



**Agricultural Development Corporation v EM Juma & Ombui
Advocates (Environment and Land Miscellaneous Application
E037 of 2024) [2024] KEELC 13528 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E037 OF 2024
MAO ODENY, J
DECEMBER 5, 2024**

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION APPLICANT

AND

EM JUMA & OMBUI ADVOCATES RESPONDENT

RULING

1. This ruling is in respect of a Chamber Summons dated 5th August, 2024 by the Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application and further orders of the court, the Ruling delivered on 25th July 2024 of Hon Priscah Nyotah (Magistrate) in Nakuru ELC No. E005 of 2024, be stayed, set aside and varied by this Honorable court.
 - d. That in the alternative, the Honourable court be pleased to order that the Respondent's Bill of Costs dated 5th February, 2024 filed in Nakuru ELC MISC APPL No E005 of 2024, be taxed afresh by another Taxing Master.
 - e. Costs of the Application be provided for.
2. The application was supported by the affidavit of Rodgers Karumpu, the Applicants Corporation Secretary who deponed that the applicant was never made aware that they had been granted leave to file submissions to the bill of costs or served with mention/hearing notice. He deponed that the Applicant's counsel was indisposed and could not attend court only to learn on 25th July, 2024 that the



ruling on the bill of costs was ready and that the mistake or sickness of counsel should not be visited on the Applicant.

3. The Applicants Corporation Secretary deponed that the Taxing Master erred in law and fact by condemning the Applicant unheard and that the decision of the learned Taxing Master is premised on the wrong principles of law and is without legal basis, unreasonable and meant to unjustly enrich the respondent.
4. The Respondent filed a Replying Affidavit sworn on 27th August 2024 by Bernard Oyugi Ombui an Advocate in the Respondent's firm and deponed they served the Objector's advocate with a Mention Notice which she duly acknowledged. He further deponed that on 20th June, 2024, in the absence of the consent on settlement, the Taxing Master directed that parties do file their written submissions on any contested items within 14 days.
5. Counsel further deponed that on the same day, they proceeded to advise the Objector's advocates using their official email and through her telephone number. It was counsel's contention that no letter was written to the Taxing Master indicating the reasons why counsel was unable to file the said written submissions and that the Objector's counsel was aware of the directions together with the ruling date and that is why she attended court on 25th July, 2024 when the ruling was delivered.
6. Mr. Ombui stated that there is no error of principle committed by the Taxing Master hence the application is incompetent and does not satisfy the criteria set out under Rule 11 of the Advocates Remuneration Order.

Applicant's Submissions

7. Ms. Ndungu, counsel for the Applicant filed submissions dated 9th October, 2024 and identified the following issues for determination:
 - a. Whether the Reference is proper before Court and has met the threshold of Rule 11 (2) Advocates Remunerations Order?
 - b. Does the Applicant's qualify for stay of execution, setting aside or variation of the Ruling dated 25th July 2024?
 - c. What does the right to be heard entail and are the Applicants entitled to it?
 - d. Whether the Taxing Master erred in principle in assessment of bill of costs dated 5th February 2024?
8. On the first issue, counsel relied on the cases of Anthony Thuo Kanai T/A Thuo Kanai Advocates versus John Ngigi Ng'ang'a Miscellaneous Application No 259 of 2013 and Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Civil Appeal No 220 of 2004 [2005] 1KLR 528 and submitted that the reference is proper before Court having been filed within 14 days.
9. On the second issue, counsel submitted that the conditions to be met in an application for stay of execution pending hearing and determination of a reference to a judge from taxation of costs are similar to the conditions for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.
10. Ms. Ndungu submitted that the instant application was filed on 5th August, 2024 and there was no unreasonable delay in filing the reference before this Court and that the taxed amount in dispute Kshs 62,813,358/= is a substantial sum and any loss suffered by the applicant in the event that it is



successful in the reference and is unable to recover the costs already paid to the Advocate can prove to be irreparable.

11. Counsel submitted that the Applicant stands to suffer irreparable damage if the bill of costs is executed and relied on the cases of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR and Butt vs Rent Restriction Tribunal [1982] KLR 417.
12. Counsel further submitted that the Advocate who had the conduct of Nakuru ELC E005 of 2024, Ms. Lilian Koskey, was involved in a road accident that left her bedridden for a couple of months beginning early March 2024 and that due to that there was an unintentional oversight in communication which led to the matter being unattended to, to the detriment of the Applicant. Counsel relied on the cases of Patel v East Africa Cargo Services Ltd [1974] EA 75 and Eastern Produce (K) Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR.
13. On the third issue, it was counsel's submission that it is only fair and just that this court finds that the Objector was not heard and allow the reference as it raises substantial issues of abuse of discretionary powers and apparent error on the bill of costs as assessed by the Taxing Master.
14. Ms. Ndungu relied on Article 25 (c) and Article 50 (1) of *the Constitution* and the cases of Geoffrey Kiru Kubai v The Industrial Court of Kenya & 4 others [2015] eKLR and Mbaki & Others vs Macharia & Another [2005] 2 EA 206.
15. On the fourth issue, counsel submitted that the assessment done by the Taxing Master is excessive and is not commensurate with the work that was done and as a result it leads to unjust enrichment. Further, that the Taxing Master erred in principle and failed to consider that the case was revolving around public land and the fees to be paid is drawn from taxpayers' money hence goes against the principles of public powers and relied on the cases of Premch and Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others [2002] EA 64, Joreth Ltd vs Kigano and Associates [2002] 1EA 92, Kamunyoru & Company Advocates vs Development Bank of Kenya Limited [2015] Civil Appeal of 2006, Moronge & Company Advocates vs Kenya Airports Authority [2014] eKLR, Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR and Kenya Airports Authority vs Otieno Ragot & Company Advocates Petition E011 of 2023.
16. Counsel submitted that this Court has jurisdiction to entertain this reference and set aside the ruling by the Taxing Master delivered on 25th July, 2024 and allow the bill of costs be subjected to fresh taxation.

