



**Keti v W.K. Ngenoh & Co. Advocates (Reference E052 of 2023)  
[2023] KEHC 25710 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25710 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
REFERENCE E052 OF 2023  
JK SERGON, J  
NOVEMBER 23, 2023  
IN THE MATTER OF KERICHO H.C. MISC. CIVIL APPLICATION  
NO. 7 OF 2023.  
AND  
IN THE MATTER OF KERICHO HIGH COURT SUCCESSION  
CAUSE NO. 6 OF 2017  
AND  
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER  
BETWEEN  
MARCELA CHEPKOECH KETI ..... APPLICANT  
AND  
W.K. NGENOH & CO. ADVOCATES ..... RESPONDENT**

**RULING**

1. The Applicant filed a Chamber Summons dated 21<sup>st</sup> September, 2023 brought under the provisions of Rule 11 (2) of the *Advocate (Remuneration) Order*, 1962 and all other enabling provisions of the law seeking for following orders:
  - i. Spent
  - ii. Spent
  - iii. That this Honourable Court be pleased to set aside the decision of the Honourable Taxing Officer delivered on the 6<sup>th</sup> of September 2023 as far as the same relates to the taxation of the



Advocate/Client's Bill of Costs dated 23<sup>rd</sup> February 2023, the quantum awarded thereon and the reasoning with respect to the said award.

- iv. That this Honourable Court be pleased to re-tax the said Advocates/Clients Bill of costs; or in the alternative, this court be pleased to remit the Bill of Costs dated 23<sup>rd</sup> February 2023, for re-taxation before a different Taxing Master with appropriate directions thereof.
  - v. That the costs of this application be provided for.
2. The Application is supported by the grounds laid out on its face and the facts stated in the affidavit of Marcela Chepkoech Keti, who deponed that the taxing master rendered her decision on the Taxation of the Advocate-Client Bill of Costs dated 23<sup>rd</sup> February, 2023 and being aggrieved with the said decision, her advocates on record wrote a letter dated 8<sup>th</sup> September, 2023 to the Taxing Master requesting for reasons over and above the ones contained in the said ruling.
  3. That the learned taxing master erred in law and principle by failing to consider that the declared amount in the P & A. 5 form in the Succession Cause was disputed and that it ought to be ascertained before it could form a basis for taxation. That the said learned taxing master also erred in law and principle by failing to tax the Advocate-Client Bill of Cost under schedule 10 (b) of the [Advocates Remuneration Order](#) that provides for fees in Probate and Administration Causes and instead applied Schedule 6 of the said order.
  4. That when she went to the Respondent's office to commence the succession proceedings, she never gave out the figure of Kshs. 85,000,000/= as the net value of the estate of their deceased father as indicated in the succession form by the said Respondent as opposed to what her sureties stood surety for in FORM 11 that is Kshs. 50,000,000/=. Further that they had agreed with the Respondent that his fee at Kshs. 100,000/= which the Respondent told her to pay and she diligently paid.
  5. She further deponed that the taxing master failed to consider the fact that the Respondent unduly delayed the matter for almost 5 years and every time they could go to his office, he asked them for more money and that the said taxing master also erred in law and principle in failing to state that being a succession cause, the Applicant/Respondent's fee should be recovered from the estate and not the applicant.
  6. That the learned taxing master erred in law and principle by failing to consider that every case must be decided on its own merit and in every variable degree and that this was a very suitable case where the taxing master ought to have awarded what was just for the ends of justice to be met since awarding such a huge figure of costs when an advocate had done so little would be tantamount to denying other litigants the access to justice.
  7. From the foregoing, she prayed that the court allows the reference herein.
  8. In response, the Respondent through his Replying Affidavit dated 11<sup>th</sup> October, 2023, sworn by W.K Ngenoh Lessan, an advocate of the High Court, deponed that the instant application was bad in law, incompetent, premature and misconceived since the applicant was not coming to the court with clean hands and that a great prejudice will be occasioned to the respondent if any of the orders sought in the instant application are granted in the Applicant's favour.
  9. That there was inordinate delay in filling the instant application since taxation was done on 6<sup>th</sup> September, 2023 hence the said application was an after thought which came after a certificate of cost and decree had been issued.



10. He refuted the assertion that the court did not consider the declared amount in P & A.5 Form and contended that in the contrary, the court did not factor in the fact that the right figure should have been over Kshs. 90,000,000/= as the current value of the properties considering the developments, being along a high way and the declared value having been of 6 years ago, the court needed to have enhanced the value but instead maintained a low figure of Kshs. 50,000,000/=which he chose not to object to in order to maintain good Client-Advocate relationship.
11. That it was not in dispute that the estate was valued at over Kshs. 90,000,000/=:, consisting of land measuring over 28 acres in addition to other prime properties forming the deceased's estate and that the said estate was faced with numerous contests and applications protesting, beneficiary and thus was treated as complex spanning from the year 2015, through citation number 1 of 2015 conducted skillfully by individual advocate on the basis that he would be paid upon completion.
12. He deponed that their leniency in charging based on lower value considering the market value had been despised by the applicant in collusion with the other beneficiaries and thus he called upon the court to come to their rescue and demand reasonable fees for the professional work done.
13. He further deponed that the role and mandate of the administrator was to act in the capacity of the owner of the estate and to account to court whenever required to give an account and inventory and not to hide with a view of trying to defeat justice and circumvent clear provisions of the law. That the information from some of the beneficiaries indicated that one administrator squandered what had been set aside for the instant process and were willing to pay up when required.
14. That the Applicant had not shown any suffering or irreparable loss that she would suffer if the instant application was disallowed thus the same was a mere speculation to defeat justice.
15. That the taxation by the court and the application for execution were proper and procedural hence the applicant's application was tantamount to escaping the responsibility of paying for professional work done.
16. The Respondent thus deponed that for the interest of justice, fairness and equity, the instant applicant be dismissed with costs Applicant/Respondent.
17. Directions were given that the Application be canvassed by way of written submissions. Accordingly, the Applicant complied and filed her written submissions. The Respondent did not file his written submission.
18. The Applicant in her written submissions dated 14<sup>th</sup> November, 2023 summarized the factual background of the matter before submitting that the tests to be applied by a taxing officer and by a Judge on a reference in making a deduction or addition if he is of the opinion that the bill of costs is manifestly excessive or manifestly inadequate is the reasonableness attaching thereto. That it was not for the court to substitute what it considered to be proper figure for that allowed by the taxing officer unless in the court's view the sum allowed by the taxing officer was outside the reasonable limits so as to be manifestly excessive or inadequate. Reliance was placed in the case of *First American Bank of Kenya v Shah and Others* [2002] 1 E.A. 64 at 69 where the court held as follows:

“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.”
19. The Applicant thus framed her issues for determination as follows:



- i. Whether the taxing master erred in principle in applying Schedule 6 of the [Advocates Remuneration Order](#) instead of Schedule 10 of the said order.
  - ii. Who should cater for the advocate's fee
  - iii. Whether the fee allowed was manifestly excessive.
20. On the first issue for determination, the Respondent/Applicant reiterated that the learned taxing officer erred in law and principle by failing to tax the Advocate-Client Bill of Costs under Schedule 10 (B) of the [Advocate Remuneration Order](#) that provided for fees in Probate and Administration causes and instead applied Schedule 6 of the said Order. The Respondent/Applicant placed reliance on the provisions of Rule 51C of the Advocates Remuneration Order to the effect that the scale of costs applicable to proceedings concerning probate and administration of estates was that set out in schedule 10.
21. That the Respondent /Applicant requested reasons for the taxation on 8<sup>th</sup> September, 2023 but had not been supplied with the same to date in violation of the provisions of Rule 11 (2) of the [Advocates Remuneration Order](#).
22. Reliance was also placed on the Court of Appeal decision in *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others* on the principles of taxation to reiterate that the taxing master wrongly applied Schedule 6 of the [Advocates Remuneration Order](#) and failed to apply Schedule 10 (B) which deals with taxation in regards to Probate and Administration matters. Further reliance was placed on the decision in the case of [Lawrence Oigoro Nyangito t/a Nyangito & Associates v Hawa Mohamed Abdalla](#) [2021] eKLR where it was held that:

