



Owiti Otieno & Ragot Advocates v Dominion Farms Limited (Miscellaneous Application E81 of 2019) [2023] KEHC 27130 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E81 OF 2019
MS SHARIFF, J
DECEMBER 21, 2023**

BETWEEN

OWITI OTIENO & RAGOT ADVOCATES DECREE HOLDER

AND

DOMINION FARMS LIMITED JUDGMENT DEBTOR

RULING

1. The Application before court is a chamber summons dated 11th December 2022 brought under Rule 11(2) of the Remuneration Order, Section 63 (e), 1A,3, 3A, 89 of the Civil Procedure Act and all enabling provisions. It is a reference from the taxing officer in Kisumu HCCC NO.1 of 2018 seeking the following orders: -
 - i. That the decision of the taxing officer delivered on 4/7/2019 with respect to the Applicant/ Advocate's Bill of Costs dated 13/5/2019 be set aside.
 - ii. That this court be pleased to quash the taxing officer's decision on the Applicant's Advocate-Client bill of costs dated 13/5/2019.
 - iii. That the Honourable court be pleased to re-tax the said bill of costs.
 - iv. That the costs of the Application be provided for.
2. The Application is buttressed by the grounds apparent on its face and the supporting Affidavit Sworn by Oscar Onyango Jonyo in which he depones that the taxing master awarded exorbitant fees in respect of items 1,2,3,4,5,6,7,8,15,22,27,28,29,33,34,35,46 and 52 of the bill contrary to established taxation principles.
3. He specifically deponed that the Taxing Master erred in awarding instruction fees of Kshs.612,652.28 instead of Kshs.400,000/=. Additionally, that the Taxing Master erred by awarding getting up fees contrary to the parameters set by Schedule 6 paragraph 2 of the Advocate's Remuneration Order.



4. In respect of item 3 the Applicant averred that the fee of Kshs.5,000/= should be set aside as the nature of the perused documents was unknown. As for item no. 4 it urged that the Advocate's Remuneration Order provides Kshs.3,500/= for attendances and not Kshs.5,000/=.
5. With respect to item 5 of the bill the Applicant stated that less than Kshs 4,000/= would suffice. On item 8, regarding service of an Application in Kisumu from Nairobi they averred that the Remuneration Order provides for Kshs.1,400/= and not the Kshs 10,000/= taxed. As for perusal of the plaintiff's list of authorities Kshs.3,000/= was touted as enough compared to Kshs.8,500/= taxed.
6. Regarding item 29 of the bill the Applicant averred that the Remuneration Order provides for Kshs.1,400/= not the exorbitant Kshs 10,000/= taxed. Equally they urged that items 29 and 33 on service of the Application dated 8/2/2019 in Kisumu and Siaya respectively should attract Kshs.1,400/= not the Kshs.10,000/= and Kshs.5000/= awarded. The same was urged for items 34 and 35 in which Kshs.5,000/= and Kshs.10,000/= were awarded instead of Kshs.1,400/= provided for in the Remuneration Order.
7. Lastly the Applicant deponed that items 46 to 52 regarding disbursements had not been accounted for in terms of receipts.
8. In further support of the Application the Applicant filed submissions dated 22/5/2023 in which it submitted that the original suit was not complex hence the instruction fee should not have exceeded Kshs.400,000/=: based on the authorities of *Joreth Limited vs Kigano & Associates* (2002) 1 EA 92, *Truth Justice & Reconciliation Commission vs Chief Justice & Ano* (2014) eKLR.
9. On the issue of getting up fees the Applicant submitted that in the original suit there was no preparation required for trial hence getting up fees should not have been awarded. Furthermore, regarding item 5 which was on folios on an Application the Applicant averred that the folios were 18 and not the 53 as stated in the bill.
10. In respect of item 8 the Applicant averred that the Respondent's office was near the Kisumu Law Courts hence Kshs.10,000/= for service was unrealistic. In the absence of proof of further expenditure, the Applicant urged that Kshs.1,400/= as stipulated in the Remuneration order should have been applied.
11. The Respondent on its part argued that the taxing master was right in awarding instruction fees of Kshs.612,652.28/=. It submitted that even on the basis of paragraph 1 (b) schedule 6 of the *Advocate's Remuneration Order* alone the instruction fees would be Kshs 543,591.37/= not Kshs.400,000/= proposed by the Applicant. The additional Kshs 68,860.92 it submitted was due to the industry employed in defending the matter given that they had to first set aside *ex parte* proceedings. It relied on the case of *Republic vs Minister of Agriculture & 2 Others* (2006) eKLR in which the court stressed the taxing officer's duty to specify the elements guiding their discretion with cogency and conviction. The court then went ahead to delineate these elements as; the nature of the forensic responsibility on counsel, novelty of counsel, deployment of considerable industry and assessment/ simplification of large volumes of documentation.
12. As regards the getting up fees it was the Respondent's submission that it drafted and filed a defence in court on 19/6/2018 hence the Applicant's allegation that there was no preparation for trial was inaccurate. This it urged was in line Paragraph 2 schedule 6 of the *Advocate's Remuneration Order* in which it is stipulated that getting up fees should be allowed in cases where there is denial of liability and joining of issues in the pleadings.



