



**Kamau v Kinyanjui & 23 others (Environment & Land Case
234 of 2017) [2024] KEELC 5845 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 234 OF 2017**

**BM EBOSO, J
AUGUST 15, 2024**

BETWEEN

BERNARD GACHIE KAMAU PLAINTIFF

AND

**LIVINGSTONE KINYANJUI & 23 OTHERS & 23 OTHERS & 23 OTHERS & 23
OTHERS & 23 OTHERS DEFENDANT**

RULING

1. This court rendered a ruling in this suit on 23/11/2022. Through the ruling, the court struck out the plaintiff's suit on the ground that the suit was res judicata. The court awarded the defendants costs of the suit. Subsequently, the 1st, 18th and 24th defendants brought a party and party bill of costs dated 13/10/2023. The bill was taxed on 17/1/2024 at Kshs179,700. On their part, the 2nd to the 17th defendants brought a bill of costs dated 2/3/2023, which was taxed on 4/12/2023 at Kshs 815,110.
2. Dissatisfied with the decision of the taxing officer, the 1st, 18th and 24th defendants filed a reference through a chamber summons application dated 23/1/2024, inviting the court to set aside the award of the taxing officer on instruction fees and assess the item as drawn or remit the bill to the taxing officer for re-taxation. The said application is one of the two applications that fall for determination in this ruling.
3. The second application that falls for determination in this ruling is the plaintiff's chamber summons dated 29/1/2024 through which the plaintiff sought: (i) an order of stay of execution of the ruling rendered on 23/11/2022, pending the hearing and determination of Court of Appeal [Nairobi] Civil Appeal No. E004 of 2023; and (ii) an order setting aside the ruling of the taxing officer rendered on 4/12/2023 on the 2nd - 17th defendants' bill of costs. The court will first dispose the application dated 23/1/2024.



Application dated 23/1/2024

4. The application dated 23/1/2024 is a reference brought by the 1st, 18th and 24th defendants. It challenges the award of the taxing officer on only one item in the bill of costs dated 13/10/2023. The item relates to instruction fees.
5. The case of the applicants is that the instruction fee awarded is manifestly low. They contend that the taxing officer did not take into account the fact that the suit property comprised of 26 plots, each valued at Kshs 3,000,000, giving the suit property a total value of Kshs 78,000,000. The applicants fault the taxing officer for awarding them instruction fees of Kshs 150,000 while on the other hand awarding the 2nd - 17th defendants instruction fees of Kshs 750,000. They contend that the taxing officer failed to appreciate the complex nature of the case and the great interest of the parties.
6. The plaintiff did not file a replying affidavit to the application dated 23/1/2024 but submitted on it through his written submissions dated 5/6/2024. Counsel for the plaintiff opposed the plea for an order setting aside the award of the taxing officer. Counsel observed that the applicants only filed a notice of appointment in the suit, adding that at the point the suit was disposed, the applicants had not filed a defence in the suit. Relying on the decision in *First American Bank of Kenya v Shah & others* (2002) IEA 64, counsel argued that instruction fees is earned the moment a defence is filed. Counsel contended that the taxing officer properly took into account this fact and awarded the three defendants instruction fees that they were entitled to.
7. The court has considered the application and the submissions tendered on the application. The single question to be answered in the application dated 23/1/2024 is whether the taxing officer committed an error or misdirection that warrants the setting aside of the award on instruction fees.
8. The principal upon which this court exercises jurisdiction on a reference under rule 11 of the Advocates (Remuneration) Order in relation to instruction fee was outlined by the Court of Appeal in *Joreth Limited v Kigamo & Associates* [2002] eKLR as follows:

“What the Learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer, he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle”
9. The Court of Appeal further emphasized the following principle on instruction fees:

“We would at this stage point out that the value of the subject matter of a suit for the purpose 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 consider just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial Judge and all other relevant circumstances”
10. The court has perused the entire record that was before the taxing officer at the time of rendering the impugned decision. The court has also read the impugned decision. The following elements emerge from the record:
 - (i) the pleadings and the ruling that disposed the suit do not disclose the value of the subject matter;



- (ii) the suit was initiated in November 2016 and had been in court for 6 years as at the date of the disposal ruling;
 - (iii) There was no filed defence by the 1st, 18th and 24th defendants at the time this suit was disposed
 - (iv) the dispute related to land which is an emotive resource in Kenya;
 - (v) the advocates in respect of whom instruction fees was sought represented only 3 out of the 24 defendants;
 - (vi) the dispute related to a parcel of land registered as Ruiru Kiu Block 2/758 whose subdivisions were the subject of contestation; and
 - (vii) the suit was struck out without going for trial.
11. From the face of the ruling, the taxing officer took into account the above factors. The taxing officer rendered herself thus:

“From the plaint dated 29th November 2016, the prayers sought are for a declaration that the suit property belongs to the plaintiff, an order directing the 22nd defendant to cancel the titles of the various plots, damages for trespass and costs of the suit.

It is not possible to ascertain the value of the suit property from the pleadings or the judgment. In this matter, Schedule 6A of the [Advocates Remuneration Order](#) 2014 is applicable.

I note that the suit commenced on or about 29th November 2016 when the plaint was filed. The 2-17 defendants filed a notice of motion dated 19th April 2022 seeking to have the suit struck out. The ruling was delivered on 23rd May 2022 whereby the suit was struck out – meaning that the suit was pending for about 6 years. This bill of costs is for the 1st, 18th and 24th Defendants. The suit had 24 defendants out of whom Millimo, Muthomi & Co. Advocates was representing three. Having put all the above into consideration, and being guided by the contents of the Advocates Remuneration Order as well as the above case law, the court is of the view that Kshs, 150,000/= is reasonable in the circumstances, as party and party costs for the 1st, 18th and 24th defendants. The amount taxed off is therefore Kshs 1,225,000/=”

12. It is clear from the above excerpts that the taxing officer took into account relevant factors. No error or misdirection on principle is disclosed in the decision of the taxing officer. I do not, in the circumstances, find a proper basis for interfering with the taxing officer’s exercise of discretion. The result is that the application dated 23/1/2024, brought by the 1st, 18th and 24th defendants, fails for lack of merit. The same is dismissed. The applicants shall bear costs of the application.

Application dated 29/1/2024

13. The application dated 29/1/2024 was brought by the plaintiff. It has two limbs: (i) a plea for an order setting aside the taxing officer’s ruling on the bill of costs brought by the 2nd – 17th defendants; and (ii) a plea for an order of stay of execution pending the disposal of an appeal by the Court of Appeal, challenging this court’s ruling rendered on 23/11/2022. The two questions that emerge for determination in the said application are:



- (i) Whether the taxing officer committed any error that would warrant the setting aside of the decision of the taxing officer; and
 - (ii) Whether the criteria for grant of an order of stay of execution pending disposal of an appeal in the Court of Appeal has been satisfied.
14. The plea for an order setting aside the ruling of the taxing officer is to be evaluated alongside the preceding notice of objection dated 18/12/2023, on which the reference was anchored. Through the notice of objection, the plaintiff/ applicant objected to the awards of the taxing officer on items 1, 2 and 55 in the bill of costs dated 2/3/2023.
15. Item 1 relates to instruction fees while item 2 relates to getting up fees. Item 55 relates to the grand total in the bill of costs as drawn. It is therefore correct to state that Item 55 is an arithmetic addition of all the other items. If there is an error of addition, that is a matter for correction by the taxing officer under Section 99 of the Civil Procedure Act. It is not an issue to warrant a reference before a Judge.
16. The relevant framework and principle on instruction fees have been outlined in the preceding paragraphs of this ruling. The factors which the taxing officer took into account are outlined on the face of the impugned as follows:
- “From the plaint dated 29th November 2016, the prayers sought are for a declaration that the suit property belongs to the plaintiff, an order directing the 22nd defendant to cancel the titles of the various plots, damages for trespass and costs of the suit.
- It is not possible to ascertain the value of the suit property from the pleadings or the judgment. In this matter, Schedule 6A of the Advocates Remuneration Order 2014 is applicable.
- I note that the suit commenced on or about 29th November 2016 when the plaint was filed. The 2-17 defendants filed a notice of motion dated 19th April 2022 seeking to have the suit struck out. The ruling was delivered on 23rd May 2022 meaning that the suit was pending for about 6 years now overflowing to the 7th year. The court takes note of the fact that there are several defendants (15 of them represented by one law firm) in the matter which makes the matter more complex than if it had just a few defendants. Having the matter pending for six years also is a fact which has been considered. Having put all the above into consideration, and being guided by the contents of the Advocates Remuneration Order as well as the above case law, the court is of the view that Kshs 750,000/= is reasonable in the circumstances. The amount taxed off is therefore Kshs 625,000/=”
17. This court fully agrees with the reasoning of the taxing officer, save to observe that the bill of costs related to 16 [not 15] defendants. The advocate received instructions and documents from each of the 16 defendants. Each of the 16 defendants had a case to be put forth by the advocate. Taking into account the fact that the sum of Kshs 750,000 relates to instructions received from the 16 defendants, I do not think the figure is inordinately high to warrant interference by this court.
18. Item number 2 relates to getting up fees. The taxing officer declined to make any award on it. She gave reasons for that decision. I do not comprehend why the plaintiff objected to an item that was never awarded in the first place. Clearly, the objection is misplaced. I now turn to the plea for an order of stay of execution.



19. The relevant legal framework on this court’s jurisdiction to grant an order of stay of execution pending an appeal to the Court of Appeal is contained in Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

- “(2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. “

20. The tenor and import of the ruling in respect of which a stay order is sought is that, it struck out this suit for being res judicata. Put differently, the order which the plaintiff seeks to stay is a negative order.

21. Our superior courts have umpteen times stated that a negative order does not attract an order of stay of execution. The Court of Appeal for East Africa emphasized this principle in Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR. Subsequent pronouncements by our superior courts have emphasized this principle.

22. Even if this court were to consider the taxed costs as the basis for a stay order, I do not think the plaintiff has demonstrated that if the assessed costs of Kshs 815,110 and Kshs 179,700, respectively, are settled at this point, he will stand to suffer substantial loss. No attempt was made to demonstrate how and what substantial loss will be suffered. The view the court takes is that should the appeal be successful, the costs will be recoverable. For the above reasons, the court has not found merit in the application dated 29/1/2024. The application is dismissed. The applicant shall bear costs of the application.

23. In summary, the two applications dated 23/1/2024 and 29/1/2024, respectively, are dismissed for lack of merit. The respective applicants shall bear costs of their respective applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Chidi for the Plaintiff

Mr Omondi for the 2nd- 17th Defendant

Mr Muthomi for 1st, 18th and 24th Defendant

Court Assistant: Elvis Hinga

