Patel & another v Mogaka Yantika & Co Advocates (Civil Miscellaneous Application E081 of 2021) [2023] KEHC 133 (KLR) (23 January 2023) (Ruling)

Neutral citation: [2023] KEHC 133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL MISCELLANEOUS APPLICATION E081 OF 2021

RK LIMO, J

JANUARY 23, 2023

BETWEEN

VNDANABEN JAYENDRA KUMAR PATEL ..... 1ST PLAINTIFF

JAYENDRA KUMAR PATEL ..... 2ND PLAINTIFF

AND

MOGAKA YANTIKA & CO ADVOCATES ..... DEFENDANT

RULING

1. The applicant herein being aggrieved by the decision of the Taxing Master dated December 8, 2021 has moved this court vide a Notice of Motion dated December 23, 2021 for a reference and seeks the following reliefs/orders: -

    a. Spent

    b. That the decision of the Taxing Master delivered on 8th December 2021 in so far as the same relate to the reasoning and determination pertaining to the taxation of items A (1), (2), (3), (5), (7), (9), (10), (12, (14), (15), (17), (19) and (20) and items B (1), (2), (3) and (4) items C(1) (2) (3) and (4) and the approved bill at Kshs 710,350.00 dated December 8, 2021 be set aside and/or reviewed downwards.

    c. That the Honorable Court be pleased to refer the matter back for re-taxation of the aforesaid items as per prayer 1 above with proper directions or guides to the Taxing Master on the proper or legal principles or rules of law to apply in considering the amounts awardable on the items objected to.

    d. That in the alternative to prayer 2 and 3 above, the Honorable Court be pleased to exercise its inherent jurisdiction and discretion and re-tax or re-evaluate the taxation process and thereafter

review or reverse the taxation awards in the bill of costs dated 10th May, 2021 afresh and/or issue directions as to a fresh taxation exercise.

e. That the costs of this reference application be provided for.

2. The grounds upon which the applicants have filed this reference are listed as follows: -

a. That the Respondent's bill of costs dated May 10, 2021 was contested and each party made respective submissions on the positions taken.

b. That the Taxing Master rendered herself vide a ruling dated December 8, 2021 which ruling aggrieved the applicants.

c. That the applicants have filed a notice of objection dated December 8, 2021 pointing out the items of contestation asking the Taxing Master for her reasons.

d. That the Taxing Master complied and supplied the ruling dated December 8, 2021 and from a foregoing reasoning, it is evident that; -

i. The taxing master did not apply the correct, proper and or/valid law and did not look at the correct factors, considerations, rules, principals of law and guidelines in evaluating the awardable costs in items A(1), (2),(3), (5), (7), (9), (10), (12), (14), (15), (17), (19) and (20) and items B(1), (2), (3) and (4) items C(1), (2) (3) and (4) and the approved bill at Kshs 710,350.00/- despite the objection and condensations, she fell into error and misdirection.

ii. The taxing master by approving and awarding the bill of costs as drawn despite the obvious objections to the same was unjustified, unfounded, wrongful, unreasonable, irrational and illegitimate.

iii. The process, the reasoning and the awards given obviously overlooked or failed to take into consideration viable, legitimate factors, facts, principles, rules, considerations and essential matters relevant and essential in taxing a bill of costs.

iv. The total amount awarded in the bill of costs on the face of it and taking into considerations the circumstances of the principal suit was obviously manifestly and out rightly inordinately and unreasonably high and/or above average in normal cases or situations or taxations.

v. The award by the taxing master as awarded is manifestly and obviously outlandish and so, it is out rightly clear that the taxing master was influenced by other factors, motives, considerations, interests and/or issues outside the normal taxation wisdom and/or took into considerations, irrelevant matters, factors, considerations or unwise reasoning in the process.

vi. The taxing master reasoned that the total figure in the impugned bill of costs was erroneous in compilation, without stating what was the actual correct figure and what was the actual amount she had taxed off and what was the actual award she considered valid or justifiable after discounting the amounts taxed off, hence her determination is unreasonable.

vii. It is evidently on record that some items were taxed off, yet, the taxing master ended up approving the bill of cost as framed without disclosing information on the amounts taxed off, hence concealing some irrelevant matters in reasoning.

e) That it is on the aforesaid premises therefore, that the applicant has filed this reference for the review, revision, setting aside, varying or challenge of the taxation of the aforementioned items as particularly set out above.

f) That it is in the interest of justice to avoid denying the applicant the fruits of her costs that it is safer that this reference be allowed, the matter be evaluated or re-taxed afresh in a manner that meets the ends of justice, ensuring that the applicant is not unjustly awarded a manifestly and or inordinately low amount.

3. The applicants have supported this reference with an affidavit sworn by their Counsel, Alfonzo Musembi Kilonzi sworn on December 23, 2021.

4. The learned Counsel avers that the ruling of the Taxing Master was flawed and has faulted the applicants for what he terms unjust legal fees.

5. In their written submissions dated June 8, 2022, the applicants submit that the Taxing Master erred on the 1st item of the bill of costs which is in respect to instructions fees. The applicants contend that the instructions fee should have been a bit lower because the suit upon which the taxation was based, was compromised by parties before the first hearing.

6. The Respondent has opposed this application through a replying affidavit by learned counsel Mr. Davis Nyantika.

7. The Respondent avers that this reference is in bad faith because in its view the applicants have not outlined any tangible ground to warrant a reference.

8. They aver that the ruling of the Taxing Master is well reasoned and that the Taxing Master applied the correct principles in taxing the bill.

9. The Respondent contends that, there is only one error which relates to the computation or calculation of the total figure pointing out that the total amount ought to be Kshs 819,150 instead of Kshs, 710,350.

10. They submit that the instructions fees were based on the subject matter of the suit whose value was determined, adding that the defence raised a counter claim which also attracted legal fees.

11. According to the respondent, the bill presented for taxation was drawn to scale and was taxed as such and has urged this court to dismiss this reference.

12. The applicants are challenging taxation of the bill of costs dated May 10, 2021. The gist of the Advocates reference is based on the following issues

i. First, that the taxing master erred in principal while taxing the bill by allowing the instructions fees billed for defending the applicants in the main suit and in the counterclaim

ii. Secondly that there was an error in the schedule relied upon by the taxing master.

iii. Third, that there was an error by failing to determine the VAT applicable and;

iv. Fourth, that the taxing master fell into error by failing to reduce the total awardable amount event after taxing-off several items in the bill

13. Before delving into the merits of the application, the general principles governing interference with the exercise of the taxing master's discretion were restated by Mativo J (as he then was), in *KANU National*

Elections Board & 2 others v Salah Yakub Farah [2018] eKLR where he referred to the case of *Visser versus Gubb 1981 (3) SA 753 (C) 754H – 755C* as follows;

> "It is trite that the court will not interfere with the exercise of the taxing master's discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

14. Having set out the law and principles applicable in a reference such as this. This court will now consider the items flagged by the applicants as the subject of their grievances.

(a) Instruction fees

15. The Applicants aver that the Deputy Registrar relied on the wrong schedule. From her ruling, it is possible to deduce that the taxing master adopted the Respondent's proposed schedule, which was Schedule 7(b) of the *Advocates Remuneration Order*. On their part, the Applicants did not indicate the schedule that the court should have adopted. However, they have taken issue with the Respondent stating that he increased the instructions fee by 50%.

16. The Deputy Registrar stated in its ruling that Schedule 7 was applicable.

    This being an advocate-client bill of costs, and going by schedule 7(B) for the taxing master to so proceed. The Court did not specify the exact clause in the schedule that it applied but she adopted the computation provided by the Respondent which reflected Schedule 7 (A) and more specifically Sub-Clause (c) of Schedule 7 (A).

17. The Applicants argument is that the Deputy Registrar failed to address herself on the use of Schedule 7 (B) and that she did not give reasons that justified the increase of the instructions fees. While it is correct that the Deputy Registrar's ruling did not contain a detailed explanation, she followed the guidelines as provided in the Remuneration Order. The matter was filed at the Chief Magistrates' Court, and this being an advocate client bill of costs, Schedule 7 was the correct schedule to apply.

18. The applicants have also faulted the Taxing Master for not taking into account the stage the case reached because in their view, the matter did not proceed to the trial stage because it was compromised.

19. On this issue, the Deputy Registrar held as follows;

> "For item 1 and 2, it is disputed that since the main suit was compromised between the parties, it should be taxed at a lower figure. There was no justification for reduction of the amount which was drawn to scale. I therefore tax the item as drawn."

20. Schedule 7 (A) provides for three scenarios where fees are billable;

    "

a. To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).

b. To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b)

c. In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule."