13. On the issue of service, encompassing items 8,29,33,34 and 35 the Respondent called the court's attention to paragraph 9 schedule 6 of the *Advocate's Remuneration Order* in which it is stipulated that service within three kilometres of the High Court shall be Kshs.1,400/= after which Kshs.35 shall be charged per kilometre. Flowing from the above it contended that since the Plaintiff in the primary suit was represented by a firm based in Nairobi, service would cost Kshs.13,370.00/= while that for Siaya would be Kshs.4,234.00/=. It thus urged this court not to disturb the taxing master's award under this limb.
14. As for perusal it stated that the award of Kshs.5,000/= was correct given that the initial pleadings were computed at 100 folios.
15. With respect to instructions to file an application dated 9/4/2008 (item 4) being taxed at Kshs 5,000/= it submitted that the same was right as per the provisions of paragraph 1 schedule 6 of the *Advocate's Remuneration Order*.
16. In respect of drawing it urged this court not to disturb the taxing master's award as the same was verifiable from the court records.
17. With regard to disbursements it was their contention that they had attached the receipts proving the amounts charged. It urged this court to uphold the taxing master's decision as it was based on sound principles.

Analysis and Determination

18. I have carefully considered the Reference before this Court, together with the Supporting Affidavit thereto. I have also considered the Replying Affidavit as well as the written submissions filed by both parties and the relevant law. The issue that arises for determination is whether there exists sufficient grounds to interfere with the ruling of the taxing master.
19. As a general rule, the High Court will not interfere with the decision of a Taxing Officer unless there exists an error in law or in principle. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* Civil Appeal No. 220 of 2004; (2005) eKLR the Court of Appeal held that:

“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.”
20. As regards the instruction fees the Applicant contended that Kshs.400,000/= would suffice as the matter was not complex. The Respondent on their part urged this court not to interfere with the taxing master's award of Kshs.612,452.28/= based on the value of the subject matter being Kshs.22,906,091/= . The Applicant has not provided the basis for its arrival at the figure of Kshs.400,000/=. It has equally not demonstrated how the taxing master erred principally in arriving at the figure.
21. A calculation of the instruction fees from the Advocate's Remuneration Order brings figure of Kshs.543,591.37. /=. A look at the taxing master's ruling does not provide the reasons as to why she taxed the bill at Kshs.612,452.28/=.
22. In reiterating the importance of the taxing master disclosing what informed their decision in arriving at any figure, the court in *Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others* (2006) eKLR stated as follows:

“... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this



court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...”

23. In view of the foregoing I do find that the instruction fee of Kshs.543,591.37/= will suffice.
24. Turning to the issue of the getting up fees the Applicant contended that the taxing master based the getting up fees on the wrong instruction fees hence arrived at manifestly excessive instruction fees. Having found that the instruction fees was Kshs.543,591.37/= it therefore follows that the getting up fees is Kshs.181,197/=, being a third of the instruction fees.
25. As regards item three of the bill which talks of perusal of the plaintiff’s documents, I find no reason to interfere with the same. The remuneration order provides for Kshs.50/= for perusal per folio. The Respondent has contended that there were 100 folios. This has not been controverted by the Applicant.
26. As for the item 5 on drawing I find no reason to interfere with that. The Remuneration Order provides for the same at schedule 6 and it hasn’t been proven that the taxing master erred in principle.
27. Regarding items 8,29,33,34,35 on service, the taxing master made a finding that the same were not supported by receipts and proceeded to award Kshs.1,400/= for each. The Remuneration Order provides for proof of actual expenditure for service. In the absence of these receipts the taxing master cannot be faulted for the finding she made.
28. The upshot of the foregoing therefore is, that the taxing master’s decision is only varied to the extent that the instruction fees of Kshs.612,452.28/= is hereby replaced with Kshs.543,591.37/=, while the getting up fees is hereby taxed at Kshs.181,197/=.
29. Each party to bear it’s own costs.
30. It is so ordered.

DELIVERED, DATED, SIGNED AT KISUMU THIS 21ST DAY OF DECEMBER 2023.

MWANAISHA. S. SHARIFF

JUDGE

