



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduati & Company Advocates v Muiruri & another (Suing as the legal representatives of the Estate of Margaret Wanjiru Kihanya) (Miscellaneous Application E28 of 2021) [2023] KEHC 24971 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24971 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KIAMBU**  
**MISCELLANEOUS APPLICATION E28 OF 2021**  
**DO CHEPKWONY, J**  
**SEPTEMBER 28, 2023**  
**IN THE MATTER OF THE ADVOCATES/CLIENT BILL OF COSTS**

**BETWEEN**

**NDUATI & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**PETER KIHANYA MUIRURI ..... 1<sup>ST</sup> APPLICANT**

**LUCY NJOKI KIHANYA ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARGARET  
WANJIRU KIHANYA**

**RULING**

1. Before the court for determination are two applications, one is the Chamber Summons Application dated 5<sup>th</sup> October, 202, and filed by ‘the Client’ seeking the following orders:
  - a. Spent;
  - b. Spent.;
  - c. That the Honourable Court be pleased to set aside the Taxing Master’s decision delivered on 10<sup>th</sup> September, 2021 as it relates to the reasoning and determination pertaining to taxation of items Nos.1, 2, 3, 4 and 5 of the Respondent’s Bill of Costs dated 22<sup>nd</sup> February, 2021.
  - d. That this Honourable Court be pleased to reassess the fees due to the Respondent in respect of the said item and make a finding on the same.



- e. That in the alternative, this Honourable Court be pleased to remit the Respondent's Bill of costs dated 22<sup>nd</sup> February, 2021 for review and retaxation of the items in dispute by a different Taxing Master.
  - f. That the costs of this application be provided for.
2. The Client's Reference is based on the Supporting Affidavit sworn by Lucy Njoki Kihanya sworn on 5<sup>th</sup> October, 2021 and the following grounds:
  - a. The Taxing Master misdirected himself in finding that the Applicant instructed the Respondent to draw the Construction Agreement dated 4<sup>th</sup> April, 2018 and proceeded to tax the excessive and exorbitant sum of Kshs. 2,000,000.00.
  - b. The Taxing Master erred further in disregarding the record before court and pegging the basis of the instruction fees on Kshs. 2,000,000,00 on a separate succession cause while the Respondent clearly sought costs for the impugned construction agreement and not from any succession cause.
  - c. The Taxing Master erred in taxing the instruction and advocates fees at Kshs. 2,000,000.00 and Kshs. 1,000,000/= respectively despite there being no evidence of instructions and there being no indication or any proof of the novelty, complexity or the amount of time spent in the drawing of the impugned Construction Agreement.
  - d. The Taxing Master under Paragraph 34 of the ruling ignored the Applicant's extensive written submissions dated 7<sup>th</sup> June, 2021 and particularly Paragraphs 25 to 39 in objection to the proposed taxation of item Nos.2, 3, 4 and 5 of the Respondent's Bill of Costs.
  - e. The taxation of Kshs. 1,000,000.00 as Advocate costs is manifestly unfair and amounts to improper exercise of the Taxing Master's powers by usurping and unreasonably applying Schedule 6, Part B of the Advocates Remuneration Order 2014 which provision applies to costs of proceedings in the High Court. The impugned taxation arose from the purported drawing of a construction agreement and not from court proceedings.
  - f. The entire decision of the Taxing Master is evidently unreasonable and injudicious.
3. In view of the above grounds as they appear on the face of the application and further explicated in the affidavit sworn in support thereof, the Client avers that it would be in interest of justice that the subject ruling dated 10<sup>th</sup> September, 2021 be set aside and thus seeks the court to direct re-taxation of the opposed items.
4. The second application is the Advocates' Reference filed through a Notice of Motion application dated 28<sup>th</sup> January, 2022. It seeks the following orders:
  - a. Spent;
  - b. Spent;
  - c. That the Honourable Court be pleased to enter judgment in favour of the Applicant herein, in terms of the Ruling delivered on the 10<sup>th</sup> September, 2021 by the Hon. Wilson Rading learned Taxing Master and in terms of the Certificate of Taxation dated 22<sup>nd</sup> September, 2021 in the sum of Kshs. 3,534,380/=



- d. That subject to prayers No.2 &3, the Honourable Court be pleased to issue a decree/judgment above for Kshs. 3,534,380 plus interest be provided for at 14% per annum from 5<sup>th</sup> April, 2018 until payment in full.
  - e. That the costs of the application be provided for.
5. The Advocate's Reference is supported by the Affidavit of Stanley Nduati sworn on the same date as the application and the following grounds:-
- a. That the Applicant filed his Bill of Costs on the 22<sup>nd</sup> February, 2021 in the above captioned matter which Bill of Costs has since been taxed.
  - b. That sometime in 2021, the Respondent herein died Intestate and the intended Respondents have since petitioned and obtained limited grant Ad Litem to the said estate of the Respondent.
  - c. That a certificate of taxation dated on even dates has since been extracted.
  - d. That the Respondents estate is on the verge of being sub-divided amongst her beneficiaries and the recovery of funds is in Jeopardy as the administrators have failed to disclose the amounts taxed in our favor as a liability to the estate in their petition for letters of administration intestate.
  - e. That the instant application is necessitated by the fact That the financial liquidity of the respondent's estate is unknown vis-a-vis in question.
  - f. That an Advocate is legally entitled to fees duly earned in the course of service in-line with the Advocates Remuneration order.
  - g. That the Respondent does not dispute the fees in any event.
  - h. That there is no dispute on retainer or otherwise.
  - i. That the instant application is made in the sole interest of justice and in due realization of legal fees earned by the Advocate/Applicant.
  - j. That if the court fails to grant the orders sought herein the Applicant is likely to suffer gross prejudice as the financial liquidity of the Respondent estate is in question.
6. On 13<sup>th</sup> June, 2022, by consent of counsel for both parties, Lucy Njoki Kihanya and Peter Kihanya Muiruri were substituted to continue the suit on behalf of the Estate of Margaret Wanjiru Kihanya (the deceased). The court then issued Directions for the two References to be disposed off by way of written submissions. The Client filed its submissions which are undated on 14<sup>th</sup> December, 2022 whereas the Advocate filed his dated 18<sup>th</sup> April, 2023. The court has read through both sets of submissions for consideration of the two references.
7. Having considered both references as filed by the parties herein, I have read through the affidavits filed in support and opposition of either reference alongside the written submissions and cited authorities by either party. For determination, this court finds is:-
- a. Whether the reference filed by the Client has met the required threshold for setting aside the Taxing Masters decision on Items No.1, 2, 3, 4 and 5 of the Respondents Bill of Costs dated 22<sup>nd</sup> February, 2021.
  - b. Whether the Certificate of Taxation dated 22<sup>nd</sup> February, 2021 should be adopted as a Judgment and Decree of this Court.



8. It is worth-noting that taxation of Bill of Costs is in the discretion of a Taxing Master (officer). However, this discretion ought to be exercised judiciously and reasonably. In the case of *Green Hills Investment Ltd -vs- China National Corporation Complete Plant Export Corporation (complainant) T/A Covet*[2004]eKLR, the Hon. Justice Ibrahim had this to say on the Taxing Masters discretion in taxation:-

“The Taxing Master is given the discretion to award what is reasonable. However, such discretion itself ought to be exercised reasonably and judiciously. Some valued reasons or explanation must be given for the award of a specific sum. It is not a question of plucking a number from the abacus”.

9. In this case, the client/Applicant has contested the taxing Master’s decision delivered on 10<sup>th</sup> September, 2021 as it relates to Item Nos.2, 3, 4 and 5 on the ground that the Advocate was never instructed to prepare a Construction Agreement dated 4<sup>th</sup> April, 2018 but the Taxing Master proceeded to wrongfully tax off the instruction fee on the Bill of Costs at an exorbitant amount of Kshs. 2,000,000.00. According to the Client/Applicant, the Advocate/Respondent neither filed a response in rebuttal to the references nor exhibited any evidence of a retainer agreement or correspondences to prove instructions. That there was also no evidence to prove attendance and meetings as enumerated at Items No.2, 3, 4 and 5 of the Bill of Costs and clearly, the Taxing Master did not demonstrate having considered any relevant factors such as novelty or complexity or amount of time spent in drawing the construction agreement in taxing the Bill of Costs. That instead the Taxing Master applied the provisions of Schedule 6 of the *Advocates’ Remuneration Order* in taxing the bill which was erroneous since this provision relates to costs of proceedings in the High Court and not from drawing of documents such as agreements.
10. The Advocate did not file a response to the said reference except for written submissions which, as has been expressed by court within this jurisdiction, have no probative or evidential value.
11. Further, Schedule 6 of the *Advocates Remuneration Order* provides as follows:-

“Instruction fees Subject as hereinafter provided, the fees for instructions shall be as follows

—

- 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.

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it.....”

12. Therefore, in relying on this provision in a taxation arising from a purported drawing of a Construction Agreement, the Taxing Master was in error in principle as this led to the Bill of Costs being taxed at an excessive and exorbitant figure of Kshs. 2,000,000.00 since 50% of the instruction fees was added.



13. The court is mindful not to interfere with the decision of a taxing officer unless the decision is erroneous in principle in assessing the costs. This was the principle set out in the case of *Kipkorir, Tito & Kiara Advocates – vs-Deposit Protection Fund Board* [2005] eKLR where the Court observed;

“On 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.”

14. This was also the decision of the Court of Appeal case of *Peter Muthoka & Another –vs- Ochieng & 3 Others* (2019) eKLR, it was stated as follows;

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of Taxing Masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with”

15. In the circumstances, the court finds that the Taxing Master failed to appreciate the subject matter and took into account irrelevant factors and provisions of law, thus arrived at an erroneous decision and irrational figure that is so excessive and exorbitant.

16. The upshot is that the errors pointed out above go to the root of the Taxing Master’s decision and therefore the Client’s Reference dated 5<sup>th</sup> October, 2021 is found to have merits and is allowed. Having arrived at the aforementioned findings, it would be an academic exercise for the court to consider the Advocates Reference dated 28<sup>th</sup> January, 2022 and the court is then inclined to dismiss the same, since it cannot enter judgment based on a Ruling that it has held was erroneous.

17. In the upshot, the following orders issue:-

- a. The Taxing Master’s decision delivered on 10<sup>th</sup> September, 2021 be and is hereby set aside in terms of Item Nos.2, 3, 4 and 5 of the Respondents’ Bill of Costs dated 22<sup>nd</sup> February, 2021.
- b. The Respondent’s Bill of Costs dated 22<sup>nd</sup> February, 2021 is hereby remitted for review and re-taxation of the Items in dispute before a different Taxing Master.
- c. The Advocates’ Reference dated 28<sup>th</sup> January, 2022 be and is hereby dismissed.
- d. Costs of the Applications shall be in the main cause.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Njiru counsel holding brief for Mr. Gitonga counsel for Client/Applicants



Mr. Njoroge counsel for Advocates

Court Assistant - Martin

