff/Applicant therefore submits that he was condemned unheard.
18. Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

  - a) upon an application with notice to all the parties; or
  - b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
19. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court.
20. In the instant suit, the Plaintiff/Applicant never filed or sought leave of court to change his Advocates after Judgement was entered. Neither did he file a Notice of Intention to act in person as required in law. It was therefore in order for the Bill of Costs to be served upon his erstwhile Advocates.



21. The right to choose legal representation belongs to the party hiring the services. The suit however belongs to the party who instructs counsel. It is not the other way round. A Party has an obligation to follow-up on the prosecution or defense of his/her case.
22. Therefore, the Plaintiff/ Applicant is not justified in claiming that he was condemned unheard. The Affidavits of Service on record show that his then Advocates were duly served throughout the taxation process and acknowledged receipt. Failure by his Advocate to respond is an issue that can be raised and dealt with in another forum rather than through a reference.
23. In *Duale Mary Ann Gurre –vs – Amina Mohamed Mahamood & Another* [2014] eKLR, the Court Judge held that: -

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

24. A litigant has a duty to follow up on his case after he has instructs an advocate. Therefore, if indeed there was a fallout between the Plaintiff and his previous Advocate, he ought to have appointed another Advocate or better still filed a Notice of Intention to act in person.

**d. Whether the Certificate of Taxation issued by the Taxing Master in this matter should be set aside as prayed for by the Plaintiff/Applicant.**

25. The starting point is whether there is a competent Reference before this court. The procedure to challenge the results of taxation is provided under Paragraph 11 of the *Advocates (Remuneration) Order* which provides that: -
  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.
26. It is not disputed that the Client/Applicant did not file the Notice of Objection to taxation contemplated under Rule 11(1) above but instead jumped straight into filing the Reference under Rule 11(2). The Client’s justification for the same is that it is not a mandatory requirement. I find this argument erroneous because it is the said Notice of Objection that sets in motion the jurisdiction of this court to deal with taxation disputes. In *OJSC Power Machines Limited, Trancentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board; Kenya Electricity Generating Company Limited & Another (Interested Parties)* [2019] eKLR Nyamweya J. (as she then was) aptly stated that:

“The provisions of Rule 11 of the Advocates’ Remuneration Order contemplate a notice in writing requesting for reasons of the Taxing Officer’s decision on taxation of specified



items of the Bill of Costs, and upon receipt thereof, an application commonly referred as a reference to a judge, setting out the grounds of objection to the taxation. The 1<sup>st</sup> Interested Party did not dispute that no such notice was given to the Taxing Officer. It is my view that even though the requirement of giving notice to the Taxing Officer of items objected to is not couched in mandatory terms, it is necessary for purposes of ensuring the necessary timelines are observed, and that such references are filed and heard timeously.”

27. Further, in *Matiri Mburu & Chepkemboi Advocates -vs- Occidental Insurance Company Limited* [2017] eKLR, Meoli J. while confronted with a similar situation noted that:

“Paragraph 11 (1) of the Remuneration Order requires a party seeking reasons for a taxation decision to give notice of the items of taxation to which the party objects which requirement was evidently not complied with in this case. Until the reasons sought under Paragraph 11 (2) of the Remuneration Order, are furnished the period of 14 days as contemplated therein does not begin to run...”

28. In my own view the provisions of paragraph 11 of the *Remuneration Order* serve several purposes. Firstly, the requirement that a party seeking reasons gives notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master of his objection. Thus the Taxing Master, the adverse party and ultimately the reference court in their respective roles can focus on the specific items objected to rather than the entire bills of costs, which often run into several pages.

29. The objective is obvious: the expeditious disposal of taxation disputes. Compliance with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily. The provisions of Article 159 (2) (d) of the *Constitution* were not intended to overthrow procedural or technical requirements, but to guard against “undue regard” to procedural technicalities in the administration of justice.”

30. It is evident that the notice of objection required to be given to the Taxing Officer is not just a mere technicality but a mandatory/necessary step in challenging the decision of a taxing officer.

31. I have perused the file; I have not seen a Notice of Objection or a semblance of it by the Plaintiff/Applicant. No explanation whatsoever has been offered to that end. In the premises, I hold and find without a doubt that the Plaintiff/Applicant did not properly invoke this Court’s jurisdiction to address or determine the issues raised in the Reference filed herein. The Reference is therefore incompetent, incurably defective and a non-starter.

32. The other aspect in determining the competence or otherwise of the purported Reference is on the timelines within which it was filed. In *Nyakundi & Company Advocates -vs- Kenyatta National Hospital Board* (2005) eKLR the Court rightly held that: -

“Under Rule 11 (2) of the Advocates (Remuneration) Order quoted above, a definite time frame for filing a reference is given. It is fourteen (14) days from the receipt of the reasons. If an Objector is delayed in making his/her reference he/she may apply for enlargement of time to make the reference under Rule 11(4) of the same Order.”



33. Similarly, in *Twiga Motor Limited –vs- Hon. Dalmas Otieno Anyango* [2015] eKLR, it was observed that: -

“The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said timelines would mean that the application would be rendered incompetent in the first instance.” [own emphasis]

34. Having found that the Reference is incompetent and incurably defective, I will not venture into the merits of the Reference as filed. The Chamber Summons dated March 26, 2024 is hereby dismissed in its entirety with costs to the Interested Parties/Respondents.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Ndung’u for the Applicant

Ms. Nyambura h/b for Mr. Mbigi for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents

Court Assistant - Yvette

**M.D. MWANGI**

**JUDGE**