Respondent's Submissions

17. Counsel for the Respondent filed submissions dated 18th September, 2024 and identified the following issues for determination:
 - a. Was the applicant served with the application for taxation?
 - b. Did the matter proceed ex-parte?
 - c. Was there an error committed by the Taxing Master to warrant the setting aside of the ruling in assessing the costs?
18. On the first issue, counsel submitted that there is no evidence in form of medical records or even a letter to the Taxing Master or to the Respondent's counsel seeking any indulgence on the ground of sickness. It was counsel's submission that the issue of sickness is being raised for the first time in this application and without any documentary evidence in support of the allegation and urged the court to dismiss the application as it is an afterthought.



19. On the second issue, counsel submitted that the Applicants attended court more than once and the mere fact that she failed and/or ignored to file written submissions does not per se make the proceedings herein ex-parte. Further that the Taxing Master considered all the relevant factors including the value of the subject matter, the complexity of the issues, the time spent by the advocate and the nature of the work done. Counsel submitted that there was no error in principle and relied on the cases of Otieno Ragot & Company Advocates vs National Bank of Kenya Limited [2016] eKLR and Muri Mwaniki & Wamiti Advocates vs Mobile pay Limited [2021] eKLR.

Analysis and Determination

20. The issue for determination is whether the Ruling delivered on 25th July 2024 of Hon. Priscah Nyotah (Magistrate) in Nakuru ELC No. E005 of 2024 should be stayed, set aside or varied by this Honorable court.

21. Paragraph 11 of the Advocates Remuneration Order provides for how to approach the court on any grievance emanating from taxation issues. It is vide a reference to the court which is like an appeal. In the case of Machira & Co. Advocates v Magugu [2002]2 E.A, Ringera J (as he then was) held as follows:

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

22. Similarly, in the case of Gacau Kariuki & Co. Advocates v Allan Mbugua Ng’ang’a [2012] eKLR it was held that:

“I am also of the same school of thought as the learned judges’ as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the Taxing Master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the Taxing Master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference.” [emphasis added]

23. It is also trite that this court cannot interfere with the Taxing Master’s decision on taxation unless it is shown that either the decision was based on an error of principle or the award was manifestly excessive as to justify an inference that it was based on an error of principle as was held in the case of First American Bank of Kenya vs Shah and Others [2002] 1 E.A. 64 at 69 as follows:

“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

24. The ruling by the Taxing Master is elaborate and starts by stating that “despite entering appearance and being granted leave to file a response to referenced Bill of costs, the Respondent did not file any



response, thus there was no challenge to the items and amount charged. However, taxation must be done”

25. The Taxing Master considered the value of the property in question which was pleaded at paragraph 6 & 7, and the witness statement of one Paul Njuguna Mwangi. The consolidated suits, where the court stated that it would assess a reasonable instruction fees to avoid double charge and unjust enrichment.
26. The Taxing Master was also guided by the case of Joreth Ltd Vs Kigano & Associates (2002) eKLR on the discretion to increase the fee as the Respondent did some substantial work on the two cases which were consolidated. The court also considered the nature of importance of the matter, the time and industry involved, the voluminous pleadings in both files hence a lot of time and industry must have been put in prosecuting the case. It is noted that the Taxing Master also considered some items which she taxed off which came to a total of Kshs. 124,026,588 from the bill of costs.
27. The Applicant submitted that the Taxing Master based her decision on an error of principle, which after considering the ruling I note that there was no error of principle as submitted by the Applicant.
28. The Applicant stated that they were never served with the notice but, the court and the Respondent proved that the Applicant had been served but did not file any response. The Applicant was served with the Mention Notice based on Exhibit marked B001.Exhibit B002. They were also given notice to file submissions but they never did on the ground that they were never notified.
29. It is strange that the Applicant is proffering and argument that counsel handling the matter was unwell hence could not have attended to the matter. This is contrary to the argument that they were not served with a notice. If counsel was unwell, then this being an institution with other lawyers, they could have sent a lawyer to hold brief to state the same. The two assertions do not add up and are contradicting each other.
30. This court therefore cannot interfere with the Taxing Master’s decision, as there was no error of principle. The application dated 5th August 2024 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

