



**Maru v Ruto (Miscellaneous Application E001 of 2023)
[2025] KEHC 3947 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
MISCELLANEOUS APPLICATION E001 OF 2023
JRA WANANDA, J
MARCH 28, 2025**

BETWEEN

DICKSON KIPLETING MARU APPLICANT

AND

VINCENT KIBIWOTT RUTO RESPONDENT

RULING

1. What is before this Court for determination is a challenge against the assessment of party and party costs awarded in a suit before the Magistrate’s Court. In terms of tautology, I would say that the Application’s description as being a “Reference” from the decision of a Taxing Master is a misnomer.
2. My reasons for stating as above are to be found in my earlier Ruling which I delivered on 8/03/2024 in this matter, and whereof I granted leave to file this matter out of time, and also issued an interim order of stay of execution. In that Ruling, I also dealt with the issue of jurisdiction to handle this matter. In finding that this Court possesses the jurisdiction to review or revisit the assessment of party and party costs by the lower Court, I cited the decision of M. Kasango J, made in the case of *Mathiu Elijah Solo v Joseph Murira* [2009] eKLR, and also the decision of Mrima J made in the case of *Richard Otieno Oloo v Anastacia Anditi Oloo & another* [2019] eKLR, and, *inter alia*, stated the following:

“ 12. I associate myself fully with the logic and reasoning of Kasango J to the effect that, despite the lacunae on the issue, this Court can very well invoke its inherent powers to check assessments of costs by the Magistrates Court. I therefore find that I have the necessary jurisdiction to entertain the present Application.

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14. I agree with the above holding of Mrima J as it bolsters the argument that this Court can also invoke its powers under Section 27 of the *Civil Procedure Act*



to check assessments of costs by the Magistrates Court. I therefore reiterate my finding that this Court possesses the jurisdiction to entertain the present Application.”

3. On the issue of the tautology referred to, in my said Ruling, I agreed with the sentiments of the two Judges to the effect that a challenge against the “assessment of costs” made by the subordinate Court is not technically an exercise that arises from “taxation of costs”.
4. The above is because a challenge against the “assessment of costs” made by the subordinate Court does not fall under the provisions of Rule 11 of the Advocates Remuneration Order and thus should not also be described as a “Reference” within the meaning ascribed therein. Instead, it is Section 27 of the Civil Procedure Act and/or the High Court’s inherent or supervisory powers which can be invoked to cure any “lacuna” in the process or procedure of challenging the “assessment of costs” by the subordinate Courts.
5. Returning to the substantive matter now before me, the Application is the Chamber Summons dated 14/4/2024 filed through the firm of Kimondo & Gachoka & Co. Advocates. The orders sought are as follows:
 - i. [.....] spent.
 - ii. [.....] spent.
 - iii. That the decision of the Taxing Officer as evidenced in the Ruling dated 20.02.2023 with respect to items (a)-pleader fees of Kshs 120,000 and items (p-y, aa, bb-attendance fees) in the Bill of Costs dated 05.08.2021 be set aside and taxed afresh by this Honourable Court with input by both parties.
 - iv. That the costs of this Application be provided for.
6. The Application is based on the grounds set out on the face thereof and is supported by the Affidavit sworn by Janerose Nanjira, the Applicant’s Advocate.
7. In the Affidavit, the Advocate deponed that the Respondent served the Applicant with his Bill of Costs dated 5/08/2021 the contents whereof are too excessive in the circumstances, and without any justification in law. According to Counsel, the trial Court failed to tax the Bill on merit as per the provisions of the law and considered extraneous evidence in allowing some of the items therein.
8. She deponed further that the Taxing Officer erred in failing to find that the attachment of the Applicant’s motor vehicle was illegal and the Respondent was therefore not entitled to any fees, that the Taxing Officer erred in failing to be bound by the law of precedent and misdirected himself in taxing the Bill at Kshs 283,520/-, which is grossly and/or manifestly excessive as to be indicative of an error in principle, and warrants setting aside.

