



**Nyandat) v Ochieng (Environment and Land Case Civil Suit
61 of 2016) [2024] KEELC 13958 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 61 OF 2016**

SO OKONG'O, J

DECEMBER 19, 2024

**IN THE MATTER OF A REFERENCE FROM THE DECISION OF THE TAXING
OFFICER HON. M.SHIMENGA DR. DELIVERED ON 7TH DECEMBER
2023 IN THE TAXATION OF THE PARTY AND PARTY BILL OF COSTS**

BETWEEN

**PRISCA AKECH OJUNGA (SUING THROUGH HER ATTORNEYS JOHN
FREDRICK OGUMBO & MILLICENT NYANDAT) PLAINTIFF**

AND

PAMELA ACHIENG OCHIENG DEFENDANT

RULING

Background

1. The Plaintiff brought this suit against the Defendant on 21st March 2016. The Plaintiff averred that at all material times, the Plaintiff was the registered proprietor of all that parcel of land known as Kisumu/Dago/1300 (hereinafter referred to as “the suit property”) while the Defendant was the registered owner of the parcel of land known as Kisumu/Dago/1755 (hereinafter referred to as “Plot No. 1755”) which was adjacent to the suit property. The Plaintiff averred that sometime in January 2016, the Defendant entered the suit property without the Plaintiff’s permission and commenced the construction of a building and other structures thereon. The Plaintiff prayed for judgment against the Defendant for;
 - a. An order of a permanent injunction restraining the Defendant from carrying out any activity or remaining upon, trespassing upon or in any other manner interfering with the Plaintiff’s quiet possession, occupation and enjoyment of the suit property.
 - b. General damages for trespass.
 - c. Costs of the suit.



2. The Defendant filed a statement of defence and a counter-claim against the Plaintiff on 8th June 2016. The Defendant denied the Plaintiff's claim in its entirety. The Defendant denied that the Defendant entered the suit property without the Plaintiff's permission in January 2016 and commenced construction of a building and other structures thereon. In her counter-claim, the Defendant averred that her activities complained of by the Plaintiff were on her parcel of land known as Kisumu/Dago/1755 (Plot No. 1755). The Defendant averred that in 2014, she fenced Plot No. 1755 and the Plaintiff destroyed the same. The Defendant averred that on or about 2nd May 2016, the Plaintiff entered Plot No. 1755 and demolished a perimeter wall that the Defendant had constructed around the plot after the earlier fence was brought down, and other structures that she had constructed on the property. The Defendant sought judgment against the Plaintiff in her counter-claim for;
 - a. A permanent injunction restraining the Plaintiff from carrying out any activity or remaining upon, trespassing upon or in any other manner interfering with the Defendant's quiet possession, occupation and enjoyment of Plot No. 1755.
 - b. General damages for trespass
 - c. Costs of the counter-claim.
3. In a judgment delivered on 15th October 2021, the court found that the Defendant was a trespasser on the suit property and issued a permanent injunction restraining the Defendant from carrying out any activity or remaining upon, trespassing upon or in any other manner interfering with the Plaintiff's quiet possession, occupation and enjoyment of the suit property. The Plaintiff's claim for damages for trespass was rejected by the court, and the Defendant's counter-claim was dismissed. The court awarded the Plaintiff the costs of the suit.
4. On 9th November 2021, the Plaintiff filed a party and party bill of costs for taxation against the Defendant. The bill of costs that had 149 items was drawn in the sum of Kshs. 791,958/-. The Plaintiff's bill of costs was taxed on 7th December 2023 at a total sum of Kshs. 617,655/-. The taxing officer taxed instruction fees (Item 1) at Kshs. 150,000/- and getting up fees (Item 2) being 1/3 of instruction fees at Kshs. 50,000/-. The taxing officer also taxed instruction fees for defending the counter-claim (item 19) at Kshs. 150,000/- and getting up fees for the counter-claim (item 20) at Kshs. 50,000/-. The taxing officer taxed off items 132, 134, 135, 137, 142, 144, and 149. I believe that the rest of the items in the bill of costs were taxed as drawn.

The reference

5. The Defendant was aggrieved with the said taxation. On 14th December 2023, the Defendant filed a Notice of Objection to the taxation of items 1-12, 19-23, 27-42, 49-114, 116-118, 122-131, 133, 136, 138, 139, 140, 141, 143, 145, 146, 147 and 148 in the bill of costs. On 9th January 2024, the taxing officer informed the Defendant's advocates that the reasons for her taxation were set out in her ruling of 7th December 2023.
6. What is now before the court is the Defendant's Chamber Summons application dated 10th January 2024 brought under Paragraph 11 of the Advocates Remuneration Order in which the Defendant has sought the following principal prayers;
 - a) That the court be pleased to set aside in its entirety the Deputy Registrar's ruling/orders made on 7th December 2023 taxing the Plaintiff's party and party bill of costs at Kshs. 617,655/- and all consequential orders.



- b) That the court be pleased to remit the matter for taxation a fresh of the Plaintiff's party and party costs with appropriate directions as to the correct approach to take in the taxation of the entire bill of costs.
 - c) That the costs of the application be in the cause.
7. The Defendant contended that the Plaintiff's bill of costs dated 8th November 2021 was not taxed in accordance with the law. The Defendant averred that the taxing officer failed to consider the submissions by the Defendant. The Defendant averred that the taxing officer applied wrong principles in her taxation of the Plaintiff's bill of costs. The Defendant averred that the award made by the taxing officer was arbitrary, excessive and contrary to the provisions of the Advocates Remuneration Order. The Defendant averred that the bill as taxed was oppressive and illegal.
8. The Plaintiff opposed the application through grounds of opposition dated 1st February 2024. The Plaintiff contended that the application had not met the threshold for interference with a decision of a taxing officer by a judge on a reference. The Plaintiff averred that the decision of the taxing officer was sound and was a proper exercise of judicial discretion donated by law. The Plaintiff urged the court to dismiss the application for lack of merit and as an abuse of the court process.
9. The court directed that the application be argued by way of written submissions. The Defendant/Applicant filed her submissions dated 19th April 2024. The Plaintiff had not filed her submissions as at the time of writing this ruling on 15th December 2024. The Defendant submitted that the ruling of the Deputy Registrar dated 7th December 2023 did not contain reasons for her taxation of the various items in the bill of costs. The Defendant submitted that in her notice of objection, she requested for reasons for taxation of several items in the Plaintiff's bill of costs. The Defendant submitted that instead of furnishing the Defendant with the reasons for the taxation of the said items, the Deputy Registrar referred the Defendant to her ruling of 7th December 2023 which did not contain any reasons for the taxation.
10. The Defendant submitted further that in her submission before the taxing officer, the Defendant contested various items in the Plaintiff's bill of costs that were not drawn to scale, including the instruction fees. The Defendant submitted that the taxing officer did not consider the said submissions. The Defendant submitted that in her assessment of the instruction fees, the taxing officer did not first ascertain the value of the suit's subject matter, which was an error of principle. The Defendant submitted that in her ruling, the taxing officer failed to consider the principles that should guide the taxing officer in the exercise of her discretion while taxing a bill of costs. The Defendant submitted that the Plaintiff's bill of costs was not taxed according to the law and urged the court to allow the application.

Analysis and determination

11. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated 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.”



12. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited* Civil Appeal No. 206 of 2006[2015]eKLR, the court stated 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 instruction fee is arrived at on the wrong principles, it will be set aside”

13. In *Joreth Limited v Kigano & Associates* [2002] EA 92 the court stated that:

“C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

“Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1).”...

...In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation...”

...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...

...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.”

14. I have considered the Defendant’s application and the grounds of opposition thereto filed by the Plaintiff. I have also considered the submissions by the Defendant’s advocates and the authorities filed in support thereof. I will not consider the limb of the application seeking a stay of execution as the court agrees with the Plaintiff that the Defendant had applied for a stay of execution of the entire judgment delivered herein on 15th October 2021 including the costs of the suit which were awarded



to the Plaintiff, and the application was considered by this court and dismissed on 9th February 2023. The court cannot revisit the issue of stay of execution in view of that order.

