



REPUBLIC OF KENYA



**KENYA LAW**  
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**Apa Insurance Company Limited v Olendo t/a Ogejo, Olendo Company Advocates (Miscellaneous Civil Application E083 of 2022) [2023] KEHC 19567 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CIVIL APPLICATION E083 OF 2022**

**PJO OTIENO, J**

**JUNE 30, 2023**

**BETWEEN**

**APA INSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**RAYMOND OLENDO T/A OGEJO, OLENDO COMPANY  
ADVOCATES ..... RESPONDENT**

*(Being an application to set aside the decision on taxation by the Taxing Officer, J. N. Maragia, Deputy Registrar, dated 12.10.2022 in Kakamega High Court Miscellaneous Application No. E206 of 2021)*

**RULING**

1. This matter was instituted by a document equivocally titled ‘Memorandum of Appeal’ as well as ‘Chamber Summons’. It is expressed to be brought pursuant to the provisions of Rules 13 (1), (2) & (4), *Advocates (Remuneration) Order* as well as Section 3A *Civil Procedure Act* and article 159 of the *Constitution*. It seeks, in the main, that the decision of the taxing master dated October 13, 2022 be set aside and the bill be remitted back for taxation or the Court itself taxes the bill.
2. The grounds shown on the face of the application and deponed to in the Affidavit in Support, as supporting the application are that; the taxing master erred in failure to find that the bill was prematurely brought; that the taxed costs were excessive and not supported by law under the Act and without the assistance of the trial court record and in disregarding Schedule 7 of the *Remuneration Order*.
3. Even though on the December 8, 2023 Mr Nandwa Advocate attended court, as holding brief for Mr Olendo Advocate for the Advocate, on account of the fact that they had been served, no response nor submissions have been filed on the behalf of the said Advocate/Respondent. The matter is thus due for determination on the basis only of the material availed by the Applicant/Client.



4. Before delving into the merits, the Court considers the titling of the matter as an appeal to be erroneous for which reason the court shall treat it as a reference because that is what the prayers of the application ask for. The Court notes that the reference has not been filed in the file the bill was taxed. Such is wholly improper and fails to help with expeditious disposal of the matter. The Court thus directs the registry that henceforth, every application seeking reference or challenging the taxation or seeking to enforce the order on taxation be filed in the file taxation took place. For that reason, it has become important to call for the file on which taxation was undertaken. In coming up with this decision I have perused the file on taxation, being Kakamega HC Misc Civil Application No 206 of 2021.
5. It is now well established that the duty and mandate of the taxing master in taxing a bill of costs vests upon such master a judicial discretion. Such discretions are otherwise immune from free and unbridled interference upon reference. The Court will only interfere with the decision of the master where it is guided upon no reason; where it is done contrary to the established principles of law and the spirit of the Remuneration Order or where the award is so little or otherwise exaggerated to demonstrate a wholly erroneous exercise of discretion in taxation<sup>1</sup>.
6. For purposes of consistency the Remuneration Order lays the considerations to be taken into account to include the value of the subject matter as disclosed in the decision or judgment. The nature and importance of litigation to the parties, the general conduct of the proceedings including whether the issue is novel or common place and any directions by the Judge. Such are the factors the taxing master must consider being requirements of the law and where such are not taken into account, the decision stands vitiated on account of error in principle.
7. But how does a taxing master gauge the weight of a litigation or the value of the subject matter, as claimed or determined by the Court in the absence of the trial court records? The court considers it a fundamental error to seek to determine an item like instruction fees in the absence of the trial court records. Here it is said, without rebuttal, that the taxation proceeded in the absence of the court file. I have called for and perused the file with the notes and there is no advertence to the trial court file or indeed any material from it having been availed to the taxing master.
8. That alone confirms to court that it was impossible to determine the weight of the litigation or even the subject matter to justify the choice of instructions fees awarded to the advocate. The court thus determines that there were no facts upon which to decide on the appropriate instructions fees in that the taxing master failed to take into account a material matter being the records at trial. It is to this Court a grievous error of principle not to establish the weight of the matter where the major issue is the determination of instructions fees. For that reason, it is the finding of the court that the discretion by the taxing master was exercised improperly and injudiciously. It is thus set aside.
9. Because the trial court file has not been placed before me to enable me expedite the determination of the costs due, this file is remitted back to the taxing master to have the bill taxed in the manner expected by law and in accordance with schedule VII of the *Advocates' Remuneration Order*.
10. As the matter is not concluded, the costs are awarded to the Client/Applicant but the same are deemed costs in HC Misc Application No E206/2021 and shall be considered by the taxing officer pursuant to the provisions of the Advocates' Remuneration Order.
11. Because this application ought to have been filed in file No E206/2021, this file must be closed forthwith to enable all further proceedings be undertaken in the proper file.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 30<sup>TH</sup> DAY OF JUNE 2023.**

<sup>1</sup> *Republic -vs- Minister for Agriculture & 2 Others, Exparte Samuel Muchiri W'Njuguna & 6 Others* [2006] eKLR



**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

No appearance for the Applicant/Client

No appearance for the Advocate/Respondent

Court Assistant: Polycap Mukabwa

