Kotut v Kipngok & Another (Environment and Land Miscellaneous Application E019 of 2024) [2024] KEELC 6133 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6133 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E019 OF 2024

JM ONYANGO, J

SEPTEMBER 25, 2024

BETWEEN

KIPLAGAT KOTUT ..... APPLICANT

AND

ROSE JEBOR KIPNGOK & ANOTHER ..... RESPONDENT

RULING

1. By a Chamber Summons dated 30th April, 2024 the Applicant sought the following orders:-
    a. Spent
    b. Spent
    c. That the Taxing Master's decision/ruling dated 17th/4/2024 in ELC Appeal No. 32 of 2019 awarding and or assessing the Respondents costs of 280,000/- be set aside and matter be remitted back for reassessment before another Taxing Master other than Hon. Kiptoo, Principal Magistrate.
    d. That costs of application be providing (sic).
2. The application is based on the Applicant's Supporting Affidavit sworn on the same day. He deponed that he is aggrieved by the decision of the Deputy Registrar on the Bill of Costs dated 23rd August, 2023 contained in the ruling delivered on 17th April, 2024. He deponed that the DR took into account irrelevant factors and failed to consider factors he should have taken into account. He explained that the matter is not a land matter but arose from Garnishee Proceedings where the Appellant sought to execute costs of KShs. 390,000/- awarded therein; that the instruction fee therefore ought to have been based on the sum of KShs.390,000/-; and that getting up fees on the appeal do not arise unless the judge certifies the appeal. He thus prayed for review and/or setting aside of the decision and that the taxation be done afresh by a different taxing master.

3. The Respondent opposed the application vide her Replying Affidavit dated 22nd May, 2024 asserting that the taxation was not ex-parte as stated in the Certificate of Urgency. She deponed that under Rule 14 of the Advocates (Remuneration) Order (ARO), the prayers sought cannot be granted. The Respondent deponed that the Applicant's Advocate had not explained why he did not appear in court for the taxation on 14th February, 2024. That the Taxing master was entitled by law to proceed after confirming that the Applicant had been granted the opportunity to appear but failed to do so, and no basis has been laid why he could not perform his duty.

4. The Respondent further averred that under Rule 11 of the ARO, the applicant had 14 days from the delivery of the ruling to object to it but he did not comply. She added that for this reason, the application was not properly before the court, and in addition it was filed out of time and that it is not a Reference. She added that the application contravenes the rule on exhaustion of remedies. She also deponed that this court has no jurisdiction to review or set aside the taxation when time has lapsed and no leave has been sought to extend time. She asked that the application be dismissed with costs.

5. In addition, the Respondent also filed a Notice of Preliminary Objection of even date raising the following grounds that:- the application is improperly before court as the same is filed out of time and inordinately late; the application is improperly before the judge as the Honourable Deputy Registrar has not been given an opportunity to give reasons for his taxation which reasons form the basis of any Reference before the Honourable Judge; the Application is against the established rule of exhaustion of remedies; in the absence of the Deputy Registrar's reasons, the application is premature and has no basis to be before the judge; the application offends Rule 11 and 14 of the Advocates Remuneration Order; and that a Reference can only relate to specific items in the bill, not an entire review or setting aside.

Applicant's Submissions

6. The court directed parties to file their written submissions and they both complied. The Applicant's submissions are dated 14th June, 2024. Counsel submitted that the costs were awarded to the Respondent after she successfully objected to Garnishee Proceedings and she filed a Bill of Costs which gave rise to the ruling of 17th April, 2024. Counsel submitted that the Applicant had outlined the aspects he was objecting to in his Supporting Affidavit. Counsel submitted that the guiding principle in dealing with a Reference is that a judge will not interfere with the exercise of discretion by a Taxing Officer unless the Taxing Officer erred in principle. He relied on Kipkorir, Titoo & Kiara Advocate vs Deposit Protection Fund Board, NRB CA Civil Appeal No. 220 of 2004 (2005) eKLR.

7. Counsel further submitted that the instruction fees should have been pegged on the KShs.390,000/- that the Applicant was pursuing in the Garnishee Proceedings. Counsel relied on Joreth Ltd vs Kigano & Associates, NRB CA Civil Appeal No. 66 of 1999 (2002) eKLR, where it was held that the value of the subject matter ought to be determined from the pleadings, judgment or settlement but if not ascertainable from discretion of the taxing master. He also relied on Peter Muchoka & Another vs Ochieng & 3 Others (2019) eKLR. Counsel contended that under Schedule 6 provides that where the subject matter does not exceed KShs.500,000/- the instruction fees is KShs.45,000/-. That the award of KShs.200,000/- thereon was thus erroneous since the value was KShs.390,000/-.

8. She also argued that the award of KShs.66,666/- as getting up fees was exaggerated and erroneous because the court issued no certificate to the effect that the case is a proper one for such an award. That Paragraph 3 of Schedule 6 of the ARO governs fees for getting up on appeal for appeals from the subordinate court to the high court and provides that getting up fee is awarded on the basis of a certificate issued by a judge of the High Court trying the appeal. That the Taxing Master thus erred

in principle in awarding getting up fees. Counsel submitted that Rule 11 of the ARO provides the process of objection to taxation of costs. Counsel contended that since the ruling of the Taxing Master included reasons for his decision, it was unnecessary to file an objection and seek reasons. He argued that the application was filed 14 days from the date of the ruling thus it was filed within time. Counsel prayed that the application be allowed and the matter be referred for re-assessment, and also asked for costs. He relied on the case of Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2) (2006) eKLR).

Respondent's Submissions

9. The Respondent's Submissions were filed on 31st May, 2024 and are mainly on the PO dated 22nd May, 2024. Counsel for the Respondent submitted that the Application is improperly before court as it was filed after 21 days, which is out of the 14- day period provided under Rule 11(1) of the ARO. Counsel faulted the Applicants for failure to seek reasons for the decision of the Taxing Master, which reasons he ought to challenge. That the Applicant is instead seeking a stay of execution and setting aside of the ruling, which are matters outside the jurisdiction of this court. Counsel argued that the Taxing Master was performing a statutory function in his role as a Deputy Registrar and cannot therefore be improperly placed out of his seat. For these reasons, Counsel prayed that the application be dismissed with costs.

Analysis and Determination

10. I have read and carefully considered the application, affidavits and annexures thereto, the Preliminary Objection and written submissions by the respective parties herein and I am of the view that the issues for determination are:

    i. Whether the Reference herein offends paragraph 11 of the Advocates Remuneration Order; and

    ii. Whether the Taxing Master erred in principle in the assessment of the instruction fees.

11. The background of this matter is that the Applicant herein, who was the Appellant in ELC Appeal No. 32 of 2019, filed an application therein seeking Garnishee orders. Upon hearing the application, the court dismissed the same and awarded costs thereto to the Respondent. The Respondent then prepared and filed his Bill of Costs dated 3rd August, 2023 which was taxed at KShs. 280,391/- vide a ruling dated 17th April, 2024. It is this ruling that is the subject of the instant application.

Whether the reference herein offends paragraph 11 of the Advocates Remuneration Order

12. According to the Respondent, the Application herein offends Rule 11 as it was filed 21 days after the Taxing Master gave his ruling with no reasons given for the delay. The Respondent further contended that the Applicant did not seek reasons for the ruling of the Taxing Master. In response, the Applicant argued that there was no reason for him to seek reasons for the Taxing Master's decision as the same were contained in the decision delivered on the 17th April, 2024.

13. Rule 11 of the Advocates (Remuneration) Order provides a detailed process of objection to taxation of costs as follows:

    " 11. Objection to decision on taxation and appeal to Court of Appeal.

        (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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (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) 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."

14. Under Rule 11(1), if the Applicant was aggrieved by the ruling, he ought to have written to the Taxing Master indicating the items of taxation he objects to. Notably, Rule 11(1) is not coached in mandatory terms, as it provides that the aggrieved party "may" give notice of his objection. It is this letter of objection that sets the stones rolling in that the Taxing Master is now required to respond by giving reasons for his decision. However, in some instances the ruling of the Taxing Master is self-explanatory, thus courts have held that the requirement to seek reasons may be dispensed with.

15. In the case of Evans Thiga Gaturu vs Kenya Commercial Bank Limited (2012) eKLR, the court observed as follows;

> " That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another "ruling" containing the reasons...
>
> > ...In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.
> >
> > However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference."

16. Additionally, in Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board (2005) eKLR, 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."

17. I have seen and read the ruling by the Taxing Master which was exhibited in the current application. The Taxing Master gave reasons for the findings he made in his decision. For this reason, and further guided by the above decisions of the superior courts, I am convinced that there was no need to require further reasons for the decision.

18. As to the timeline, the Applicant submitted that the Application herein was filed on 30th April, 2024 thus within the 14 days period allowed under Rule 11(2) of the ARO. As explained above, Rule 11(1) gives the Applicant had 14 days from the date of the ruling to give notice in writing to the Taxing Master of the items of taxation to which he objects. The Taxing Master would then be obligated to respond by giving the reasons for his decision on the contested items. Upon issuance of the reasons for the decision by the Taxing Master, the Applicant has 14 days under Rule 11(2) to file the Reference herein. However, since the reasons had already been issued in the ruling, the Applicant had 14 days within which to lodge the Reference herein. It is clear that no reasons were given for the alleged delay in filing the reference. In addition, there was no prayer for extension of time within which to file the Reference.

19. Nevertheless, the issue of timelines has been raised and this court must determine it. The Ruling on the Bill of Costs was delivered on 17th April, 2024. The Application herein is dated 30th April, 2024 and I have confirmed from the endorsement on the Court Copy and from the e-filing portal that it was filed on 2nd May, 2024. Contrary to the allegations and submissions of both the Applicant and the Respondent, this Application was filed exactly 15 days from the date of delivery of the ruling. The Applicant only delayed in filing the application for 1 (one) day. In seeking to balance the interest of the respective parties herein, I am convinced that the failure to comply was not inordinate.

20. And although there was no prayer for extension of time or reasons given for the delay, this court will exercise its inherent powers to make a determination on the same. Rule 11(4) above gives this court power in its discretion to enlarge the time fixed by Sub-rule (1) or (2) for the taking of any step. The said provision does not give any conditions for the extension of time save that the decision to do so is wholly reliant on the discretion of the court. And having considered that the delay was only one day, it is my considered opinion that the same was not inordinate. For this reason, the court will proceed to deem the reference as duly filed on time.

Whether the Taxing Master made errors of principle in the assessment of the instruction fees

21. From the instant application, it appears that the Applicant's main objections are on the instruction fees and getting up fees. On the instruction fee, the Taxing Master made the following finding:-

> " Item 1 - instruction fees, the Respondent has submitted a fee of KShs.887,500/- under this item on the basis that the subject property is valued at KShs.52,000,000/-. I have perused through the pleadings and the court's judgment and note that this is a land matter and the value of the property was not expressly stated in the pleadings. In the case of Joreth Limited vs Kigano & Another (2002) E.A. 92 where the court set out various factors that are to be considered in determining the instruction fee, namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties."

22. The Applicant relied on the case of Joreth Limited vs Kigano & Associates (2002) eKLR where the Court of Appeal held that:-

> " We would at this stage point out that the value of the subject matter of a suit 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 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."

23. The Applicant has not denied the allegation that the Bill of Costs dated 23rd August, 2023 was on costs awarded on the Garnishee Proceedings awarded vide the Ruling delivered on 14th October, 2020. This is confirmed by the Respondent at Paragraph 10 of her Replying Affidavit where she deponed that "the claim addressed by the Court was the attachment of my accounts and not just one account". Since they were not Costs of the Appeal itself as claimed in the Bill of Costs and the ruling, the Taxing master ought not have assessed the instruction fees as he did. In fact the instruction fees for Garnishee Proceedings are set out at Paragraph 14 of Schedule 6A of the ARO which provides that:

> " 14. Garnishee proceedings
>
> (a) Instructions to institute garnishee proceedings, if not opposed - KShs 4,200
>
> (b) Instructions to institute or to defend garnishee Proceedings, when opposed, such sum as the taxing officer considers reasonable but not less than KShs14,000."

24. The issue of placing a value on the subject matter in my opinion does not arise, and the Joreth Limited Case cited above does not therefore apply in this instance. This is because there is a prescribed amount to be charged as instruction fees for Garnishee Proceedings. The award on that score was therefore principally erroneous.

25. On getting up fees, the Taxing Master's finding was that:

> " Item 2 - getting up fees and the same is taxed off at KShs.66,666/-."

26. According to the ruling on the Bill of Costs, the award of getting up fees was made under Paragraph 3 of Schedule 6A of the ARO which provides that:

> " 3. Fees for getting up an appeal
>
> In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee."

27. The Applicant properly submitted that there is no certificate issued by the court on the award of getting up fee. In any event, as already explained, the Bill of Costs filed was not for Costs awarded on the Appeal itself, but on a post-judgment Application. The Taxing Master thus erred in principle in making that award.

28. In ordinary circumstances, a court will not interfere with the exercise of the Taxing Master's discretion unless it is satisfied that he misdirected himself on matters and arrived at a decision that was erroneous. In Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board (2005) eKLR the Court of Appeal explained that;

> " On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur vs Nyeri Electricity Undertaking (1961) EA 497, the predecessor of this Court said at page 492 para I:
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> "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".
>
> An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles - see Arthur vs Nyeri Electricity Undertaking (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see Devshi Dhanji vs Kanji Naran Patel (No. 2), (1978) KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji vs Kanji Naran Patel (No. 2) (supra)."

29. From the foregoing, it is my finding that the Notice of Preliminary Objection dated 22nd May, 2024 has no merit and is therefore dismissed. On the other hand, I do find that the Taxing Master made errors of principle in his decision and completely misapprehended the provisions of the ARO applicable to the Bill of Costs. As a result, the figure he arrived at was manifestly excessive and exorbitant. In the

circumstances, I find merit in the Reference filed by the Applicant and the same is allowed as prayed. Consequently, the following orders shall issue:-

a. The Taxing Master's decision made on 17th April, 2024 in ELC Appeal No. 32 of 2019 awarding the Respondent costs of KShs.280,391/- and all consequential orders thereto be and is hereby set aside.

b. The Bill of Costs shall be taxed afresh by another Taxing Master other than Hon. Kiptoo, Principal Magistrate.

c. The Applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2024

.....

J.M ONYANGO

JUDGE

In the presence of;

Dr. Chebii for the Respondent

No appearance for the Applicant

Court Assistant: Brian