Replying Affidavit

9. On his part, Mr. Matekwa representing the firm of Mwinamo Lugonzo & Co. Advocates acting herein for the Respondent, informed the Court that he would be relying on the same Replying Affidavit that the Respondent had filed earlier on 14/12/2023, in response to the Application for leave to file this matter out of time and for stay of execution.
10. In the said Replying Affidavit sworn by Delmas Lugonzo Mwinamo, the Respondent’s other Counsel, he deponed that the Respondent served the Applicant with the Taxation Notice in respect to the Respondent’s Party and Party Bill of Costs on 1/2/2023, that when the matter came up for assessment



of the Bill before the trial Magistrate, the Applicant had an opportunity to object to any items that it wished to oppose but did not attend Court to oppose the same, and that the Magistrate considered the Bill and had the same taxed as presented. He deponed further that the Applicant had the opportunity to voice and object to any items in the subordinate Court but chose to ignore attendance in spite of service. He deponed further that the Applicant is acting in bad faith and the Application is aimed at frustrating the Respondent from enjoying the fruits of his Judgment. The rest of the matters deponed have already been dealt with and determined in my earlier said Ruling and are therefore no longer relevant.

Hearing of the Application

11. I then granted the parties the opportunity to file written Submissions. However, Mr. Matekwa informed the Court that he will not be filing any Submissions and will be relying fully on the Replying Affidavit already on record. On the Applicant's part, despite being granted extension of time to file Submission, up to the time of finalizing this Ruling, I have not come across any Submissions filed by the Applicant, not even in the Judiciary Case Tracking System (CTS).

Determination

12. The issue that arises for determination in this matter is "whether this Court should disturb and/or review the assessment of costs made by the Magistrate's Court in Iten SPMCC No. 10 of 2019".
13. In my earlier Ruling, in finding that the Applicant had an arguable case, I stated as follows:

"In this case, I note that the damages awarded by the Magistrate Court, was on Appeal, reduced from Kshs 800,000/- to Kshs 500,000/-. A perusal of Schedule 7 of the Advocates Remuneration Order points to Party & Party instruction fees of about Kshs 65,000/- (higher scale) as the appropriate amount. The amount assessed by the Magistrates Court being Kshs 283,520/-, prima facie, the Applicant appears to have a valid and arguable point which this Court may need to interrogate. For this reason, I allow the prayer for enlargement of time."
14. However, in the Replying Affidavit, as aforesaid, Counsel for the Respondent deponed that they served the Applicant's Advocates with the Taxation Notice in respect to the Party and Party Bill of Costs but when the matter came up for assessment of the Bill before the trial Magistrate, the Applicant had an opportunity to object to any items that it wished to oppose but did not attend Court to oppose the same, and that the Magistrate therefore proceeded to consider the Bill in the absence of the Applicant and had the same taxed as presented. According to Counsel therefore, the Applicant had the opportunity to voice or object to any items in the Subordinate Court Civil but chose to ignore attendance in spite of service.
15. If the above statement is true, then I agree with the Respondent that it will be improper for this Court to take up the exercise of re-assessing the costs when the Applicant did not attend the exercise of assessment of costs before the trial Court.
16. I deliberately did not deal with this issue in my said earlier Ruling since it would have amounted to interrogating substantive facts on a Preliminary matter. I therefore expected the Applicant to take the cue and respond to the allegation at the substantive hearing of the matter. Unfortunately, the Applicant's Advocates never bothered to seek leave to file a Supplementary Affidavit to respond to the allegations of failure to attend before the trial Magistrate during assessment of the party and party costs, nor did they even file Submissions before this Court to address the allegation. The allegation



of their non-attendance before the trial Magistrate's Court therefore remains uncontroverted and unchallenged.

17. If the Respondent's allegations are true, then the Applicant's Advocates ought to have first returned to the trial Court as their first port of call. They would have then explained to that Court their failure to attend the assessment of costs exercise, seek the setting aside of the assessment, and pray to be granted a chance to oppose the Bill of Costs on merits. They cannot fail to attend before the trial Magistrate then before explaining themselves to that Court, purport to side-step it by "jumping" to the High Court for review of the same orders given ex-parte as a result of their non-attendance. This, I cannot accept as it will be wholly unprocedural and premature. For reason of the non-attendance before the trial Court, the Applicant ought to have first exhausted the available remedy at the Magistrate's Court before he can secure any audience before this High Court for redress.
18. For the said reason, I decline to determine this matter on merits.

Final Orders

19. In view of my findings above, I hereby strike out the Notice of Motion dated 14/4/2023 with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Applicant

Mr. Matekwa h/b for Mr. Mwinamo for the Respondent

Court Assistant: Brian Kimathi

