



**Okwiri & Co Advocates v Kamau (Miscellaneous Application
E210 of 2022) [2024] KEHC 10201 (KLR) (13 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E210 OF 2022
DO CHEPKWONY, J
AUGUST 13, 2024**

BETWEEN

OKWIRI & CO ADVOCATES APPLICANT

AND

LEONARD NGANGA KAMAU RESPONDENT

RULING

1. Through Chamber Summons Application dated 29th February, 2024, THE Applicant filed a Reference pursuant to Article 159 of *the Constitution* and Paragraph 11 of the *Advocates Remuneration Order* and Section 51 (2) of the *Advocates Act*. It seeks the following orders:-
 - a. Spent.
 - b. That this Honourable Court issues a stay of execution of the Certificate of Taxation dated 26th October, 2023 for payment of Kshs 78,585.30 pending the hearing and determination.
 - c. That the decision of the Taxing Officer as evidenced in the Ruling delivered on 1st September, 2023 with respect to the bill of costs dated 7th December, 2022 be set aside and taxed afresh by this Honourable Court.
 - d. That in the alternative, the Honourable Court be pleased to order that the Respondent's Bill of Costs to be taxed afresh by another Taxing Master.
 - e. That the costs of this application be provided for.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Leonard Nganga Kamau sworn on 29th February, 2024. The Applicant holds that he was sued in the Children Court No. E015 of 2022 for maintenance and custody of his minor children. He stated that he used the Respondent for legal representation who verbally agreed to take up the case on a partial pro bono basis fee of Kshs. 30,000/=, all inclusive. The Applicant holds that he paid a deposit of Kshs. 25,000/



- = and a disagreement ensued between them which culminated into the Respondent filing the Bill of Costs dated 7th December, 2022.
3. The Applicant stated that he was not informed of the Ruling date until a letter dated 4th September, 2023 was served upon him wherein he was informed that the taxed amount was Kshs. 78,585.30. He requested for a copy of ruling vide a letter dated 12th September, 2023 after he had been visiting the court registry where he would always be advised that the same was being typed. That he was served with a copy of the Ruling on 16th February, 2024 via Whatsapp together with the Certificate of Taxation dated 26th October, 2023.
 4. The Applicant holds that he is dissatisfied with the decision of the Taxing Officer dated 1st September, 2023 and the Certificate of Costs dated 26th October, 2023 and seeks the court to set the same aside. He adds that the Respondent's advocates have threatened to execute the Certificate of Taxation through Whatsapp message dated 23rd February, 2024 which would make the reference nugatory.
 5. On 5th March, 2024, the court directed that the Reference be disposed of by way of submissions which the Applicant filed his which are dated 18th March, 2024 and the Respondent's submissions are dated 28th March, 2024.
 6. It is the Applicant's submissions that under Paragraph 51 of the [Advocates Remuneration Order](#), the applicable scale of costs of subordinate courts other than the Kadhi Courts is that which is set out under Schedule 7. He submits that under Schedule 7 (4)(c), the instruction fees in proceedings for custody and access to children is Kshs. 5,000/= . That although the Taxing Officer correctly confirmed the appropriate scale to be Schedule 7, erred in law for taxing it under Paragraph 2 instead of Paragraph 4(c). The Applicant holds that, the Respondent had agreed to take up the matter on an oral agreement of Kshs. 30,000/= all inclusive which he paid Kshs. 25,000/= leaving a balance of Kshs. 5,000/= He holds that the case was concluded before hearing as a Parental Responsibility Agreement dated 22nd September, 2022 was filed.
 7. The Applicant argues that where there is a provision for increment the same has to be commensurate to the work done. He holds that in this case the taxing officer used instruction fees of Kshs 50,000/= without explaining how the same was arrived at. He holds that the matter was only mentioned and no hearing was done. The Respondent neither attended court nor furnished the work done. He argues that the discretion of the taxing officer should not be exercised without any basis and relies on the case of Robert Kipng'etich C, An Administrator of the [Estate of Damaris Chepkurui – vs- Patriciah May Chepkurui T/A May Mitei & Co Advocates](#) [2021] eKLR
 8. The Applicant has urged the court to base instruction fees at the agreed Kshs. 30,000/= from which Kshs. 25,000/= should be deducted leaving a balance of Kshs. 5,000/=. He holds that on the item of mediation attendance, he holds that the same was erroneous as Parental Responsibility Agreement was filed in court without the assistance of the Respondent and therefore the taxing officer erred in awarding it.
 9. The Applicant holds that there was no basis of the taxing officer to add the ½ and it relied on [Otieno Ragot & Company Advocates –vs- Kenya Airports Authority](#) [2021] eKLR as it had not determined correctly the party and party costs first and he therefore urged the court to review the same.
 10. In his submissions, the Respondent relied on the principles governing assessment of costs in the case of [Premchand Raichand Ltd –vs- Quarry Services of East Africa Ltd](#) (No. 3) [1972] EA 162. The Respondent argues that the court should disregard the Reference as the same is an afterthought having been filed five (5) months after the ruling was delivered. As stated in Paragraph 5 of the Ruling, the



