



REPUBLIC OF KENYA



KENYA LAW
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**Makau v UAP Insurance Co. Limited (Miscellaneous Civil Application
E210 of 2022) [2023] KEHC 18185 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E210 OF 2022

CW MEOLI, J

MAY 25, 2023

BETWEEN

MUMBE MAKAU APPLICANT

AND

UAP INSURANCE CO. LIMITED RESPONDENT

RULING

1. For determination is the chamber summons dated March 21, 2022 by Mumbe Makau (hereafter the Applicant) seeking inter alia that the decision of the taxing officer given on March 17, 2022 taxing the bill of costs in the sum of Kshs. 116,535/- be set aside; that the taxing officer's decision on items 2, 11 and 40 of the bill of costs dated 13.07.2021 be set aside and be substituted with a decision of this court upon taxation of those items in the bill or be taxed as charged in the bill of costs. The summons is expressed to be brought under Paragraph 11 of the *Advocates Remuneration Order* and Section 3A of the *Civil Procedure Act* among others, on grounds on the face of the thereof as amplified in the supporting affidavit sworn by Nelson Felix Kaburu, counsel for the Applicant
2. The gist of counsel's affidavit is that the Applicant's bill of costs dated 13.07.2021 was taxed on 17.03.2021 and being dissatisfied by the said decision on Items 2, 11 and 40 preferred this reference seeking re-assessment of the foregoing items. That item 2 relates to a miscellaneous cause and not an interlocutory motion whereas item 11 relates to a filed document whose folios could be ascertained and were not factually 28 in number as was held by the taxing officer. He further deposes that the subject value of the matter was about Kshs. 844,580/- and not Kshs. 702,555/- as further held by the taxing officer. In conclusion, he asserts that it is mete and just that this court assesses the correct charges in respect of the items in question.
3. UAP Insurance Co. Ltd (hereafter the Respondent) opposes the motion through a replying affidavit dated 18.05.2022 deposed by Njomo John, counsel on record for the Respondent. He takes issue with



- the summons by asserting that the Applicant attempted to charge double instruction fees in respect of a singular appeal and that the taxing officer did not err in her award in respect of the same; that separately charging instruction fees for the suit and motion within the same cause amounts to unjust enrichment; that an application for leave to file an appeal is intrinsically tied to both the initial suit and appeal that springs from it; and that instruction fees are calculated based on the value of the subject matter as discerned from either the pleadings, judgment or settlement. He urged the court to dismiss the motion with costs.
4. The summons was disposed of by way of written submissions. Counsel for the Applicant confined his submissions to the three (3) items challenged in the reference. Addressing item 2, counsel relied on Schedule 6 Paragraph 1(a) & (b) of the Advocates Remuneration Order 2014, Section 2 of the Civil Procedure Act, taxation decisions in Co-operative Bank of Kenya Ltd v James Kiplagat Chesang & Another HC. Misc. Civil Appl. No. E060 of 2020, Thomas Okao & Another v Lucy Mwikali Kitonyo HC. Misc. Civil Cause No. E404 of 2020 and the of-cited decision in Joreth Limited v Kigano and Associates [2002] 1 E.A 92 to contend that the correct minimum fee that ought to have been allowed for the item was Kshs. 75,000/-.
 5. He asserted that proceedings were commenced by way of originating summons and that there ought to be consistency in taxation. Submitting item 40, counsel argued that the value of the subject matter ought to have been as per the plaint and decree in the suit giving rise to the appeal and not the primary suit from which no appeal had been preferred. That the decision of the taxing officer ought to be set aside as it discloses an error of fact and principle concerning the value of the subject matter. The challenge in respect of item 11 in the reference was abandoned. In conclusion, the court was urged to allow the chamber summons with costs.
 6. On the part of the Respondent, as a preliminary issue, counsel contended that the prayers sought in the reference are defective as the Applicant does not seek the review on items 2, 11 & 40 in the bill of costs hence the reference ought to be dismissed as parties are bound by their pleadings. In response to the Applicant's submissions on items 2 and 40, counsel called to aid the decisions in Kanu National Elections Board & 2 Others v Salah Yakub Farah [2018] eKLR and Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2021] eKLR. His position was that the Applicant's argument that item 2 ought to have been charged in a similar manner as a suit is misconceived and allowing it would result in unjust enrichment and double jeopardy on the part of the Respondent.
 7. It was further submitted that the taxing officer did not err in pegging the taxable amount on item 40 on the judgment sum rather than the decretal sum as argued by the Applicant. That the court was generous with its award on the item and ought to have applied itself to the category of appeals not provided for, the subject of the appeal having been the decision of the trial court striking out the Respondent's defence. He pointed out that some of the authorities cited by the Applicant lacked persuasive and/or binding authority to this honorable court as such the same ought to be disregarded. Counsel urged the court to dismiss the reference with costs.
 8. The Court has considered the grounds of the reference as well as the affidavit material and submissions. However, before delving into the substance of the reference it would be remiss if this court failed to address a preliminary issue. The reference before this court is in respect of party and party bill of costs in respect of proceedings in Nairobi High Court Civil Appeal No. 254 of 2019. The taxing officer delivered her ruling on 17.03.2021. However rather than filing the instant reference within the same cause, the Applicant opted to institute the instant miscellaneous proceedings.
 9. The procedure provided in the Advocates Act for recovery of costs is intended to be uncomplicated and expeditious. Thus, it is difficult to understand why the Applicant opted to take the path of instituting



a fresh and separate cause. Thus, potentially denying the court convenient access to material relevant to the application. Nonetheless, the court will endeavor to render a determination based on the material placed before it.

10. In *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162, Spry, V-P. stated at p.164 that:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

11. The Court of Appeal in the foregoing decision laid down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs as follows:-

“

“(a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;

(b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made.”

See also *Rodgers Mwema Nzioka v The Attorney General & 9 Others* (2007) eKLR and *Rogan Kamper v Grosvenor* (1978) eKLR.

12. Ojwang J (as he then was) in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others* (*supra*). observed that:-

“Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer



should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

13. Similarly Ringera, J (as he then was) in *First American Bank of Kenya v Shah & Others* [2002] 1 E.A. 64 at p.69 stated;-

“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.... Of course it would be an error of principle to take into account relevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge. Needless to state not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment.”

14. With the foregoing principles in mind, the court has reviewed the grounds argued before it. The Applicant’s reference is specific to items 2 and 40 item 11 having been abandoned. Surprisingly, the Applicant did not attach the subject bill of costs that was fortunately furnished by the Respondent as “Annexure NJ-02” in the response to the reference. The bill was in respect of a miscellaneous application for leave to appeal out of time and the substantive appeal. The Applicant contends that instruction fees in item 2 relate to a miscellaneous cause and not an interlocutory motion in the substantive appeal. In rebuttal the Respondent argues that Applicant has attempted to charge separate instruction fees in respect of a singular appeal. The taxing officer awarded Kshs. 5,000/- on item 2, which this court pre-supposes was premised on Schedule 6 Part A in relation to Appeals. (See;- Appeals (c)(viii)).
15. What the said schedule provides for is instruction fees for applications not otherwise provided for arising during proceedings. The application in question here is a miscellaneous motion seeking leave to appeal out of time. The court’s reasoned deduction is that the nature of the application is not interlocutory; depending on the outcome of the application, the matter may end there, or an appeal may be subsequently filed. In my reading of the entirety of Schedule 6, instruction fees for that kind of motion is not provided for.
16. Quite possibly the Applicant’s thinking may have been informed by the item titled “other matter not provided for” contained in the schedule. Given the nature of item 2, the court, while applying itself to the facts and drawing guidance from the principles enunciated in *Premchand Raichand* (supra) finds and holds that the award of the taxing officer under the said item was justified. Awarding fees under item 2 as proposed by the Applicant would result in an excessive or double award on instructions. Nothing therefore turns on this aspect.
17. Concerning item 40, the Applicant contended that the taxing officer erred by failing to find that the value of the subject matter was Kshs. 844,580/- and not Kshs. 702,555/-. On the part of the Respondent, it was summarily argued that instruction fees is calculated based on the value of the



subject matter as discerned from either the pleadings, judgment or settlement. The Court of Appeal in *Joreth Limited v Kigano and Associates* [2002] 1 E.A 92 stated that:

“We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge.”

18. The taxing officer while relying on the case of Joreth Limited proceeded to award Kshs. 75,000/- under item 40, stating that:-

“It is therefore trite law that the instruction fees is calculated from the value of the subject matter which is discerned from the pleadings, judgment or settlement.

In the instant case, the value of the subject matter herein can be determined from the judgment of the lower court that was upheld which is Kshs. 702,555.50 as per the decree. This item is taxed at Kshs. 75,000.00 (Kshs. 45,000.00) is hereby taxed off.” (sic)

19. On a perusal of the record and material presented before this court, and the judgment in Nairobi High Court Civil Appeal No. 254 of 2019, it is evident that the said proceedings terminated in favour of the Applicant. The taxing officer was appropriately cognizant of the applicability of Schedule 6 (1) (b) of the *Advocates Remuneration Order* in assessing the taxable amount under item 40. This court gathers from the judgment delivered by Serгон J. in the above appeal, that the appeal originated from the judgment of the lower court in respect of a declaratory suit essentially seeking to enforce the award made in the primary suit

20. The value of the subject matter could be ascertained, though it appears that the taxing officer applied the decretal sum and not the judgment award. This was an erroneous deduction in the court’s observation. That said, the Court of Appeal in Kipkorir, *Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR stated as follows:-

“On a 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (*supra*) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the



general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza v Ferrao [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (*supra*)).

21. The applicable value was the judgment award and the Applicant's reference is partially merited to the extent that Schedule 6 (1) (b) of the *Advocates Remuneration Order* prescribes instruction fees on an appeal in respect of the award in the instant matter ("See: -Annexure NJ-03") to be Kshs. 90,000/-. The taxing officer misapplied herself when she taxed item 40 at Kshs 75,000/-. Accordingly, her decision on item 40 is hereby set aside and the item taxed at Kshs. 90,000/-. To that extent only the reference has succeeded. All other items remain as taxed.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Kaburu

For the Respondent: Ms. Oenga h/b for Mr Manyara

C/A: Carol