“ ... The Ruling of the Taxing Officer is clear that she relied on Schedule 10 that deals with taxation of bills in respect of Probate and Administration proceedings. Schedule X does not clarify whether it applies to proceedings before the High Court or Subordinate Courts. In my view this issue is settled by the provision of Paragraph 51C - Costs in probate and administration cases “Subject to paragraph 22, the scale of costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule 10.” The paragraph, just like Schedule X, does not differentiate proceedings before the High Court and those in the Subordinate courts.”
23. The Respondent/Applicant thus submitted that had the taxing master applied Schedule 10(B) as provided for, her entire taxation would have been fundamentally and principally at variance from the one she arrived at in her ruling dated 6<sup>th</sup> October 2023 while applying schedule 6 of the [Advocates Remuneration order](#).
24. Consequently, the Respondent/Applicant urged the court to make a finding that the honourable taxing master erred in principle in applying Schedule 6 instead of the correct Schedule, that is schedule 10 of the [Advocate Remuneration Order](#).
25. On who should cater for the Advocates fees, the Respondent/Applicant submitted that the same should be recovered from the estate and not from the Applicant herself, since the said Applicant was only able to enjoy 3 acres of the deceased's estate hence the court ought to find out the value of the Applicant's entitlement in the deceased's estate before taxing the same. That in failing to specify who should cater for the Respondent's fee, she was at risk of being executed upon by the said Respondent in her personal capacity as a beneficiary.



26. The Applicant relied on the case of *In re Estate of the Late Kipsiele Arap Chumo alis Kipsiele (Deceased)* [2019] eKLR where it was held that:
- “On whether the legal fees is payable from the estate, I have been referred to may court cases. In my view, after a deceased person dies, and in the course of succession proceedings, only the administrator to some extent and subject to the direction of court can commit the estate of a deceased person to new debts. Other beneficiaries can consent only to the extent of their portion of property entitlement, or anticipated portion from the estate.”
27. Further reliance was placed on the provisions of Rule 55 of the *Advocates Remuneration Order* to the effect that the court may order costs to be borne by the estate of a minor, lunatic, insolvent or deceased person and may give such directions as may be necessary to secure the due payment thereof.
28. The Respondent/Applicant thus submitted that the honourable taxing master erred in law and principle in failing to direct the Respondent to recover his costs from the entire estate as opposed to recovering his costs from the Applicant in her personal capacity.
29. On the third issue as to whether the fee allowed was manifestly excessive, the Respondent/Applicant submitted in the positive and maintained that the same warranted the interference by the court. That the learned taxing master erroneously applied schedule 6 of the Advocates Remuneration Order which led to the fee awarded being excessive. Further, that despite the Respondent/Applicant getting only 3 acres of the deceased’s estate, the Respondent proceeded to condemn the Applicant to pay the entire amount of Kshs. 1,510, 218/=.
30. That had the learned taxing officer applied the principles of taxation as set out in the case of Premchand Rainchand Ltd (supra) and considered the instant matter on its own merit, then she should have exercised her discretion in accordance with schedule 10 of the *Advocates Remuneration Order* and awarded fees which are reasonable within the law.
31. In view of the foregoing, the Applicant urged the court to make a finding that the fee awarded on the 6<sup>th</sup> September, 2023 was manifestly excessive which necessitates the interference of the court.
32. I have considered the Application, the Replying affidavit and the Applicants submissions and the law. The issues for determination are as follows:
- i. Whether this Court should interfere with the taxing Master decision his ruling dated 6<sup>th</sup> September, 2023.
  - ii. Who bears the cost of the application?
33. On the first issue, the applicant submitted that the learned taxing officer erred in law and principle by failing to tax the Advocate-Client Bill of Costs under Schedule 10 (B) of the *Advocate Remuneration Order* that provided for fees in Probate and Administration causes and instead applied Schedule 6 of the said Order.
34. She also submitted that the erroneous application of Schedule 6 instead of schedule 10 of the *Advocates Remuneration Order* led to the fee awarded being excessive. Further, that despite the Respondent/Applicant getting only 3 acres of the deceased’s estate, the Respondent proceeded to condemn the Applicant to pay the entire amount of Kshs. 1,510, 218/=.
35. Upon my perusal of the records, specifically the Ruling dated 6<sup>th</sup> September, 2023, I find that the taxing master, acknowledged that the proceedings in the lower courts were protested hence she applied schedule 6 of the *Advocates (Remuneration) (Amendment) Order, 2014*.



36. I find that the bone of contention in the instant application is the schedule used in the taxation of the Advocate-Client Bill of cost.
37. Rule 51C of the *Advocates (Remuneration) Order*, 1962 provides that:
- “Subject to paragraph 22, the scale of costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule 10.”
38. Rule 22 of the said *Order* on the other hand provides as follows:
- “(1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.
- (2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.”
39. Upon my further study of the record, specifically the Respondent’s Replying Affidavit and the Ruling dated 6<sup>th</sup> September, 2023, I find that there is no any indication that the Advocate herein elected to charge his fees under Schedule 5 of the *Advocates (Remuneration) (Order) 2014*.
40. In the case of *Lawrence Oigoro Nyangito t/a Nyangito & Associates v Hawa Mohamed Abdalla (Supra)*, it was held that:
- “...In my view this issue is settled by the provision of Paragraph 51C - Costs in probate and administration cases “Subject to paragraph 22, the scale of costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule 10.” The paragraph, just like Schedule X, does not differentiate proceedings before the High Court and those in the Subordinate courts.”
41. From the foregoing, I agree with the applicant that the Advocate-Client Bill of Costs should be taxed under Schedule 10 of the *Advocates (Remuneration) (Amendment) Order*, 2014 and not Schedule 6 that the said Bill was taxed under.
42. In *Premchand Rainchand Ltd* (supra) it was held as follows with regards to Principles of taxation
- “i.
- (a) That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;
- (b) that a successful litigant ought to be fairly reimbursed for the costs that 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;



- ii. That the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;
- iii. That in considering bills taxed in comparable cases allowance may be made for the fall in value of money;...'

43. I find that the fact that the Advocate-Client Bill of Costs was taxed under a wrong schedule leading to the advocates fee being excessive warrants interference by the court as per the authority above. Consequently, I find that the answer to the first issue is in the positive.

44. Before delving into the issue of costs, I note that the Applicant had raised the issue as to who should cater for the Advocates fee in her submissions to the effect that the same should be recovered from the deceased estate and not from the Applicant herself, since the said Applicant was only able to enjoy 3 acres of the deceased's estate hence the court ought to find out the value of the Applicant's entitlement in the deceased's estate before taxing the same. That in failing to specify who should cater for the Respondent's fee, she was at risk of being executed upon by the said Respondent in her personal capacity as a beneficiary. It is worth noting that the same was not one of the orders sought in the instant Application.

45. In *Adetonn Oladeji (NIG) Ltd vs Nigeria Breweries PLC* S.C. 91/2002 the J.S.C expressed themselves as follows:-

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

46. Applying the principles in the aforementioned authority, I am of the considered view that a party is bound by her pleadings. What the Applicant pleaded was that the court re-tax the Advocate-Client Bill of Costs or in the alternative remit the same before a different Taxing Master to be taxed under the appropriate order. On the contrary, if the Applicant was claiming that the Advocate's fee should be recovered from the deceased estate, she ought to have pleaded the same or amended her pleadings to reflect the same and not introduce it in her submissions hence the said claim is disregarded.

47. Consequently, and for the above reasons, the Chamber Summons dated 21<sup>st</sup> September, 2023 is allowed giving rise to issuance of the following orders:

- a. The decision of the Taxing Officer delivered on 6<sup>th</sup> September, 2023 as far as same relates to the Taxation of the Advocate/Client's Bill of Costs dated 23<sup>rd</sup> February, 2023 is set aside.
- b. The Advocate-Client Bill of Costs dated 23<sup>rd</sup> February, 2023 to be remitted back to the Taxing Officer for re-taxation under Schedule 10(b) of the Advocates (Remuneration) (Amendment) Order, 2014 by another taxing officer other than Hon. E. W. Karani.

48. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**



**J.K. SERGON**

**JUDGE**

In the presence of:

Morata for the Applicant

No Appearance for the Respondent

