



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ouko, SCJ in Chambers)

APPLICATION NO. 10 OF 2014

— BETWEEN —

FREDRICK OTIENO OUTA.....APPLICANT

-AND-

JARED ODOYO OKELLO.....1ST RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSION.....2ND RESPONDENT

RETURNING OFFICER

NYANDO CONSTITUENCY.....3RD RESPONDENT

ODM PARTY.....4TH RESPONDENT

(Being a Reference seeking to vary the decision of the Hon. Kasavuli, Deputy Registrar, dated and delivered on 25th September 2023)

Representation:

Otieno, Yogo, Ojuro & Co. Advocates for the Applicant

Ben Aduol Nyanga & Co. Advocates for the 1st Respondent

RULING OF THE COURT

[1] **RECALLING** that by a reference dated 16th June 2023, the applicant asked the single Judge to consider reviewing the decision of the Deputy Registrar dated 9th June 2023 on the Bill of Costs with respect to items Nos. 1, 2, 3, 5, 13, 14, 19, 20, 25, 26, 35, 36, 37 and 40. Consequently, on 22nd September 2023, this Court (*Ouko, SCJ in Chambers*) delivered a ruling in the following terms:

“(i) Item No. 1 on the instruction fees is now taxed at Kshs. 1,000,000.

(ii) Items Nos. 2, 3, 5, 13, 14, 19, 20, 25, 26, 35, 36, 37 and 40 taxed to scale are upheld.

(ii) As costs are awarded at the discretion of the Court, parties shall bear their own costs”; and

[2] BEARING IN MIND that the taxation in dispute arose from an election petition in which Fredrick Otieno Outa, the applicant was found to have been properly elected Member of the Parliament for Nyando Constituency in the 2013 general elections, and the applicant’s costs in the High Court, Court of Appeal and the Supreme Court were to be borne by Jared Odoyo Okello, the 1st respondent; and

[3] NOTING that the applicant has now filed a second bill of costs arising out of Application No. 10 of 2014 which was separate from the bill of costs filed in respect of the main appeal being Petition No. 6 of 2014. The entire bill of costs comprises 40 items whose cumulative value is Kshs. 3,875,029.08. In Application No. 10 of 2014, the applicant had sought *inter alia* orders of stay of execution of the judgment and orders of the Court of Appeal; an order stopping the 2nd respondent from certifying the seat of Member of Parliament for Nyando Constituency vacant pending the determination of the appeal; and an order stopping the 2nd respondent from announcing and/or conducting elections for Nyando Constituency pending the determination of the appeal. By a ruling delivered on 6th May 2014, the application was allowed with the Court directing that, *“The costs of, and incidental to the instant application shall abide this Court’s Judgment and final Orders”*; and

[4] UPON considering the application dated 2nd October 2023 brought pursuant to Sections 3A and 23(2)(e) of the Supreme Court Act, 2011 and Rule 62 of the Supreme Court Rules, 2022 for orders that:

- i) *The Honourable Judge be pleased to set aside and/or vary the decision of the Deputy Registrar dated 25th September, 2023;*
- ii) *In the alternative, the Honourable Judge be pleased to issue directions that the Applicant's Bill of Costs dated 16th June 2023 be placed before another taxing officer for taxation or to tax the Bill as may be just and appropriate in the circumstances; and*
- iii) *Costs of this application be provided for.; and*

[5] UPON reading the applicant's affidavit sworn on 2nd October 2023 by Fredrick Otieno Outa, in support of the Motion and the submissions dated 2nd October 2023 filed on his behalf to the effect that: the Deputy Registrar disallowed the applicant's bill of costs in its entirety for the reason that the applicant had been compensated enough from the High Court to the Supreme Court; that the Deputy Registrar erred in considering an award of costs in other courts as a basis of denial of costs in this particular application; that despite the Deputy Registrar acknowledging an award of costs to the applicant herein, he proceeded to disallow the bill in its entirety; that the Court having addressed itself on who was entitled to costs of the application, it would be unfair to deny such a party costs for the reason that they have been compensated enough; and that the Order of the Court issued on 6th May 2014 cannot be radically overturned because costs have been awarded from the High Court to the Supreme Court; and

[6] TAKING INTO ACCOUNT the 1st respondent's grounds of opposition and submissions dated 26th October 2023 on the grounds, that the applicant failed to lodge his Bill of costs as soon as practicable after the making of the order for costs contrary to paragraph 2(2) of the Third Schedule; that instead, it was lodged eight years after the order of costs was made; that the Bill of costs dated 16th June 2023 is an abuse of court process, bad in law and fatally defective as it fails to comply with the mandatory provisions of the Rule 60(2) of the Supreme Court Rules and paragraph 3(1)(a), 3(2)(b) and 3(4) of the Third Schedule; that the Bill of costs is incompetent as it introduces in these proceedings a stranger by the name Jared

Otieno Odoyo who has not been a party contrary to the provisions of clause 3(2)(b) of the Third Schedule; that the Bill lacks the following elements: endorsement with a form of certificate for signature by the taxing officer; and the dates showing when the said services were rendered and a certificate signed by the advocate lodging the Bill. For the aforementioned reasons, the bill of costs ought to be dismissed; and

[7] FURTHER, considering the submission by the 1st respondent that the Deputy Registrar committed one fundamental mistake by changing the names of the parties as they appear in the bill of costs *suo motu* and when the very issue was in contention; and

In view of the foregoing, **I, NOW OPINE AS FOLLOWS:**

[8] The judgment from which this reference arises was rendered on 3rd July 2014, slightly over nine years today and within two election cycles. In that judgment, the Court directed that: *“The appellant’s costs at the High Court, the Court of Appeal and the Supreme Court shall be borne by the 1st respondent.”* Subsequently, the appellant filed his Bill of Costs on 16th June 2023.

[9] In exercise of the authority conferred by Rule 6 of the Supreme Court Rules 2020, the taxing officer, in disallowing the bill of costs rendered himself as follows:

“[6] In view of the very elaborate final orders of the court above and while bearing in mind that the Applicant herein has already been awarded costs taxed in the High Court, Court of Appeal and at the Supreme Court, I find this bill of costs dated 16th June 2023 a non-starter. The costs due to the Applicant in prosecuting the application dated 4th April 2014 cannot be severed from the costs taxed by myself vide the ruling dated 9th June 2023 which now stands reviewed as per the ruling of Hon. Ouko SCJ in SC Pet. (Ref.) No. 6 of 2014 delivered on 22nd September 2023.

[7] I concur with the submissions by the 1st respondent that the Applicant had been compensated enough in all proceedings in this matter from the High Court to the Supreme Court. It is my finding that any further attempt to tax this bill as framed and drawn will amount to unjust enrichment. The bill of costs dated 16th June 2023 is therefore disallowed in its entirety.”

[10] What test is a court to apply when it is considering whether to interfere with a ruling by the taxing officer? The grounds upon which a single Judge will interfere with the Taxing Officer’s decision on taxation are now settled beyond all peradventure. Unless it is demonstrated that the decision was based on an error of principle, for example, that the sum awarded was so manifestly excessive or obviously deficient, the single judge is not justified to interfere with the certificate of taxation issued by the taxing officer after considering pleadings and arguments.

[11] In its Ruling on the question of stay of execution delivered on 6th May 2014, the Court directed that the costs of that application would abide the outcome of the final Judgment and final orders. Based on this order, and upon the final judgment awarding costs arising from proceedings in the three courts, one would have expected the applicant in extracting the decree and drawing the bill of costs to do so conclusively by including all proceedings connected and incidental to the appeal, from the High Court to the Court of Appeal through to this Court.

[12] The applicant instead presented his bill to the taxing officer but left out parts of the proceedings. The taxing officer’s ruling having been reviewed in the Court’s ruling of 22nd September 2023, that ruling was final in terms of Rule 6(3) of the Supreme Court Rules 2020, in so far as the proceedings in all the three courts were concerned. It was irregular for the applicant to subsequently file a separate bill of costs arising out of the same appeal. The applicant in doing so was litigating by installment, highly discouraged practice as it could impair the administration of justice and lead to inefficient use of judicial resources. A party must bring his whole

claim at the same time. But after doing so and electing to forego part of it, he cannot be heard to complain about that choice after the event because to allow him to litigate in installment would not only be oppressive and prejudicial to the other parties but also would amount to an abuse of the Court process.

[13] The taxing officer in this matter having discharged his duties and issued a certificate of taxation was *functus officio*. The single Judge discharged that certificate upon review of the taxing officer's ruling and a fresh final one issued on 9th October 2023. The court will not allow the applicant to deploy his grievances piecemeal by bringing a multiplicity of taxations in the same retainer and keep on hauling the respondents over the same matter.

[14] In the circumstances, I find that no material has been placed before me to interfere with the taxing officer's proper exercise of discretion to dismiss the applicant's second bill of costs.

[15] Regarding the 1st respondent's submission that the taxing officer committed a fundamental error in changing the names of the parties as presented in the bill of costs without being moved by any of the parties, I note that by a letter dated 1st November 2023, the Registrar directed the 1st respondent to make a formal application to raise the issue, which application was filed on 6th December 2023 and is pending determination. Be that as it may, it is apparent that from the High Court to the Court of Appeal and before this Court, the contest has always been between Jared Odoyo Okello and Fredrick Otieno Outa, the two main candidates in the elections of the year in question. Clearly, the applicant in taking out the Bill of Costs, I believe inadvertently mixed up the names, by calling the 1st respondent "Jared Otieno Odoyo". Moreover, I note that the 1st respondent in his own pleadings concerning the taxation of the Bill and this reference, perpetuated this very mistake by calling himself "Jared Otieno Odoyo" on the heading of his pleadings and has never brought up the error in his name until this stage. However, both the impugned ruling on taxation dated 25th September 2023 and the final

certificate of costs dated 9th October 2023, correctly indicate the 1st respondent's name as Jared Odoyo Okello. Therefore, nothing really turns on this issue.

[16] Consequently, and for all the reasons explained, this reference fails and is dismissed with an order that the applicant shall bear the costs of this reference.

[17] **ACCORDINGLY**, I order that:

- i) The reference dated 2nd October 2023 be and is hereby dismissed; and*
- ii) The applicant shall bear the costs of this application as costs are awarded at the discretion of the Court.*

DATED and DELIVERED at NAIROBI this 8th Day of December 2023.

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W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA