Nyaanga & another (Miscellaneous Civil Application E032 of 2022)
[2023] KEHC 480 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

MISCELLANEOUS CIVIL APPLICATION E032 OF 2022

RE ABURILI, J

JANUARY 30, 2023

IN THE MATTER OF

DUKE ONGAKI NYAANGA ..... 1ST APPLICANT

GUARDIAN BUS COMPANY LIMITED ..... 2ND APPLICANT

RULING

1. This matter is similar to Misc E034 and E033 of 2022. All the three matters have common applicants and Respondent who were defendants and plaintiff respectively in the lower court case files wherein the plaintiffs obtained judgment against the applicants herein and party and party costs were assessed in favour of the plaintiff in the respective cases whose particulars are disclosed in the body of this ruling as adopted as applying to MISC E034 and Misc E033 of 2022 thereby inviting the three References filed to this court by the applicants/ defendants, challenging certain items in the taxed bills of costs by the taxing officer Hon. C.I Agutu, Senior Resident Magistrate.

2. This ruling therefore determines the Reference filed vide Chamber Summons application dated 05/12/2022 brought under the provisions of section 89 of the *Civil Procedure Act*, Schedule 7 of the *Advocates Remuneration Order (2014)* and section 11 of the *Advocates Remuneration Order,* 2014.

3. The Reference arises from the ruling rendered on 22/11/2022 on a taxation of party and party costs dated 12/07/2022 in Ukwala PMCC No. 38 of 2020, by Hon. C.I Agutu SRM. In the said case, the respondent herein was the plaintiff successful party wherein judgment was entered in his favour against the respondents on liability in the ratio of 70:30 and general damages awarded, subject to contributory negligence in the n same ratio.

4. The applicants herein who were the defendants in the suit before the lower court lament that the taxing officer taxed the Respondent's party and party bill of costs as drawn despite the Applicants' submissions on the Bill of Costs opposing certain items in the said bill.

5. Aggrieved by the taxation order, the Applicants wrote to the taxing officer on 24/11/2022 notifying her of the objection on items 5,6,12 and 14 on service fees, item 8 on court attendance fees on 24/11/2020, 18/5/2021,13/7/2021, 16/11/2021, 25/01/2022, 1/03/2022 and 29/3/2022 and items 9 and 15 on court attendance fees. The Applicants also complained that the taxing officer had failed to subject the Bill of Costs to 30% less contributory negligence by the Plaintiff.

6. The Applicants then approached this court to have the disputed items set aside and taxed afresh.

7. The Applicants claim that the award was too excessive, that there was neither a legal basis for the award nor was there proof of expenses incurred by the Respondent. They disputed item number 8 on court attendances because no hearing took place; that the cost contravened Schedule 7 of the *Advocates Remuneration Order* and that items 9 and 10 awards were excessive and also contrary to Schedule 7 of the *Advocates Remuneration Order*. In addition, the applicants complain that the taxing officer totally disregarded the Applicants' submissions. The Applicants also urged that the costs of the Reference be provided for.

8. The Respondent through his counsel Mr Omondi opposed this Reference and filed Grounds of Opposition dated 14/12/2022 contending that this court lacks jurisdiction to entertain these proceedings; that no competent reference had been instituted by the Applicants; that the application was premature and misconceived and that the purported reference lacked merit and was therefore an abuse of court process.

9. The Reference was canvassed by way of written submissions. The Applicants' counsel filed their written submissions dated 22/12/2022 whereas the Respondent's counsel filed written submissions dated 16/01/2023.

10. In the Applicants' submissions, counsel for the Applicants; Miss Ogato identified three issues for determination. One and two were whether this Court has jurisdiction to entertain a reference from an assessment/decision of a Bill of costs by a magistrate court and whether the Application is pre-mature respectively. Issue three dealt with the disputed items in the Bill of Costs.

11. On the firsts issue, Counsel quoted paragraph 11 of the Advocates Remuneration Order and cited *David Maingi v Juma Wadhier & Daniel Omondi Juma Suing As Legal Representative On Behalf Of The Estate Of Angeline Aoko Juma)* Siaya High Court Miscellenous no E31 of 2022 where this court cited the case of *Donholm Rahisi Stores (firm) V E.A Portland Cement ltd* and *Vincent Kibiwot Rono v Abraham Kiprotich Chebet* (2022) eKLR where it was held that:

> 'Having established that taxation and assessment mean basically the same thing, it is therefore in order that the dispute as to assessment is brought before this court by way of references. In the premises, this court has jurisdiction to entertain this matter.'

12. In regard to the second issue, Miss Ogato cited the same case where the court stated that:

> '... Filing of a reference is not dependent on availability of reasons or decisions for taxation other than the reasons contained in the Ruling for taxation and that therefore the failure of the magistrate to give those reasons is not fatal to the reference as the same would be more or less a duplication on the Ruling of taxation.'

13. On the third issue, counsel for the Applicants proposed their ideal costs based on the reasons they thought were adequate for each opposed cost. This will be discussed in the content of the analysis below.

14. In the Respondent's counsel's submissions, it was argued that because the Notice of objection was addressed to the Executive Officer and who was not the taxing officer, then there was no competent notice of objection filed. In addition, Counsel submitted that there was no ruling by the taxing officer attached to the application and therefore the application was premature and incompetent.

15. Mr. Omondi posited that the jurisdiction to tax bills is a preserve of the taxing officer and is a discretionary jurisdiction hence a judge will only interfere with the exercise of that discretion where it is proved that the Taxing Officer erred in principle. He relied on Nairobi High Court Misc Civil Application No. E 207 OF 2019: *Insurance Regulatory Authority v Waweru Gatonye and Company Advocates*.

16. The Respondent also responded to the Applicants' aversions on the disputed items in the Bill of costs which I shall deal with in my analysis.

Analysis and Determination

17. I have carefully considered the Application, grounds and Supporting Affidavit and the Respondent's Grounds of opposition and the parties' counsel's rival submissions. I find the following issues are ripe for determination:

    i. Whether this court has jurisdiction to entertain the reference and therefore whether this reference is competent as has been instituted by the Applicants;

    ii. Whether the application is premature and misconceived;

    iii. Whether the challenge to the specified items in the Bill of costs as taxed is merited;

    iv. Whether the taxing officer should have subjected the taxed costs to 30% contributory negligence;

    v. What orders should this court give

    vi. Who should bear the costs of the application.

18. On the first and second issues, it was the Respondent's Counsel's contention that there was no competent reference before this court because the notice of objection was addressed to the Executive officer; yet he was not the taxing officer. According to the Respondent's counsel, the issue of competency therefore meant that this court had no jurisdiction to determine the reference.

19. It was however the Applicant's position that in light of paragraph 11 of the Advocates Remuneration Order and in line with my findings in the case of *David Maingi* (*supra*), this court has jurisdiction to hear the reference.

20. Paragraph 11 of the *Advocates Remuneration Order* 2014 provides that should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects. In this case, the Notice f objection was addressed to the Executive officer, Ukwala Law Courts and copied to the taxing officer, Hon C.I. Agutu. The question is, does the fact that the Applicants sent a notice of objection to the Executive officer render the reference fatally incompetent?

21. The resounding answer is no. The reason is that from the said Notice of objection, the taxing officer who assessed the bill of costs is copied in the said letter. In addition, the Court's Executive officer is the administrator in the lower court and therefore administratively, he is the custodian of all court files that go before the magistrate's courts or taxing officer just as the Registrar or Deputy Registrar is the

administrative head of the Superior courts or divisions. I therefore find that the notice of objection as addressed to the Executive officer, Ukwala Law Courts, is competent and so is the reference herein; as far as the notice of objection is concerned. I therefore find hold that this court has jurisdiction to hear and determine the merits of this reference.

22. On the third issue, it was the Respondent's contention that the application was premature and misconceived because the ruling of the taxation officer and the reasons for the taxation were not availed to this court by the Applicants. In response, the Applicants submitted that they filed a notice of objection but the taxing officer had to date neither furnished them with the Ruling nor the reasons for the assessments made. The Applicants cited the case of *David Maingi* (*supra*) where this court held that filing a reference is not dependent on the availability of reasons or decisions for the taxation.

23. However, the context of the *David Maingi* (*supra*) case was that if the ruling of the taxing officer included the reasons for the taxation, then there was no need to apply for further reasons.

24. Indeed, the basis of this Reference is the ruling on taxation by the taxing officer and therefore it was important that the applicants attach copy of that ruling for consideration by this court.

25. In *Joseph Tamata v Mary Nthambi Mbuvi* [2021] eKLR, Kemei J dismissed a reference which had no ruling on taxation attached to it. This is a persuasive decision which is not binding on this court of concurrent jurisdiction. In the premises, I shall find my own bearing on the issue, having regard to the overriding objective of the law as contemplated under Article 159 (2) (d) of the *Constitution*.

26. The basis of the reference is the impugned ruling on taxation. This court has been told that it is not aware if the taxing officer gave reasons for the taxation as it did and so this court cannot interrogate the reference properly.

27. The respondent contends that failure to file the Ruling on taxation was therefore fatal to the reference which reference this court should find to be incompetent and therefore amenable for striking out or dismissal.

28. Whereas I agree with the respondent's counsel's argument that the applicant ought to have annexed a ruling on taxation for this court to assess and evaluate whether reasons for taxation of the challenged items in the bill of costs were given and therefore whether the taxing officer ought to have awarded the respondent those impugned items in the bill of costs, the question that this court must pose before resolving the above issue is whether, even if the applicant had availed to this court the ruling on taxation, and even if the reasons for taxation were given and availed to this court, this court would have been sufficiently enabled to determine this reference without the entire court file containing the trial court proceedings being availed to this court.

29. In my humble view, this court will only be enabled to do justice if it is in possession of the trial court file containing proceedings since most of the items which are being challenged concern court attendances and in order for this court to satisfy itself that there were court attendances warranting the awards made by the trial court, it must peruse the trial court file.

30. He above position is predicated on the fact that References are not independent proceedings. They are anchored on the original court files where proceedings were conducted. A reference is similar to but not the same as an appeal. Just like an appeal which cannot be determined on merit without the trial court record from which an appeal is drawn being availed to the Superior Court, for this court to determine a reference which is highly contentious as this particular one, it must peruse the trial court file.

31. In addition, the Superior court which is confronted with an appeal or a reference cannot blame the appellant or applicant for non-availability of the trial court record.

32. I observe that the trial court record was never called for by the Deputy Registrar of this court, this not being an appeal where the first action upon receiving a memorandum of appeal is to call for the submission of the lower court record to this court for admission of the appeal to hearing.

33. It is the duty of this court to do justice to all irrespective of status and in exercising judicial authority, procedural technicalities must give way to substantive justice. To that extent, this court being a superior court of record must rise above procedural technicalities and play its role of ensuring that those who appear before it get justice and get it overtly.

34. The applicants have not come to this court to seek discretion of the court as it is in their right as stipulated in Paragraph 11 of the Advocates Remuneration Order, to challenge the taxation made by the taxing officer in the lower court. They seek very substantive orders that would, if found to be merited, upset the taxation of the challenged items in the party and party bill of costs taxed in favour of the respondent who was the successful litigant in the suit before the trial court.

35. As a consequence, this court must apply itself to the constitutional tenets of justice. In that regard, I did call for the trial court record in this court's exercise of its supervisory jurisdiction under Article 165(6) and (7) of the *Constitution* for perusal and scanned copies of the lower court file proceedings in Ukwala PMC No. 38 of 2020 were supplied to me for perusal.

36. Having perused the proceedings in the lower court file wherein the taxation was undertaken, the question is whether the taxing officer erred in principle awarding the respondent the items challenged in this reference. I will answer this question by examining each item and comparing it with the trial court record of proceedings.

37. In the taxed bill of costs, items 5, 6,12 and 14 relate to service fees on reply to defence upon counsel for the defendant in Nairobi, service fees on mention date for 15/9/2020 in Nairobi and fees on replying affidavit upon counsel for the defendant in Nairobi.

38. On each of the four items for service fees, the trial court awarded Kshs 15,000. The applicant contends that fare to Nairobi was Kshs 1,000 and not what was claimed and awarded.

39. The respondent in defending the said items submits that the service was done by a process server and that it was at the height of Covid 19 in mid-2020 when it was very difficult to travel to Nairobi and effect service hence the service fees charged which included travelling costs, subsistence and professional fees for the process server was reasonable.

40. The respondent did not avail any receipt as evidence that the said monies were disbursed to the process server who went to effect service. His counsel submits in defence of the figures in contention that the applicant did not move the taxing officer under Paragraph 13A of the Advocates Remuneration Order to have the receipts availed.

41. In *First American Bank of Kenya v Shah and Others* [2002] 1 EA. 64 at 69, Ringera J. (as he then was) stated 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."

42. On this issue of service fees and whether it was properly awarded by the taxing officer, my view is that a bill of costs is a claim put forth by a successful party in judicial or quasi-judicial proceedings.

43. In law, he who asserts must prove. The respondent made a claim that he expended monies to effect service of essential documents upon the applicant's counsel in Nairobi.

44. Even if there is proof that service was indeed effected, it is the incumbent upon the respondent to prove to the court what amount of money he expended so that he can be reimbursed as costs of the suit. This is so because unlike in matters of court attendances which are res ipsa loquitur as the court record will show on the face of it, payments made to third parties are not the type of expenses that the court can take judicial notice of.

45. Thus, assuming that the respondent indeed spent the kshs 15,000 as claimed, the question is where is evidence of that expenditure? In my humble view, the respondent was under a duty to prove that expenditure before the taxing officer could award his, even if the items were not opposed by the applicant.

46. I am fortified on this point by the provisions of Order 21 Rule 9A of the *Civil Procedure Rules* which stipulates that:

> "A party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought."[emphasis added]

47. A similar situation arose in *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another* [2022] eKLR where Nyakundi J sitting in Eldoret High Court observed, as follows, after a similar argument was placed before him and upon the learned Judge referring to Order 21 Rule 9A of the *Civil Procedure Rules*:

> "A perusal of the statement of costs that was filed by the respondent reveals that indeed there were no supporting documents filed by the respondent. Further, there was no proof of receipt from the process server for items 1(c), (f), (g), (h) and (r). In the premises, each of the items are assessed at kshs. 5,000/- and therefore kshs. 15,000/-, kshs. 5,000/-kshs. 5,000/-, kshs. 5,000/- and kshs. 3,000/- are taxed off items 1(c), (f), (g), (h) and (r) respectively.

48. This matter is in pari materia with the above case.

49. The respondent's counsel relied on Paragraph 13A of the *Advocates Remuneration Order* which provides for the powers of the taxing officer as follows:

> "The taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."

50. In my humble view, the powers and authority of the taxing officer under the above paragraph do not take away the duty of a party who alleges that they expended monies to prove that allegation or pleading.

51. Paragraph 13A of the *Advocates Remuneration Order*, in my view, must be read together with Order 21 Rule 9A of the *Civil Procedure Rules* as reproduced above such that if a party whose costs are being assessed does not prove what he is claiming, the court should not award him the claimed costs as prayed. This is because the above paragraph does not shift the burden of proof from the respondent to the applicant.

52. In explaining the import of paragraph 13A of the *Advocates Remuneration Order*, Nyakundi J had this to say in *Sunsand Dunes Limited v Raiya Construction Limited* [2020] eKLR at Malindi High Court:

> " Under this rule, the record of the Misc. Application for taxation should contain documents relating to the proceedings in the trial Court and corresponding record of appeal. In the Court of Appeal and the certified decree or orders relevant to the taxation as premised in the drawn bill of costs. On the contrary, a perusal of the taxation proceedings objected to by the applicant failed to contain the extract of the copy of Judgment of the Court of Appeal which substantively granted costs incurred in both Courts to be due and payable to the applicant. Therefore, I agree again with the applicant that an order for taxation ought to reflect the terms of the Judgment itself. Consequently, the main consideration for this Court should be whether the dismissal order and further upholding the Preliminary Objection by the respondent was consistent with the Court of Appeal Judgment of 24.5.2018."

53. What I gather from the above observation is that the documents, books and paper referred to are not a substitute for evidence of disbursement being adduced before the taxing officer can award such costs. For example, a process server can be called upon to be cross examined on his affidavit of service or on his invoice and or receipt for an amount claimed, where there is a contest as to whether that process server charged the amount claimed or not.

54. In this case, there is evidence of service of the notices in issue but there is no evidence of how much was expended. This being a disbursement, the process server should have provided the respondent with an invoice claiming for payment and the respondent would then issue him with a receipt although issuing of an invoice is not evidence of payment. The court would then grant the item claimed based on the receipt.

55. In *Francis Mwanza Mulwa v Thomas Kimau Wambua* [2015] eKLR, B.T. Jaden J (RIP) stated as follows in a matter where the applicant blamed the taxing officer for failing to invoke the provisions of Paragraph 13 A of the *Advocates Remuneration Order* and I concur:

> " The Applicant contends that the Taxing Officer failed to invoke the provisions of paragraph No. 13A of the *Advocates (Remuneration) Order*.
>
> The application proceeded ex parte. The Respondent did not file any papers in opposition to the application though service had been effected. The Applicant filed written submissions which I have considered. Section 13A of the *Advocates (Remuneration) Orders* provides as follows:
>
> "For the purpose of any proceeding before him, the Taxing Officer shall have power and authority to summon and examine witnesses, to administer oath, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."
>
> The Applicant's contention is that the Taxing Officer ought to have invoked the provisions of the aforestated provision. It is observed that the Applicant did not apply or call upon the Taxing Master to invoke the said provision of the law. The Applicant participated in the taxation and had the opportunity to summon witnesses or produce any books and documents but did not do so. There was no single document exhibited before the Taxing Officer by the Applicant to establish a relationship of engagement between the parties. The Applicant cannot therefore be heard to complain on matters that were not raised

before the Taxing Officer (See for example Owino Okeyo & Co. –v Pelican Engineering & Construction Co. Ltd. 2007 e KLR).

For the above stated reasons, the application is dismissed with costs."

56. In my view, the respondent was under a duty to prove his allegations of expenditure and therefore in the absence of any evidence that kshs 15,000 was disbursed to the process server, I find that the taxing officer was in error in principle in awarding those items as there was no basis upon which a disbursement could be awarded without proof yet the process server could have been reached to issue receipts for the amount charged for effecting service of notices upon the applicant's counsel in Nairobi.

57. On item 6, I agree with the applicant's counsel that it should have been taxed off as the reply to defence was served together with the mention notice on 31/8/2020 hence it is a duplication. It is hereby wholly set aside.

58. However, as the applicant's counsel conceded in his submissions in the lower court that the respondent could be awarded Kshs 5000 per service down from Kshs 15,000, I hereby set aside the awards under items 5,12 and 14 on service and substitute the same with kshs 5000 for each of the three occasions that service is said to have been effected all totalling kshs 15,000 and not kshs 45,000 as awarded by the taxing officer on the three items.

59. On items 8,9 and 15 on court attendances, I have perused the trial court record of proceedings. On all the court attendances in contention, I observe as follows: on 24/11/2020, the matter was for hearing and it is Mr Kapere counsel for the plaintiff who sought adjournment as his client had been taken ill. The case was adjourned to 9/3/2021. The defendant cannot therefore be penalised. I find that there was no justification for awarding the costs of that day to a party who was not ready to proceed with the hearing of his case. I set it aside and award nothing.

60. On the 9/3/2021, the hearing proceeded with Dr. Sokobe testifying. The respondent was awarded kshs 5,000 although Schedule 7(i) only allows that sum where the hearing is for a whole day. As only one witness testified, the hearing could not have taken the whole day. I find Kshs awarded to be excessive. It is hereby set aside and substituted with an award of kshs 2,500 for half day since the court record does not indicate at what time the matter proceeded for hearing.

61. On 18//5/2021, two witnesses PW3 and PW4 testified. The proceedings are clear on this. The attendance is governed by Schedule 7 (ii) and kshs 2,100 is allowable as it was each part after the first. I uphold the award. The same applies to attendance for 5/10/2021, when Dr Wekesa Weluke Evans testified and the plaintiff closed his case I uphold kshs 2100. On 13/7/2021, the suit was scheduled for hearing but was rescheduled to 5/10/2021 with no reasons given and no costs for adjournment were awarded as stipulated in Schedule 7 (8). I therefore set aside Kshs 2100 and substitute with kshs 1,400. On 16/11/2021 the case was for hearing but from the trial court record, both counsel mutually agreed to adjourn it to 25/1/2022. No costs of adjournment were awarded. I set aside the Kshs 2100 awarded and substitute it with Kshs 1400. On 25/1/2022, the suit was for defence hearing but the defendant's driver was unavailable and he was said to be a long-distance driver and could not attend court virtually. No hearing took place hence the plaintiff was entitled to kshs 1400 and not Kshs 2100 as no adjournment costs were awarded by the trial court. On 1/3/2022, the case was for defence hearing but Ms Ogato advocate was said to be unwell as she had undergone surgery. No hearing proceeded and no costs of adjournment were awarded hence the respondent/ plaintiff was entitled to kshs 1400 and not 2100. On 29/3/2022, the case was due for defence hearing but no hearing took place as the defence closed its case without calling any witness. The plaintiff/ respondent was therefore entitled to Kshs 1400 and not 2100 as no costs of adjournment were awarded.

62. On Item 15 attendance for assessment of the bill of costs, the bill was canvassed by way of written submissions. However, parties attended court for directions upon which they filed submissions and a ruling was delivered on 22/11/2022. I find that the Respondent was entitled to kshs 1400 and not 2100.

63. In the end, I find and hold that the respondent was entitled to the reassessed sums of costs for the reasons that I have supplied. The total in the bill of costs is Kshs 23000(contested reassessed items)+50,0775 (uncontested items)=73,775

64. On 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.

68. As it was not the fault of the applicant to tax the bills in the manner faulted by this court although the respondent supported those errors which are obvious, I order that each party shall bear their own costs of this reference.

69. I so order. File closed and this judgment and order shall apply mutatis mutandis and with necessary modifications as to the parties' names and item numbers under challenge to HC Misc Civil Cases Nos 34 and 33 of 2022.

70. I so order. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE