



REPUBLIC OF KENYA



**Samali v Mbugua & another (Miscellaneous Application E117 of 2022)  
[2023] KEHC 26811 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E117 OF 2022  
RE ABURILI, J  
DECEMBER 19, 2023**

**BETWEEN**

**SIMON SAMALI ..... APPLICANT**

**AND**

**SIMON CHEGE MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**ANTONY MBUGUA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling determines the Reference dated 12<sup>th</sup> July 2022 supported by the affidavit sworn by Maureen Akoth Okumu advocate on 12<sup>th</sup> July 2022.
2. The Reference challenges the ruling on the taxation of the bill of costs taxed on 30<sup>th</sup> June 2022 and specifically, the items Nos. 21 and 23 of the Party and Party Bill of Costs dated 29<sup>th</sup> March 2022, urging this court to review, set aside and tax afresh the said items.
3. In the alternative, the Applicant urges this court to remit all the items in Party and Party bill of costs dated 29<sup>th</sup> March 2022 for taxation before a different taxing officer and costs of the Reference.
4. The grounds in support of the Reference as reproduced in the affidavit are that the taxing officer erred in principle regarding items 21 and 23 on the issues of expert witness expenses and the further court fees claimed.
5. That she failed to consider Section 74A (1) (e) of the *Advocates Remuneration Order* 2014 on professional scale fees of an expert witness to be charged and that it does not emphasize on production of receipts.
6. That the taxing master ignored the presence of the expert witness testimony on record which was prima facie evidence of the services rendered hence Section 74(1) (e) was applicable in ascertaining the expert witness expenses to be charged.



7. That a receipt by Dr. Neema Mbaruk for attending court on 25<sup>th</sup> May 2022 for Kshs.40,000 was produced during the hearing and it formed part of the court records.
8. That the official receipts for further court fees of Kshs.7,840 and Kshs.500 were ignored and that the submissions by the defendant were ignored.
9. The Respondents in their opposition to the Reference contend that the Reference is incurably defective, incompetent, is an abuse of the rules and of the court and does not lie.
10. That Rule 11 of the Advocates Remuneration Order was not complied with, that no notice of objection to the taxation was ever filed prior to the filing of the Reference contrary to Rule 11 (2) of the *Advocates Remuneration Order* which requires that before filing a reference, a party aggrieved by the taxation must file a Notice of objection to the taxing master specifying the items of taxation objected to.
11. The Respondents further contended that item 21 on the bill of costs is not the same as the one as challenged in the Reference as the item on expert witness expense is item 22 hence this court is not seized of jurisdiction to determine on an item which has not been challenged. That item 21 was on expenses for filing of the bill of costs at Kshs.325 which was not even opposed by the Respondents.
12. That on item 23, no receipt for payment was attached or exhibited at the taxation or in this Reference hence the challenge is unwarranted.
13. Further, that even assuming that item 21 is item 22, there was no evidence of such payment.
14. The parties filed written submissions on their respective positions and cited various decisions in support of their positions.
15. I have considered the pleadings in the Chamber Summons, the affidavits for and against the Reference and the supporting and opposing submissions.
16. The main issues for determination are:
  1. Whether this Reference as filed is competently before this court.
  2. What orders should this court make.
17. On the first issue of whether the Reference dated 12<sup>th</sup> July 2022 and filed in court on 12<sup>th</sup> July 2022 is competently filed in this court, the Respondents contend that the Reference is premature and offends the provisions of Rule 11 of the *Advocates Remuneration Order* which mandates that before a Reference is filed, Notice of Objection to taxation must be filed with the taxing master, 14 days of the date of taxation, setting out the items objected to and asking for reasons on the same.
18. Paragraph 11 of the *Advocates Remuneration Order* provides as follows:-
  - “(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
  - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