15. With regard to the reference, the Defendant had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court. The Defendant challenged the taxing officer's taxation of the Plaintiff's bill of costs dated 8th November 2021 on the ground that the taxing officer failed to give reasons for her taxation of the said bill of costs at Kshs. 617,655/-. I have perused the submissions that were made by the parties before the taxing officer and the ruling of the taxing officer dated 7th December 2023. I have noted the following: The Defendant contested the instruction fees and the getting up fees for the main suit which were charged under items 1 and 2 of the Plaintiff's bill of costs. The Defendant argued that since the suit did not involve any monetary claim, the instruction fees that was claimed by the Plaintiff was excessive. The Defendant also challenged items 3 and 4 of the bill of costs arguing that the Plaintiff was not entitled to charge fees for perusing her own documents, and instruction fees on an application. The Defendant challenged items 5, 6, and 7 of the bill arguing that the same were repetitive. Items 8 to 12 were challenged for the same reason.
16. The Defendant contested the instruction fees and getting up fees claimed by the Plaintiff for the counter-claim. The Defendant argued that the court did not award the Plaintiff costs for the counter-claim and as such the Plaintiff was not entitled to claim the same from the Defendant. The Defendant also challenged items 21, 22, 23, 27, 28, 33-35, 37, 39, 40-42, 49, 50, 51-112, 114, 116, 118, 122, 123, and 124-149 for the reasons which the Defendant set out in her submissions before the taxing officer.
17. In her ruling, the taxing officer taxed instruction fees for the main suit at Kshs. 150,000/- and assessed the getting up fees at Kshs. 50,000/- being 1/3 of the instruction fees. As correctly submitted by the advocates for the Defendant, there is no explanation of how the taxing officer arrived at the instruction fees of Kshs. 150,000/-. The taxing officer stated as follows: "Item 1 is taxed at Ksh. 150,000 which I believe is reasonable as instruction fees". How the taxing officer concluded that the said sum of Kshs. 150,000/- was reasonable is not explained in the ruling. In assessing the instruction fees, the taxing officer was supposed to apply the 2014 edition of the Advocates Remuneration Order (ARO) which she did. Instruction fees is based on the value of the subject matter of a suit. The taxing officer had a duty while assessing the instruction fees to ascertain first the value of the subject matter of the suit from the pleadings or the judgment of the court. If the taxing officer had managed to ascertain the value of the subject matter of the suit, she would then assess reasonable instruction fees with the minimum scale fees provided in the ARO as the basis for such assessment. If the taxing officer was unable to ascertain the value of the subject matter of the suit from the pleadings and the judgment of the court, the taxing officer in line with the decision of the court in *Joreth Limited v. Kigano & Associates* (supra), was supposed to use her discretion to assess such instruction fee as she considered just. In *Eastland Hotel Limited v. Wafula Simiyu & Co. Advocates* [2014] eKLR the Court of Appeal stated that:

"This Court's decision in *JORETH LIMITED v KIGANO & ASSOCIATES* (supra) which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate."



18. I agree with the Defendant that the taxing officer erred in not first ascertaining the value of the subject matter of the suit before assessing the instruction fees. It is uncertain how the taxing officer arrived at the sum of Kshs. 150,000/-. I am not surprised therefore with the Defendant's contention that the ruling of the taxing officer did not contain reasons for her decision. This was an error of principle that warrants interference with the decision of the taxing officer.
19. I have perused the judgment of the court dated 15th October 2021 and the decree extracted therefrom on 9th November 2021. I have noted that the court dismissed the Defendant's counter-claim but said nothing about the costs of the said counter-claim. The court awarded the Plaintiff, "Costs of the suit". I agree with the Defendant that in the absence of an express order awarding the Plaintiff the costs of the counter-claim which is a cross-suit, the taxing officer erred in awarding the Plaintiff Kshs. 150,000/- as instruction fees for defending the counter-claim and Kshs. 50,000/- as getting up fees for the counter-claim. Again it is also not clear how the taxing officer arrived at the said instruction fees of Kshs. 150,000/-. The taxing officer simply stated that "Item 19 is also taxed at Ksh. 150,000. Item 20 is therefore taxed at Ksh. 50,000/-." I agree with the Defendant that the taxing officer also committed an error of principle in her taxation of the instruction fees and getting up fees for the counter-claim.
20. There is no indication in the ruling of the taxing officer of how she taxed items 3-18, and items 21-131. It was from my reading of the taxing officer's notes made on the copy of the Plaintiff's bill of costs in the court file during the taxation that I concluded that she taxed items 3-18, and items 21-131 as drawn. As this court has stated previously, the notes made by the taxing officer in the court file are not part of the ruling. Without looking at the said notes that were not available to the Defendant, there was no way the Defendant could have known that the taxing officer taxed items 3-18, and items 21-131 in the Plaintiff's bill of costs as drawn. It is not surprising therefore that in her notice of objection to taxation, the Defendant asked for the reasons for the taxation of nearly all the items in the bill of costs and when the Defendant was told that the reasons were in the ruling, the Defendant found none. Failure on the part of the taxing officer to indicate in the ruling how she taxed items 3-18, and items 21-131 in the Plaintiff's bill of costs and the reasons for such taxation amounted to an error of principle. The Defendant was entitled to the reasons for the taxation of all the items in the Plaintiff's bill of costs that the Defendant objected to during the taxation. Failure on the part of the taxing officer to provide the reasons in her ruling and response to the notice of objection amounted to an error. Without such reasons, the court is unable to say whether or not the taxing officer considered the submissions that the Defendant made before her.
21. In *Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board*(supra), the court stated as follows:

“ 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'Sonza 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.”
22. I find no compelling reason why I should tax the bill of costs herein. I am of the view that the taxing officer would be better placed to tax the bill which has to be taxed afresh since the taxation of the whole bill of costs was contested.

Conclusion

23. In conclusion, the ruling and orders made by the taxing officer, Hon. M.Shimenga on 7th December 2023 on the Plaintiff's bill of costs dated 8th November 2021 are set aside. The said bill of costs is



remitted for taxation afresh by another taxing officer. Each party shall bear its costs of the application dated 10th January 2024.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Ms. J. Omondi-Court Assistant

