



**Obae t/a KO Obae v Kipkorir (Miscellaneous Civil Application  
E022 of 2022) [2023] KEHC 21415 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS CIVIL APPLICATION E022 OF 2022**

**JK SERGON, J**

**JULY 27, 2023**

**N THE MATTER OF KENNETH ONDIEKI OBAE T/A K.O. OBAE**

**BETWEEN**

**IN THE MATTER OF KENNETH ONDIEKI OBAE T/A KO OBAE . ADVOCATE**

**AND**

**ROBERT KIPKORIR ..... CLIENT**

*(Being a Reference from the decision of the Learned Taxing Officer,  
Honourable Karani – Deputy Registrar, High Court Kericho, delivered on  
15th March, 2023, on Taxation of the Bill of Costs dated 14th March, 2022)*

**RULING**

1. The instant application for this court’s determination is a tax reference vide a chamber summons application dated March 23, 2023 in which the applicant was seeking the following orders;
  - i. Spent
  - ii. That this Honourable Court be pleased to review, vary and/or set aside the ruling of the learned taxing master delivered on March 15, 2023, on the Respondent’s Bill of Costs dated March 14, 2022, or in the alternative, the Respondent’s Bill of Costs dated March 14, 2022, be remitted back for taxation before the same or another Taxing Officer, with appropriate directions on the question of assessment.
  - iii. That the costs of the Reference be awarded to the Applicant.
2. The Application is supported by grounds on the face of it and supported by the supporting affidavit of Mourice Ouma, practicing in the firm of Odhiambo Ouma and Company Advocates and in conduct of this matter on behalf of the Applicant herein and was therefore authorized and competent to swear this affidavit.



3. The Applicant avers that the Applicant filed his Bill of Costs dated March 14, 2022 in which the Learned Taxing Officer delivered her ruling on March 15, 2023 assessing the fees payable to the Applicant as Kshs 96, 150/=, annexed and marked as "MCA-1" is a copy of the Bill of Costs and ruling dated March 15, 2023.
4. The Applicant avers that the Learned Taxing Officer erred in law and fact in taxing item 1 on instruction fees in the Bill of Costs dated March 14, 2022 erroneously and without applying her mind to the applicable law and principle.
5. The Applicant avers that the Learned Taxing Officer erred in law and fact in taxing the Applicant's fees on attendances and services at figures that were too low and completely inconsistent with the provisions of the Advocate's Remuneration Order and rules thereof.
6. The Applicant further avers that the Learned Taxing Officer erred in law and fact in failing to appreciate the nature of the suit that was subject of the Bill of Costs filed by the Applicant and the nature and extent to which Applicant rendered his services and was therefore entitled to the fees sought.
7. The Respondent filed a replying affidavit dated July 3, 2023 in response to the instant application and avers that he was involved in a road accident on April 11, 2019 and through the Applicant herein filed a suit vide Kericho CMCC No 218 of 2018 and that prior to filing the suit he had entered into an advocate client fee payment agreement with the Applicant for settlement of the Applicant's instruction fee. Subsequently, they won the trial and the court awarded him Kshs 8,084,859/= in damages annexed herewith and marked "RKK-1" is a copy of the said judgment.
8. The Respondent further avers that the defendants the suit before the lower court being dissatisfied with the entire judgment preferred an appeal before this court to wit Kericho Civil Appeal No 3 of 2021 annexed herewith and marked "RKK-2" is a copy of the memorandum of appeal.
9. The Respondent avers that following to a breakdown in communication between himself and the applicant who was his counsel, he had difficulties communicating with the applicant and therefore he visited the court precincts and he learnt that the judgment delivered in Kericho CMCC No 218 of 2018 had been appealed against and it was following the said communication breakdown that on January 6, 2021 he instructed the firm of M/S DC Ngeno & Company Advocates to represent him in the intended appeal.
10. The Respondent avers that at the time of instructing the said firm to represent him on appeal, the Appellants had proceeded to serve the Applicant herein with the memo of appeal and the record of appeal.
11. The above notwithstanding the Respondent avers that he did not instruct the Applicant to represent him in the appeal and that the Applicants did not file any document or attend any mention or hearing on his behalf in the appeal.
12. The Respondent avers that due to the fact that the Applicants were served with the memorandum of appeal his advocates on record put in a proper application to come on record on January 18, 2022 and that the Applicants did not object annexed herewith and marked "RKK-5 A & B" is a copy of the application dated January 18, 2022 and the letter dated February 24, 2022.
13. The Respondent avers that he settled the applicant's instruction fees for representing him in the primary suit, he paid a sum of Kshs 2,425, 457.70/= annexed herewith and marked "RKK-6" is a copy of the letter dated October 27, 2022 stating as much.



14. The Respondent avers that in furtherance of their broken down relationship with the Applicant they have refused to release his balance of Kshs 616,971/= being part of the decretal sum in an effort to deny him fruits of the courts judgment and further to the above the Applicant has sought assessment of their alleged costs for handling an appeal Kericho HCC Appeal No 3 of 2021 which appeal the said firm did not offer legal representation and the taxing master in her discretion awarded them costs of Kshs, 96,150/=.
15. The Respondent therefore urged this court to set aside the taxing master ruling dated March 15, 2023 as the Applicant had no instruction to represent him in the appeal and neither did they file any response and/or document that would warrant them being allowed to enjoy costs and further implored the court to compel the applicant to surrender Kshs 616, 971/= as the amount rightfully owing to him.
16. The Respondent further avers the said application lacks in merit and should be dismissed with costs to himself as the applicant was trying to deny him enjoyment of the fruits of litigation.
17. The Respondent filed submissions and reiterated that the applicant herein was not properly instructed to defend the appeal and further that the appeal amounted to an entirely separate suit from the primary suit and therefore counsel representing either party had to seek proper instructions to defend or/ prosecuting the appeal, in which event the applicant did not enter any appearance in the appellate court, hence were not entitled to costs. The Respondent cited order 9 rule 9 of the *Civil Procedure Rules* and the following cases *Peter Chere Kiiru v Charles Mulanda Manyelo* [2019] eKLR and *Ezekiel Kiprono Lamai v Lawrence Kibor Nganai* [2020] eKLR.
18. The Respondent maintained that the applicant was not entitled to costs awarded by the taxing master and further that the taxing master in her ruling dated March 15, 2023 was cognizant of the fact that the applicant herein did not file any pleadings neither did he oppose the appeal. The applicant was devoid of instructions and therefore was not entitled to instruction fees under schedule 6 of the *Advocates Remuneration Order*.
19. The Respondent therefore urged this court to set aside the decision of the taxing master dated March 15, 2023 and make a finding that the applicant did not have proper instructions and therefore the taxing master erred and relied on the wrong principles of law in awarding the said costs to the applicant.
20. I have considered the application, replying affidavit and rival submissions and the sole issue for determination is whether this court ought to review, vary and/or set aside the ruling of the Learned Taxing Officer delivered on March 15, 2023 and I find that the answer is in the affirmative.
21. I have considered the fact arising to the instant reference that the applicant herein represented the respondent in the primary suit Kericho CMCC No 2018 of 2018 and the respondent was awarded damages of Kshs 8,084, 859/= which was appealed against, at the time the relationship between the respondent and the applicant was irretrievably broken down, hence the respondent instructed another firm of advocates to represent him in the appeal. There was a delay in compliance of order 9 rule 9 of the *Civil Procedure Rules* on change of advocates and as a result the applicant herein was served with both the memorandum of appeal dated January 15, 2021 and record of appeal. The respondent herein instructed the firm of M/S DC NGENO to come on record on January 6, 2021 but the said firm filed a notice to come on record on January 18, 2022 a year later after the applicant herein had been served with the memorandum and record of appeal. It was then that the applicant herein filed a bill of costs for settlement of its fees.
22. I find that that decision of the Learned Taxing Officer in the ruling with regard to item 1 cannot stand because the Applicant failed to establish that it had instructions.



23. The respondent was right to state that the applicant did not have instructions to represent him in the Appeal. The taxing officer therefore erred to award instructions fees yet the Advocate had no instructions from the client to represent him on Appeal.
24. Consequently, the decision of the Learned Taxing Officer delivered on March 15, 2023 is set aside and is substituted with an Order dismissing the Bill of Costs. The Respondent is awarded costs of the reference assessed at Kshs 20,000/=.

**DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JULY, 2023**

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**J.K. SERGON**

**JUDGE**

**In the presence of:**

C/Assistant - Rutoh

Onduso holding brief for the Applicant

No Appearance for the Respondent