19. The Respondent has annexed to his submissions, decision showing that failure to file Notice of Objection to taxation is fatal to the Reference. However, those decisions are persuasive. Where the Applicant is not asking for the reasons for taxation on the items challenged or where reasons are in the ruling, my view is that filing of Notice of Objection is not necessary and therefore failure to file the same is not fatal to a Reference which sets out the items under challenge.
20. The Reference filed on 12<sup>th</sup> July 2022 was within 14 days of the date of the ruling on taxation.
21. I find no prejudice was occasioned by the filing of a reference setting out items under challenge, without first filing Notice of Objection to taxation asking for reasons for taxation on the disputed items.
22. Accordingly, I find that the Reference is competently before this court for determination on its merits.
23. On what orders should this court make, I observe that the Applicant challenges items 21 and 22 and he consistently says so even in the affidavit in support thereof and the grounds. On the part of the Respondents, it is contended and submitted that item 21 was for filing fees of bill of costs which was Kshs.325.00 and that item 22 is the one which referred to expert witness expenses of Dr. Neema and Dr. Olima hence the objection to the item is misplaced.
24. I have perused the Plaintiffs bill of costs dated 21<sup>st</sup> March 2022 and filed on 29<sup>th</sup> March 2022. Item 21 is under disbursements and it refers to Expert Witness Expenses Dr. Neema and Dr. Olima.
25. What the Respondent claims to be item 21 is what his advocate reproduced or recreated vide his written submissions on the bill of costs. The written submissions are dated 27<sup>th</sup> April 2022 where counsel listed item 21 to be filing fees on bill of costs Kshs. 325.00 and item 22 as Expert witness expenses for Dr. Neema and Dr. Olima.
26. It therefore follows that the objection by the Respondent is misplaced as the item was properly described by the Plaintiff both in the filed and taxed bill of costs and in the Reference hereto. The Ruling of 30<sup>th</sup> June 2022 also referred to item 21 not 22.
27. I overrule the objection by the Respondents and sustain the objection by the Applicant referring to item 21.
28. The only question is whether this court should interfere with the ruling of the taxing master on items 21 and 23 of the bill of costs.
29. In *First American Bank of Kenya Limited vs Shah & Others* (2002) 1 EA. 64 at 69, Ringera J (as he then was stated as follows:-

“First, I find that on the authorities this court cannot interfere with the taxing officer 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.”

30. The above principles restate what the Court of Appeal in *Joreth Limited vs Kigano & Associates* (2002) 1 EA 92 stated that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.
31. What did the taxing master in this case do? Regarding item 21, she stated as follows in impugned Ruling.

“item 21 on witness expenses by Dr. Olima and Dr. Neema there was no evidence tendered as proof of the services rendered and as such the same is assessed at NIL.” Is that the position in the trial court file which was availed to this court for perusal?
32. I have perused the trial court file Winam SPMCC No. 36 of 2019. The evidence tendered by Dr. Neema was taken on oath on 25<sup>th</sup> February 2021. She concluded as follows:-

“...I charged Kshs.40,000 for attending court today. Exhibit P 1 b.”
33. That exhibit P 1(b) as produced in the trial court record and attached to the discharge summary of the Plaintiff from Nightingale Hospital is an official receipt from Royal Medical Specialists with the particulars of Neema Mbaruk MB.chB Mmed (Ortho) Orthopedic Surgeon printed on it. The receipt is dated 25<sup>th</sup> February 2021 the same date that the doctor was testifying in court and the amount is Kshs.40,000 for court appearance. It is issued to Advocate Maureen Okumu.
34. That item was listed as No. 21 on the filed bill of costs albeit the amount sought by the advocate covers 2 doctors and is Kshs.45,000 not Kshs.40,000.
35. In addition, when Dr. Olima testified earlier on on 12<sup>th</sup> November 2020, he said nothing concerning the court attendance expenses.
36. The taxing master stated in her ruling that there was no proof of payment of the amount in question and disallowed it. The Respondents submit that in the chamber summons and affidavit in support, no such evidence was annexed.
37. At page 7 last paragraph of the submissions by the Respondents’ counsel, he insists that there was NIL given on the payment of such expenses.
38. Counsel for the respondents nonetheless concedes at the 1<sup>st</sup> paragraph of page 8 of his submissions that the doctor’s fees for attending court are permitted to be charged by the applicable remuneration scale of doctors at sums of between Kshs.60,000 to Kshs.120,000 but that there was no such charge or evidence of payment.
39. As I have stated above, I have perused the trial court proceedings and albeit the receipt was not attached to this reference, it was produced by Dr. Neema on 25<sup>th</sup> February 2021 as referred to in her testimony that she charged Kshs.40,000 for court attendance.
40. I find that there was proof of payment by way of the doctor’s own oral testimony and the receipt produced by the doctor which regrettably, the taxing master did not refer to. That in itself is an error in principle on the part of the taxing master.



41. I therefore allow the objection and set aside the nil award on item 21 of the Bill of Costs and substitute it with an order allowing that item No. 21 which was pleaded as a disbursement and proved by way of a receipt produced in evidence as P 1(b) by Dr. Neema Mbaruk.
42. On whether the taxing master erred in principle in disallowing item No. 23 of the Bill of Costs, item 23 is non-existent. Instead, we have item No. 22 on disbursements of further court fees.
43. The taxing master disallowed that item and the Respondents support the position by the taxing master on account that indeed, there was no proof of payment of further court fees.
44. The trial court record as perused by myself shows that on 29<sup>th</sup> March 2022, the Plaintiff paid into court Kshs.8,340 made up of Kshs.500 being assessment of costs and further court fees of Kshs.7,840.00. This was vide transaction No. QCT6G2AWRE. It was the same date of filing of the bill of costs dated 21<sup>st</sup> March 2022.
45. I observe that the taxing master is the one who erred in identifying item No. 22 as No. 23 hence the reference herein mentioning item 23 which is non-existent on the bill of costs which was taxed.
46. That item 22 is further court fees of Kshs.7,970 but as I have stated above, further court fees was Kshs.7,840. There was an official court fee receipt for that amount and for the taxing master to state that it was not proved, was an error of principle. The taxing master could at most reduce the figure and not disallow it and had she perused the court file, she could have discovered that the receipt was appended to the bill of costs which she was taxing on the 30<sup>th</sup> June 2022.
47. For the above reasons, I find that the objection is justified. I set aside the order disallowing the item No. 22 and listing it as item 23 and substitute it with an order allowing item 22 on the bill of costs dated 21<sup>st</sup> March 2022.
48. I allow a sum of Kshs.7,840 which was paid as further court fees. As Kshs.500 was not pleaded, I shall not allow it.
49. In the end, I find and hold that this reference has merit. I set aside the order of taxation of 30<sup>th</sup> June 2022 and substitute it with an order increasing the amount awarded by Kshs.40,000 plus Kshs.7,840 totalling Kshs.117,030 + Kshs.40,000 + Kshs.7,840 = Kshs.164,870.
50. Accordingly, this Ruling shall be served on the taxing master of the court originating Winam SPMCC No. 36 of 2019 with directions that a fresh certificate of costs be issued reflecting the figures including items allowed in this Reference.
51. As the error was committed by the court/taxing master which never saw or referred to the receipts which were apparent in the court file, I shall not penalise the Respondents with costs of the Reference. I say so because it was the duty of the Plaintiff/Applicant to alert the taxing Master of the receipts and had this been done, the taxing master would have referred to them and the respondents would have responded thereto at that stage. Those receipts were also not annexed to the reference and this court had to call for the trial court file and peruse the proceedings and exhibits and filed documents to find them.
52. The trial court record to be returned forthwith together with this Ruling and order.
53. This file is therefore closed.
54. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**R. E. ABURILI**



**JUDGE**