21. The record from the Lower Court's file indicate that the defendant's counsel filed a defence and counter-claim dated May 31, 2018 in respect of the Principal Suit being Kitui CMCC No 6 of 2018. Thereafter, the said Counsel filed a pre-trial questionnaire on September 13, 2018 before filing an application to cease acting on January 20, 2021. The primary matter having been settled out of court it is the finding of this court that Schedule 7(A) (C) as cited by the Respondent was appropriate and applicable in the circumstances.

22. This Court is well guided by the decision of the Court of Appeal in *Joreth Ltd versus Kigano & Associates* [2002] eKLR, where it held that instruction fees is earned when the Advocate acts on the Client's instructions to defend the suit by filing the defence and a matter does not have to be set down for hearing for an advocate to earn instruction fees. The appellate court held as follows;

> "By the first ground thereof the respondent states that Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct. There is nothing however to suggest in the ruling of C.K. Njai, Esq., that he had considered the Instruction Fee on the stage the suit had reached. It was the learned judge who so considered the matter. The learned judge was clearly wrong in saying that one-half the work done qualifies for one-half Instruction Fee." (Emphasis added)

23. The Deputy Registrar may have failed to specifically state the exact sub-section of schedule that she relied on. However, she indicated that the applicable schedule was Schedule 7 and that was correct.

24. Instructions fees were based on the value of the subject matter which was Kshs. 11,000,000/- which was correct as was held in Joreth Ltd versus Kigano & Associates [2002] eKLR where the Court held;

> "The value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstance."

25. Counsel for the applicants further takes issue with the billing of fees for drafting and filing a defence as well as a counterclaim as part of his instructions fees. He submits that the trial court erred in principle by taxing the counter-claim as a separate item.

26. In the Counterclaim, the Applicants in the original suit sought for a refund of monies paid as deposit as well as interest. At Paragraph 6 of the defence, the Applicants claimed that they had paid a total of Kshs 2,100,000/- paid in two installments of Kshs 1,000,000/- and 1,100,000/- paid in part performance

of the sale agreement. Counsel billed Kshs 180,000/- being instructions for filing and prosecuting the counterclaim of Kshs 2,100,000/- anticipated in the judgment. The Deputy Registrar awarded the same finding that the item had been drawn to scale.

27. The applicants' contention is erroneous. The Taxing Master was correct because the Court in *Kenyariri & Associates Advocates vs Salama Beach Hotel Ltd & 4 others* [2014] eKLR supported her when it held as follows: -

> "A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. A Counter claim is therefore in all respects a suit by the Defendant.
>
> The Applicant is therefore entitled to instruction fees on the Counter claim. The taxing officer erred in not awarding the Applicant instruction fees on the Counter claim."

28. Flowing from the above, this court finds that contrary to the applicants' assertions, the Deputy Registrar or the Taxing Master did not err in principle by allowing taxation of the item on counter claim as a separate item. The fee charged on counter-claim is regular and billable as such because a counter-claim is considered a separate cause from the defence mounted. It was proper for the issue to be itemized and taxed separately.

(b) V A T Charged

29. The applicant has faulted the taxing master on her determination of VAT applicable. The only issue for determination here is not whether VAT is chargeable because it is taxable. It is the actual amount upon which the VAT should be based upon. The applicants submitted before the Tasking Master that VAT should be based on Kshs 130,000 but having taxed item 1 & 2 the Taxing Master was correct to tax VAT at Kshs 111,600. I find no basis to interfere with the Taxing Master's decision, in that respect notwithstanding the fact that she may have inadvertently found that item on VAT was uncontested.

(c) Whether the total amount taxed was computed Correctly

30. The Taxing Master taxed off items 12,15,17, B (1) (2) and C (4). In respect to items 12, 15 & 17 the Taxing Master find no evidence to justify the same while she found that Part B(I) and (2) were not provided for and that item C was Taxed off for lack of evidence. I have checked at the ruling and the Deputy Registrar states that items 1,2,3 in part were allowed because receipts were available in the court file which appears to contradict her final finding.

    The total amount taxed was Kshs. 710,350 but my computation shows that the total figure should have been Kshs. 835,100 after factoring the items taxed off. The Deputy Registrar appears to have been generous to the applicant because after noting the mathematical error, she went ahead and gave the amount of Kshs. 710,350 because that is what the Respondent had applied for. In light of the mathematical error, this court is left with no option but to correct the total amount taxed to Kshs 835,100.00. This reference therefore, fails and the respondent's taxable fee is adjusted from Kshs 710,350 to Kshs. 835,100 which is the correct computation upon factoring the items taxed off. I shall make no order as to costs in this reference so each party shall meet its own costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD, DAY OF JANUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE