



Kiplagat v Chelimo & 6 others (Miscellaneous Reference Application E060 of 2022) [2024] KEELC 6256 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS REFERENCE APPLICATION E060 OF 2022**

**JM ONYANGO, J
SEPTEMBER 24, 2024**

BETWEEN

HELLEN JEPKOSGEI KIPLAGAT APPLICANT

AND

PHILLIP CHELIMO 1ST RESPONDENT

SHADRACK NKANAI 2ND RESPONDENT

ANDREW CHESAINA 3RD RESPONDENT

JAMES TOO 4TH RESPONDENT

DANIEL KETER 5TH RESPONDENT

SAMUEL KIPKEMBOI CHEBOM 6TH RESPONDENT

PHILEMON SAWE 7TH RESPONDENT

RULING

1. The Applicant filed a Reference vide a Chamber Summons Application dated 17th November, 2022 seeking the following orders:-
 - a. Pending the hearing and determination of this reference, this Honourable Court be pleased to order a stay of execution from the ruling of Honourable B.K. Kiptoo delivered on 2nd of September, 2022.
 - b. The ruling of the magistrate regarding the party/party bill of costs be set aside and taxed afresh.
 - c. This Honourable Court remit the party/party bill of costs dated 13th September, 2019 to be taxed afresh (sic) by a different Taxing Master.
 - d. Costs hereof be provided for.



2. The Reference is based upon the Applicant's Supporting Affidavit of the same date and the grounds on the face thereof. The Applicant's case is that the Bill of Costs dated 13th September, 2019 was vide a ruling delivered on 2nd September, 2019 taxed at KShs.387,894/-. That the Applicant's advocate sought and received reasons for the ruling from the Taxing Master which are dated 21st October, 2022. The Applicant deponed that the said reasons were general and she could not infer what the magistrate took into account in awarding KShs.100,000/- as the instruction fees. He added that the Taxing Master ought to have recorded the specific and clear reasons that he took into account in taxing the bill, and in not doing so, he had failed to exercise his discretion judiciously and awarded an exorbitant amount. The Applicant asked that this court either re-tax the bill of costs or remit it for taxation by a different taxing officer.
3. Phillip Chelimo, the 1st Respondent, swore an Affidavit on behalf of himself and the other Respondents on 29th November, 2023 stating that the Reference lacks merit, is frivolous, an abuse of court process and ought to be dismissed. He deponed that the party/party bill of costs was properly assessed as per the *Advocates Remuneration Order* (ARO) 2006. He added that the reasons given for the award on instruction fees in the reasons issued on 21st October, 2022 were sufficient. That the court exercised its jurisdiction and considered various factors thus the fee granted is reasonable and not exorbitant as alleged. Further, that the court cannot interfere with the decision of a Taxing Master unless he erred in principle, and in this case he considered all principles in making his award. He averred that the instant application is intended to frustrate the Respondents from recovering costs and it is only fair that it be dismissed with costs.
4. The application was canvassed by way of written submissions.

Applicant's Submissions

5. In the Applicant's submissions dated 4th July, 2024 Counsel commenced by citing the case of *R vs Wilkers* (1770) 4 Burr 2527, 2539: 98ER on the definition of judicial discretion. Counsel then submitted that a Taxing Officer must consider and note the factors taken into account when determining the instruction fee. Counsel argued that it was unclear how the Taxing Master exercised his discretion to arrive at the amount of KShs.100,000/- and that the reasons put forward are not helpful. Counsel argued that the Taxing Master did not exercise his discretion judiciously which is an error in principle and law, thus this court ought to assess the decision. Counsel also relied on *Humphrey & Company Advocates LLP vs Rural Electrification Authority* (2019) eKLR and *Republic vs Minister for Agriculture & 2 Others Ex parte Samuel Muchiri W'njuguna & 6 Others* (2006) eKLR. He argued that the decision should not stand as there is an error in principle. He asked that the Reference be allowed with costs.

Respondents' Submissions

6. On the other hand, the Respondents submitted that the Taxing Master has discretion to assess instruction fees in case the value of the subject matter cannot be determined from the pleadings. Counsel cited *Eastland Hotel Limited vs Wafula Simiyu & Co. Advocates* (2014) eKLR and *Joreth Limited vs Kigano & Associates* (2002) E.A. 92 at 99-100 in support of this contention. Counsel was of the opinion that the land had a value of approximately KShs.62,000,000/- in the year 2019 which under the ARO, 2014 would attract instructions fee of KShs.862,500/-. Counsel argued that the Taxing Master was therefore lenient and reasonable, and in addition judiciously exercised his discretion to award KShs.100,000/- as instruction fees. Counsel further submitted that the Taxing Master gave his reasons explaining that he was guided by Schedule 6 of the *ARO, 2014* and the case he relied on. The award thus was justified and should not be interfered with.



7. Counsel for the Respondent submitted that the Applicant did not object to the other items meaning they were assessed according to scale and should also not be interfered with. Counsel further submitted that this court can only interfere with the ruling where there is an error in principle (*Rachuonyo & Rachuonyo Advocates vs National Bank of Kenya Limited* (2021) eKLR where the court relied on *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* (2005) eKLR). Counsel argued that the Taxing Master adhered to the principles of taxation, adding that the Applicant herein failed to demonstrate that the Taxing Master erred in principle. Counsel concluded by submitting that the Party/Party Bill of Costs was assessed to scale, which taxation should not be interfered with and urged that this Reference be dismissed with costs.

Analysis and Determination

8. I have considered the Reference and the response thereto, together with the parties' respective submissions as well as the authorities cited therein. Only two issues lend themselves for determination by this court, these are:-
- i. Whether the Taxing Master erred in assessing the instruction fees at KShs.100,000/-;
 - ii. Whether the Taxing master made errors of principle in taxing the Party/Party Bill of Costs.
9. It is worth noting that together with the Reference, the Applicant filed an Application of even date seeking leave to file the Reference out of time. In that application, she also sought for an order that the leave, if granted, do operate as stay of execution of the Taxing Master's ruling of 2nd September, 2022. Through a ruling delivered by this court on 27th September, 2023 the said application was allowed and thus there is a stay of execution in place.

i. Whether the Taxing Master erred in assessing the instruction fees at KShs.100,000/-

10. From the Chamber Summons and Supporting Affidavit, the Applicant has expressed her objection to the award of KShs.100,000/- by the Taxing Master, terming it exorbitant. The Respondents on the other hand are of the view that considering the value of the subject matter at the time of institution of the suit, the award is justified and should not be interfered with.
11. Instruction fees are calculated based on the value of the subject matter, which value ought to be determined from the pleadings, judgment or settlement as the case may be. However, where the value of the subject matter is not ascertainable from the foregoing, the Taxing Master has the discretion to assess the instruction fee as he considers just, taking into account such factors as were laid down in the *Joreth Limited vs Kigano & Associates Case* (Supra). The Taxing Master did not indicate in his ruling whether or not it was possible to determine the value of the subject matter from the pleadings or judgment, only that he exercised his discretion in assessing the amount awarded thereunder.
12. The Applicant on her part did not allege that the value of the subject matter was ascertainable. This leads me to believe that the Taxing Master was not able to determine the value of the subject matter from the pleadings or judgment, thus he resolved to exercise his discretion. The Applicant also did not deny that the Taxing Master has the said discretion, save that he did not exercise it judiciously as he was required and as a result he awarded an exorbitant sum. In his reasons, the Taxing Master explained that:-

“Instruction fees. The court exercised its discretion in awarding the instruction fees. This also guided the court in determining the getting up fees. The court relied on *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 fees 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. While being keen to consider the general conduct of the proceedings and all other relevant circumstances.”

13. Indeed, the Court of Appeal in *Joreth Ltd vs Kigano & Associates (Supra)* outlined the principle to be considered when assessing the value of the subject matter as follows:

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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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.

14. The only complaint the Applicant has with regards to the reasons issued are that they were general and he could not infer what specific action the Taxing master took into account in awarding the KShs.100,000/- instruction fee. Going by the above however, the reasons given for the award are in my opinion not only self-explanatory, but are also very clear and sound. I am not convinced by the argument that the Taxing Master failed to properly exercise his discretion.

15. In any event, it is settled law that when a taxation decision is challenged through a Reference, a judge will normally not interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs. See *Kipkorir, Titoo & Kiara Advocates* Case (Supra), where the Court of Appeal held:

“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.”

16. Thus, a Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. Where it is shown that the Taxing Master made such errors of principle, then a Judge may be at liberty to interfere with their decision. In this case however, the Applicant has not shown the alleged error in principle, neither has she presented any valid grounds to warrant interference by this court.

ii. Whether the Taxing Master made errors of principle in taxing the party/party bill of costs.

17. The Respondents argued that the Reference was only with regards to the instruction fee awarded. This is however not the case. Annexure AA2 of the application dated 17th November 2022 seeking for leave to file a Reference out of time is the letter of Objection to the Taxation. The letter is dated 9th September, 2022 and indicated that the Applicant “objects to the taxation in its entirety save for the court’s decision on rejecting VAT”. The letter then requested the court to supply them with the reasoning of the court on all the items in the Bill to enable them file a Reference.

18. I note, that in his ruling dated 2nd September, 2022 the Taxing Master explained that:

“I have perused through the bill of costs and not (sic) that some work was done under the 2009 Remuneration order and other under 2014 Remuneration order. In this case both the Remuneration orders are applicable. I am duly guided by the case of *Odera Obar & Co Advocates v Jet Properties and Apartments Limited* (2019) eKLR. In essence, items 1-6 of the bill of costs are subject to the 2009 remuneration order. However, the other items



are subjected to Remuneration order 2014. I have perused the items and note that they are drawn to scale.”

19. On which Advocates Remuneration Order between the 2009 and 2014 ones is applicable, in the above cited case of *Odera Obar & Co Advocates vs Jet Properties and Apartments Limited* (2019) eKLR, the court held that:-

“ 16. The Taxing Officer’s decision was further challenged on the ground that she used the Remuneration Order of 2009 to assess fees in respect of instructions given and work done after April 2014. It is indeed true that instructions to prepare an agreement between the developer and the contractor were given in July 2014. The 2009 Remuneration Order was replaced by the 2014 Remuneration Order on 11/4/2014. It was therefore an error of principle for the Taxing Officer to use the 2009 Remuneration Order to assess fees for instructions given and work done after April 2014. The material Bill of Costs properly indicated that the bill was drawn under the two sets of Remuneration Orders.”

20. I however have not been fortunate enough to examine the entire record which was before the Taxing Master, and none of the parties herein, more so the Applicant thought it wise to annex a copy of the Bill of Costs. Though not fatal to the reference, failure to annex a copy of the disputed Bill of Costs is self-defeating. In this case for instance, it has denied the court a chance to confirm whether there was indeed an error in principle as alleged or whether Taxing Master erred in applying the two Advocates Remuneration Orders in assessing the costs. In *Joseph Tamata vs Mary Nthambi Mbuvi* (2021) eKLR, Justice Kemei explained the repercussions of failing to avail a copy of the bill of costs as follows:-

Again, the applicant did not avail a copy of the bill of costs for perusal so that the court will have an opportunity of seeing the various items presented for taxation. In short, the court cannot be expected to act in vain when the applicant has not availed the impugned ruling or even the bill of costs dealt with by the taxing officer.

21. The Taxing Master explained in his reasons that for the other items of the Bill of Costs, he relied on the available court record and Schedule 6 of the ARO, 2014. This court has not been made aware of what these other items were and the amounts that they were assessed at. The court is therefore not in position to confirm whether indeed these items were drawn to scale, or whether the individual items were indeed taxed as per the relevant Advocates Remuneration Order under which the work was done. In the circumstances, I am constrained to believe the decision of the Taxing Master as he had the benefit of having all the material before him.
22. For the above reasons, I am not able to set aside the ruling of the Taxing Master as that will be tantamount to interfering with the decision of the Taxing Master when no justification has been provided for doing so. The Reference herein thus fails, the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER, 2024

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J.M ONYANGO

JUDGE

In the presence of;



1. Miss Mukulo for the 1st -6th 87th Respondents
 2. Mr. Mwangi for Mr. Ingutia for the Applicants
- Court Assistant: Brian

