



REPUBLIC OF KENYA



**Coast Bus (Mombasa) v Echesa (Miscellaneous Civil Application
E167 of 2023) [2024] KEHC 12839 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E167 OF 2023
S MBUNGI, J
OCTOBER 25, 2024**

BETWEEN

COAST BUS (MOMBASA) APPLICANT

AND

JOSEPH ANDREA ECHESA RESPONDENT

*(Being a reference from the decisions of the Taxing Officer, Hon. M. Anyango -
PM delivered on 25th November, 2023 in Mumias CMCC No.313 of 2016)*

RULING

1. The applicant lodged an application dated 08.02.2024 in this court seeking the following orders:
 - a. That the decision of the taxing master delivered on 25, September 2023 be set aside and assessed costs be subjected to 50% liability by this Honourable Court.
 - b. That the costs of this application be provided.
2. The application was premised on the following grounds: -
 - i. That the award is too excessive in the circumstances.
 - ii. That there is no legal basis for the award.
 - iii. That the award is punitive in nature and not compensatory.
 - iv. That the taxing officer misdirected herself by failing to subject the taxed costs to 50% liability as per the court's judgment.
3. The application was supported by an affidavit sworn by the applicant where he averred that the costs taxed at Kshs. 98,248/- was too high and made in total disregard of the applicant's submissions. The



applicant also stated that the taxing officer failed to subject the taxed costs to 50% liability as prescribed under the Schedule 7 Note 3 of the Advocates Remuneration Order 2014.

4. The respondent filed a relying affidavit in this court on the 27.02.2024 in opposition to the instant application where he stated that judgment was entered in favor of the respondent it was subjected to liability of 50% and also was awarded costs and interest in the matter.
5. The respondent averred that the party to party costs was subject to 50% liability as instruction fees was Kshs. 30,000/- and not Kshs. 40,000/- based on the sum awarded after deduction on liability.
6. The respondent submitted that there was no error in the taxation and the notice of motion filed herein is misplaced and an abuse of the court process.
7. Parties filed submissions.

Analysis and Determination.

8. I have looked at the record of the lower court and in particular the judgment where liability was apportioned at 50%. I have also looked at the ruling on plaintiff's bill of costs dated 24.06.2023 delivered on 25.09.2023.
9. The issue is the interpretation of Schedule 7 Note 3 of the Advocates Remuneration Order 2014 which states:

“Where success in a suit is divided, the scale may be distributed having regard to partial success on either side”

10. It is the applicant's submission that there was a partial success on the plaintiff's (respondent) suit against the defendant/applicant to the extent of 50%. Therefore, it follows that the respondent could and can only be entitled to costs equivalent to 50% which is the success rate of his suit and not 100%.
11. The applicant further submitted that the fact that the taxed costs were based on Kshs. 78,000/- which was 50% of the awarded quantum of damages does not absolve him from another reduction in costs at 50% as contributory negligence.
12. The applicant cited the case of Siaya High Court Misc.Civil Application No. E034 of 2022 – Duke Ongaka vs Sheldon Obel where the court held as follows in paragraphs 64-67 of the judgment by Hon. Judge Aburili: -

“...64.Whether costs should be subjected to contributory negligence ratio, I have perused the ruling by the taxing officer who was also the trial magistrate. I find no evidence that she subjected the taxed costs in the ratio of the apportionment of liability. There is also no evidence that she declined to apportion the same. The ruling is silent.

65. The question is whether the failure by the taxing officer who was also the trial magistrate to subject the assessed bill of costs to 30% contributory negligence by the plaintiff respondent was an error of principle on her part.
66. The respondent's counsel has defended the inaction by the taxing officer. The answer to this question is very simple as it is contained in the note 3 to Schedule 7 of the Advocates Remuneration Order under Part and Party Costs. the said Notes provide as follows:



'3. Where success in a suit is divided, the scale may be distributed having regard to partial success on either side.'

67. The above note is clear such that it needs no interpretation. In this case, there was partial success of the plaintiff's suit against the defendant applicant herein. It follows that the respondent could and can only be entitled to costs equivalent to the success of his suit and that success is 70% and not 100%. I therefore find that the taxing officer erred in principle in failing to subject the assessed party and party costs to 30% contributory negligence, having found the plaintiff partially liable in negligence at 30%. For that reason, I hereby find that the assessed costs shall be paid to the respondent less 30% contribution..."

13. The respondent's counsel submitted that Schedule 7 Note 3 of the Advocates Remuneration Order talks of 'scale' but not 'costs'. Scale is provided in Schedule 7 (c) where it provides for lower scale and higher scale.
14. The respondent further submitted that party to party costs contain instruction fees, attendance fees and disbursements which are expenses which a party incurred in bringing the case to court.
15. The respondent further submitted that the attendances and disbursements are to the party who came to court and hence cannot be subjected to partial success.
16. Lastly, he submitted that the respondent was awarded costs and not half costs, so subjecting the assessed costs to 50% will amount to the respondent being awarded half the costs hence changes the judgment of the lower court yet this is not an appeal.
17. In arriving to a determination this court is alive to the fact that it cannot interfere with the taxing officer's decision on taxation unless it is shown the decision was based on an error of principle or the awarded costs was manifestly excessive as held in the case of *First American Bank of Kenya vs Shah & others* 92002) 1 EA 64, AT 69, Ringera J (as he then was) stated that the 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.
18. I have considered all the material placed before me. I am of school of thought that where a suit partially succeeds, and costs are awarded the costs should be divided /shared in accordance with the degree/ratio of success.
19. Schedule 7 Note 1 of the Advocates Remuneration Order states "When an order has been made in general terms for the payment of costs by either party and an advocate has been employed, those costs, in addition to the court fees, shall be computed under this Schedule, which shall be the minimum fee, and shall include (except as may be provided) taking instructions, drawing or perusing documents, pleadings or similar documents, engrossing and filing documents, and all necessary attendance at court or chambers"
20. To me, taking into account the provision of Schedule 7 Note 1 of the Advocates Remuneration Order the assessment of costs done by the magistrate should have taken into consideration the provisions of Schedule 7 Note 3 of the Advocates Remuneration Order, even if the trial magistrate did not specify in his judgment that the costs of the suit awarded were to be subject to 50% contributory negligence. I therefore find the taxing officer erred in principle in failing to subject the assessed party and party costs to 50% contributory negligence the trial court having found the plaintiff partially liable in negligence at 50%.



21. For the above reasons, I hereby order that the assessed costs shall be paid to the respondent less 50% contribution.
22. On the issue of cost, I find that it was not the fault of the parties in the manner the bill was assessed. I therefore order each party to bear its own costs of this reference.
23. This ruling will apply to MISC. E166 of 2023 with modifications where necessary.
24. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Ms. Tesot holding brief for Wesonga for the applicant – present

Applicant - absent

Respondent - absent

Court Assistant – Elizabeth Angong'a

