



**Tonui & another v Tonui & 2 others (Environment and Land Miscellaneous Application E009 of 2024) [2024] KEELC 7276 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7276 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2024**  
**LA OMOLLO, J**  
**OCTOBER 31, 2024**

**BETWEEN**

**SAMWEL TONUI ..... 1<sup>ST</sup> APPLICANT**

**PHILIP TONUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN KIPKEMOI TONUI ..... 1<sup>ST</sup> RESPONDENT**

**JOEL KIPLANGAT TONUI ..... 2<sup>ND</sup> RESPONDENT**

**ISMAEL KIPRONO TONUI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Applicants Chamber Summons Application dated 3<sup>rd</sup> April, 2024. The said application is expressed to be brought under Section 11 of the Advocates Remuneration Order, Section 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya.
2. The application seeks the following orders;
  - a. That the decision of the Honourable Taxing Master delivered on 19<sup>th</sup> March, 2024, in so far as the same relates to the reasoning and determination pertaining taxation of items 1, 2, 65-69, 83 of the bill of costs dated 1<sup>st</sup> February, 2024, be set aside/removed/quashed and vacated by way of reference and all consequential orders be set aside.
  - b. That in the alternative to prayer 1, the Honourable Court exercises its inherent jurisdiction and be pleased to re-tax items 1, 2, 65-69, 83 of the bill of costs dated 1<sup>st</sup> February, 2024.
  - c. That in the alternative to prayer 1 and 2 above, the Honourable Court exercises its inherent jurisdiction and refer the bill of costs dated 1<sup>st</sup> February, 2024 to another taxing officer for re-taxation or make directions to (sic) a fresh taxation.



- d. Spent.
  - e. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of one Samwel Tonui (1<sup>st</sup> Applicant) sworn on 3<sup>rd</sup> April, 2024.

### **Factual Background.**

- 4. The application under consideration first came up for hearing on 5<sup>th</sup> April, 2024 when the Court directed that it be served upon the Respondents.
- 5. On 24<sup>th</sup> April, 2024 the Court gave directions that the application would be canvassed by way of written submissions.
- 6. On 18<sup>th</sup> July, 2024 parties confirmed having filed submissions and the application was reserved for ruling.

### **The Applicants Contention.**

- 7. The 1<sup>st</sup> Applicant contends that the Taxing Officer delivered a ruling on the party and party bill of costs dated 1<sup>st</sup> February, 2024 on 19<sup>th</sup> March, 2024 and taxed the same at Kshs. 1, 026,345/=.
- 8. The 1<sup>st</sup> Applicant also contends that their Advocates on record sought reasons for the said taxation as per the stipulated legal timelines vide a letter dated 20<sup>th</sup> March, 2024.
- 9. The 1<sup>st</sup> Applicant further contends that the Taxing Officer taxed item No. 1 on instruction fees at Kshs. 300,000/=.
- 10. It is the 1<sup>st</sup> Applicant's contention that he is advised by his Advocates on record that the determining factor for instruction fees is the value of the subject property based on the pleadings, judgement and/or settlement. In the present case the value could not be ascertained.
- 11. It is also the 1<sup>st</sup> Applicant's contention that based on the foregoing, the instruction fees ought to have been pegged at Kshs. 120,000/= (on a higher scale) as the orders sought in the suit were a declaratory order for trespass and a permanent injunction. It is further the 1<sup>st</sup> Applicant's contention that the sum of Kshs. 300,000/= awarded was excessive.
- 12. The 1<sup>st</sup> Applicant contends that the amounts awarded under item No's 1, 2, 65-69, 82-83 are manifestly excessive and contrary to the law and should therefore be reduced.
- 13. The 1<sup>st</sup> Applicant also contends that no receipts were produced as proof that the Respondents incurred the said expenses.
- 14. The 1<sup>st</sup> Applicant further contends that it is in the interest of justice that the ruling delivered on 19<sup>th</sup> March, 2024 be set aside and the bill of costs dated 1<sup>st</sup> February, 2024 be re-taxed by another Taxing Officer or this Honourable Court.
- 15. It is the 1<sup>st</sup> Applicant's contention that the Respondents have already demanded immediate payment of the taxed amount.
- 16. The 1<sup>st</sup> Applicant ends his deposition by stating that unless the orders sought are granted, the Applicants stand to suffer irreparably since the Respondents may levy execution of the taxed costs to their detriment.