Respondent holds that the factors were considered by the Taxing Officer before the bill of costs was taxed.

11. The Respondent's argument is that there is no basis for which to interfere with the decision of the Taxing Officer and relied on various authorities. He stated that the Ruling of the Bill of Costs was taxed correctly as per the [Advocates Remuneration Order](#), 2014 and the same should be upheld.

Analysis and Determination

12. In considering the application dated 29th February, 2024, I have read through the respective affidavits and submissions filed by the parties either in support or opposition of the prayers sought and find the issue in contention being instruction fees.
13. according to the Applicant, the Respondent orally agreed to take up the matter for a fee of Kshs.30,000/=, all inclusive whereby he paid Kshs.25,000/= and was left with a balance of Kshs.5,000/= but the case was concluded before hearing because a Parental Responsibility Agreement dated 22nd September, 2022 was filed. It is his argument that the Kshs.50,000/= used by the Taxing Officer as instruction fees was never explained.
14. The court has read through the Respondent's submissions dated 27th June, 2023 on instruction fees, which state that the sum of Kshs. 30,000/= was not the entire legal fees but the costs of disbursements. He has noted that the Bill of costs also acknowledged receipt of Kshs. 25,000/= and the same was deducted from the total costs.
15. It is trite that the court should never interfere with the discretion of the Taxing Officer unless the same is based on an error in principle. This principle was set out by the Court of Appeal in the case of [Kipkorir, Tito & Kiara Advocates -vs- Deposit Protection Fund Board](#) [2005] eKLR, where it was stated that:-

“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.”
16. It is also trite that on instruction fees, the value of the subject matter ought to be ascertained and the same can be deduced either from the pleadings, Judgment or settlement, if such be the case. But if the same is not ascertainable, a Taxing Officer is then entitled to use their discretion to determine the instruction fee. This is the position that was established in the case of [Joreth Ltd -vs- Kigano & Associates](#), CA Civil Appeal No. 66 of 1999 [2002] eKLR.
17. In the instant case, the court finds that on instructions fees, the Taxing Officer used the appropriate scale under Schedule 7 (2) which states:-

“In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the Judgment (other than proceedings falling under Paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000/= if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs 50,000/=”
18. In view of the above provision, the Taxing Officer correctly exercised its discretion and applied the appropriate scale in awarding Kshs. 50,000/= as instruction fees. Therefore, the court cannot then interfere with the decision of the Taxing Officer as all the other items too were taxed to scale by the Taxing officer.



19. In the circumstances, the court finds that the Chamber Summons Application dated 29th February, 2024 lacks merit and the same is thus dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KIAMBU THIS 13TH DAY OF AUGUST, 2024.

D. O. CHEPKWONY

JUDGE