### **Respondents Response.**

17. The Respondents filed a Replying Affidavit sworn on 15<sup>th</sup> April, 2024 by one John Kipkemoi Tonui (1<sup>st</sup> Respondent).
18. He deposes that the ruling delivered on 19<sup>th</sup> March, 2024 is not erroneous.
19. He also deposes that the Applicants application has been filed in bad faith and only intends to delay the conclusion of the matter.
20. He further deposes that the Taxing Officer awarded the Respondents Kshs. 1,026,345/= which was reasonable because as per the bill of costs dated 1<sup>st</sup> February, 2024, they incurred expenses of over Kshs. 1,465,845/=.
21. It is his deposition that the Applicants application is frivolous, vexatious and an abuse of the Court process.
22. It is also his deposition that the Applicants failed to comply with the orders of this Honourable Court and therefore the execution of the ruling dated 19<sup>th</sup> March, 2024 is overtaken by events and should not be allowed. (Sic)
23. It is further his deposition that the Applicants have come to Court with unclean hands and therefore their averments are made in bad faith.
24. He deposes that the Applicants were aware of the taxation as they were duly served and an affidavit of service filed in Court.
25. He also deposes that the Applicants application for stay of execution is malicious and an abuse of the Court process.
26. He further deposes that the Applicants only want to deny them the fruits of their judgement.
27. He ends his deposition by seeking that the application be dismissed with costs as it lacks merit.

### **Issues for Determination.**

28. The Applicants filed their submissions on 22<sup>nd</sup> May, 2024 while the Respondents filed their submissions on 27<sup>th</sup> May, 2024.
29. The Applicants submitted on whether they are entitled to the orders sought.
30. The Applicants rely on the judicial decisions of Premchand Raichand Ltd versus Quarry Services of East Africa Ltd (No. 3) (1972) EA 162, Republic & another v Medical Practitioners & Dentists Board & 2 Others; MIO (Suing on Behalf of MIO (A Minor) & 3 Others (Interested Parties) (Miscellaneous Application 59 & 63 of 2019 (Consolidated)) [2024] KEHC 2095 (KLR) (Judicial Review) (5 March 2024) (Ruling), Kenya Power and Lighting Ltd versus Msellem (Miscellaneous Civil Application E056 of 2021) [2022], Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR and submit that the Taxing Officer failed to exercise his discretion and apply the principles provided for under Schedule 6 of the Advocates Remuneration Order.
31. The Applicants also submit that the Taxing Officer in his ruling delivered on 19<sup>th</sup> March, 2024 acknowledged that the suit was not complex and therefore ought to have awarded a minimum of Kshs. 75,000/= under Schedule 6 of the Advocates Remuneration Order.



32. The Applicants further submit that the Taxing Officer however proceeded to exercise his discretion and awarded the sum of Kshs. 300,000/= as instruction fees without any justification.
33. It is the Applicants submissions that the Respondents had sought for Kshs. 147/= under item No. 2 and yet the Taxing Officer awarded kshs. 50,000/=.
34. It is also the Applicants submissions that the Taxing Officer proceeded to allow the rest of the items as prayed and yet the amounts sought were exaggerated. For instance, item No's 63 and 83 being costs of execution and miscellaneous expenses were taxed at Kshs. 300,000/= and Kshs. 15,000/= respectively and yet no receipts were produced.
35. It is further the Applicants submissions that the taxed amount ought not to have exceeded kshs. 160,345/= as hereunder;
  1. Item 1 (Instruction fees) – Kshs. 75,000/= (taxed at Kshs. 300,000/=)
  2. Item 2 – Kshs. 147 (taxed at Kshs. 50,000/=)
  3. Items 65-68 – Kshs. 0.00 – Already provided for under items 1, 79, 84, 86 and 87 (taxed at Kshs. 60,000/=)
  4. Item 69 – Kshs. 0.00 as no receipts were provided (taxed at Kshs. 300,000)
  5. Increase in half of item 1 – 68 – Not provided in the Remuneration Order. (Taxed at Kshs. 326, 300/=)
  6. Item 83 – Kshs. 0.00 – as no receipts are provided. (taxed at Kshs. 15,000/=)
36. In conclusion, the Applicants submit that the Taxing Officer erred in principle in awarding excessive amounts as taxed costs which was contrary to the law and principles of taxation.
37. The Respondents submit that they instituted Kericho ELC Case No. 187 of 2015 (formerly Kericho High Court Suit No. 45 of 2009) against the Applicants herein seeking injunctive orders as well as a declaration that the Defendants were trespassers on land parcel No's Kericho/Getarwet/935, Kericho/Getarwet/936, Kericho/Getarwet/937 and Kericho/Getarwet/938.
38. The Respondents also submit that judgement was entered in their favour and they filed their bill of costs dated 1<sup>st</sup> February, 2024 which was taxed at Kshs. 1,026, 345/= on 19<sup>th</sup> March, 2024.
39. The Respondents identify the following issues for determination;
  - i. Whether the reference herein lacks merit for offending Paragraph 11 of the Advocates Remuneration order.
  - ii. Whether the Taxing Master erred in principle in the assessment of the instruction fees.
40. With regard to the first issue, the Respondents submit that the Applicants reference was filed fourteen days after the Taxing Officer delivered his ruling and it therefore lacks merit.
41. The Respondents also submit that the Applicants did not have to seek reasons for the Taxing Officer's decision as they were already contained in the ruling delivered on 19<sup>th</sup> March, 2024.
42. On the second issue, the Respondents rely on Paragraph 11 of the Advocates Remuneration Order and submit that the Taxing Officer was well within his discretion to tax the bill as he did because the Applicants did not challenge the bill despite being given many chances to do so.



43. The Respondents rely National Oil Corporation Limited vs Real Energy Limited & another [2016] eKLR, Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] eKLR and submit that the Taxing officer in his ruling complied with the provisions of Paragraph 11(2) of the Advocates Remuneration Order and gave reasons for his decision.
44. The Respondents also submit that the Applicants did not comply with the provisions of Order 21 Rule 9B of the Civil Procedure (Amendment) Rules 2020 as they failed to file a response to the bill of costs dated 1<sup>st</sup> February, 2024.
45. The Respondents further submit that the Applicants did not specify the items in respect of which they were seeking reasons in their letter addressed to the Taxing Officer.
46. The Respondents rely on the judicial decision of Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2) [2006] 1 EA 5 and submit that the Applicants application dated 3<sup>rd</sup> April, 2024 ought to be struck out with costs.

### **Analysis and Determination.**

47. After considering the Applicants application, the response thereto and the submissions, the following issues arise for determination;
  - a. Whether the Taxing Officer’s decision on the bill of costs dated 1<sup>st</sup> February, 2024 delivered on 19<sup>th</sup> March, 2024 should be set aside and the same be taxed afresh.
  - b. Who should bear costs of the application.
48. The principles for setting aside the decisions of Taxing Officers were established by the Court of Appeal in the judicial decision of Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR. The court held as follows;
 

“On 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.”
49. In *Kamunyori & Company Advocates v Development Bank of Kenya Limited [2015] Civil Appeal 206 of 2006*, the Court of Appeal gave instances where discretion cannot be deemed to have been exercised properly as follows;
 

“...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.” (Emphasis mine)

  - A. Whether the Taxing Officer’s decision on the bill of costs dated 1st February, 2024 delivered on 19th March, 2024 should be set aside and the same be taxed afresh.
50. The Applicants are seeking that this Court sets aside the Taxing Officer’s decision on the bill of costs dated 1<sup>st</sup> February, 2024 that was delivered on 19<sup>th</sup> March, 2024 on the ground that the amounts awarded were manifestly excessive.



51. The Respondents on the other hand contend that firstly, the Applicants filed their reference outside of the fourteen-day period provided for under Paragraph 11 of the Advocates Remuneration Order and secondly the Applicants did not file any response to their bill of costs.
52. Further, the Respondents contend that the Taxing Officer exercised his discretion in the amounts awarded as taxed costs.
53. Paragraph 11 of the Advocates Remuneration Order provides as follows;
  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 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 subparagraph (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 expired.”
54. Where a party is dissatisfied with the decision of a Taxing Officer, he/she is expected to give a Notice of Objection itemizing the items objected to especially where the Taxing Officer has not given any reasons for the decision.
55. The Applicants have annexed a copy of a letter dated 20<sup>th</sup> March, 2024 addressed to the Deputy Registrar seeking for reasons for the taxation of the Party and Party bill of costs dated 1<sup>st</sup> February, 2024.
56. The Applicants submit that the Taxing Officer did not give any reasons while the Respondents submit that it was not necessary for the Taxing Officer to give reasons because the reasons were already contained in the ruling.
57. In the judicial decision of Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another [2022] eKLR the Court held as follows;

“The taxation ruling was delivered on 17<sup>th</sup> January 2022. The Applicants wrote to the taxing officer on 19<sup>th</sup> January 2022 notifying him of the items that he wished to object to. There are no reasons that have been presented by the taxing officer as per the Provisions of Rule 11(2) of the Advocates (Remuneration) Order.

However, it is a judicial principle that a

ruling contains reasons for the decision given. I associate myself with the reasoning of the Court in Bernard Gichobi Njira v Kanini Njira Kathendu & another [supra] where the Court was of the opinion that the paragraph only grants an aggrieved party in a case chance to ventilate his grievance(s) only on the itemized bill. I do not find the failure of the magistrate to give these reasons fatal to the reference as the same would be more or less a duplication of the ruling. (Emphasis mine)



In Ahmed Nassir –Vs- National Bank of Kenya Ltd [2006] E.A the Court held: -

Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of 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 Sub-rule (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.”

(Emphasis mine)

58. I have perused the Court record and I note that the Applicants did not annex a copy of the said bill of costs or the decision by the Taxing Officer which was delivered on 19<sup>th</sup> March, 2024.

59. In the judicial decision of *Monyo & 2 others v Ngige (Miscellaneous Civil Application E07 of 2020)* [2023] KEHC 817 (KLR) (10 February 2023) (Ruling) the Court held as follows;

“For taxation matter like this, it would have been necessary to avail a copy of the bill, or for the affidavit to set out what was charged for instructions fees and attendance, for the Court to compare with the ruling on taxation and reasons advanced. As said before, the bill of costs and the ruling are alluded to but no copy is exhibited.”

60. It is my view that it was crucial for the Applicants to annex to their application copies of the bill of costs dated 1<sup>st</sup> February, 2024 and the ruling of the Taxing Officer delivered on 19<sup>th</sup> March, 2024 in order for this Court to determine whether it was necessary for the Applicants to seek for reasons and if reasons were given, whether they were based on the wrong principles.

61. It is important to note that the Taxing Officer delivered his ruling on 19<sup>th</sup> March, 2024 while the Applicants filed their reference on 5<sup>th</sup> April, 2024. The reference was filed seventeen days after the Learned Taxing Officer delivered his ruling.

62. In the judicial decision of *Mirugi Kariuki & Co Advocates v Andrew Isoe Ochoki* [2022] eKLR the Court held as follows;

“As noted before, the notice of objection to taxation was filed nineteen days from the date the ruling was delivered and the respondent/applicant did not give any reasons for the delay. In my view there is no competent reference before the Court the same having been filed out of time without the leave of the Court. The ruling by the taxing officer contained the reasons and the invocation of paragraph 11(2) of the Advocates Remuneration Order was unnecessary. If the Applicant was dissatisfied with the ruling on taxation delivered on 29<sup>th</sup> September 2021 he ought to have filed a reference within 14 days of the ruling by the 14<sup>th</sup> October 2021. The reference was

filed on 19<sup>th</sup> October 2021 clearly out of time and no application to enlarge time was sought by the Applicant as provided under paragraph 11 (4) of the Advocates Remuneration Order. 13. The reference is accordingly struck out for being incompetent and an abuse of the Court process.” (Emphasis mine)



63. The Court of Appeal in *Mario Rossi v Salama Beach Hotel Limited* [2018] eKLR while considering whether a reference filed out of time is a nullity within the provisions of Rule 55(1)(b) of the Court of Appeal Rules stated thus;

“It is common ground that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is, not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice. It is for that reason that Courts advocate for strict compliance with such time lines.” (Emphasis mine)

64. As was held in the above cited judicial decisions, a reference filed out of time and without leave of Court is not competent and ought to be struck out.

65. The present reference was filed on 5<sup>th</sup> April, 2024 which was evidently out of time. The Applicants neither gave reasons for the delay nor sought to enlarge time as provided for under Paragraph 11(4) of the Advocates Remuneration Order.

### **B. Who should bear costs of the application?**

66. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

### **Disposition.**

67. Taking all the above into consideration, I find that the Applicants reference dated 3<sup>rd</sup> April, 2024 is not competent having been filed out of time and without leave. Consequently, it is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

\_\_\_\_\_ for the Applicant.

\_\_\_\_\_ for the Respondent

Court Assistant; Mr. Joseph Makori.

