



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 44 OF 2017

PATRICIA MUTHONI NJUE.....APPELLANT/APPLICANT

VERSUS

SAMSON KHALWA.....1ST RESPONDENT

MOMBASA KHUSHI MOTORS CO.LTD.....2ND RESPONDENT

RULING

1. The applicant herein filed the instant application dated 27.08.2021 and wherein he seeks for orders that;

- i. The decision of the taxing officer delivered on 16.08.2021 as far as the same relates to taxation of item One (1) and all court attendances of the Advocate Client Bill of Costs, the quantum awarded thereon and the reasoning with respect to the said award be set aside.
- ii. The Honourable court be pleased to retax Item One (1) of the said Bill of Costs.
- iii. The costs of this application be provided for.

2. The application is premised on the grounds on its face and further supported by the affidavit by Morris M. Karigi wherein among other issues, faulted the taxing officer for having failed to exercise her discretion judiciously by holding that Kshs. 30,000/= was reasonable instruction fees.

3. The applicant's case is that the learned taxing officer erred in principle as she arrived at a decision which is contrary to the applicable law and that the taxing officer misapprehended and misapplied the law in regards to item number one of the bill of costs on instruction fees. Further, that the taxing officer failed to exercise her power and discretion given to her by the Advocates Remuneration Order in arriving at the value of the subject matter of the suit. Basically, the applicant attacked the award by the taxing master as being too low in relation to instructions fees.

4. The application is opposed by a replying affidavit sworn on 04.10.2021 and wherein the deponent deposed that the application is misconceived and it's premised on a misapprehension of law and facts. That the Bill of Costs was not drawn to scale as per the Advocates Remuneration Order and that the Taxing Master took into consideration the attendances that the appellant/applicant was not entitled to.

5. Directions were taken that the application be canvassed by way of written submissions which I proceed to summarize as follows:

6. The applicant filed his written submissions and wherein he reiterated the fact that the Deputy Registrar erred in failing to take into account the ascertainable sum of Kshs. 600,000/= in determining the instruction fees that was payable to the appellant. That the taxing officer further took into account irrelevant considerations in the assessment of the costs by relying on the provisions of the Advocate Remuneration Order under schedule 6(a), which is titled "other matters" to proceed to award the sum of Kshs. 30,000/= as instructions fees. Reliance was made on the case of **Joreth Limited v Kigano Associates Nrb Civil Appeal no. 66 of 1999 eKLR (2002) EA 92.**

7. The respondents filed their written submissions and wherein it was reiterated that the learned taxing master was correct in awarding an amount of Kshs. 30,000/= as instruction fees in the matter. That the Advocates Remuneration Order provides the applicable amount to be any sum not less than Kshs. 25,200/= and further that the taxing master aptly addressed the applicant's concerns as raised in their submissions by clearly stating that the parameters of the award as sought only relates to matters of a fresh civil nature.

8. It was their case that the ruling of the taxing master proceeded to enumerate the attendances that the applicant is entitled to. It was their

view that the taxing master acted within the interests of justice and as such, they urged this court to dismiss the application with costs to them.

9. I have considered the application herein, the response thereto and the respondent's submissions and it is my considered view that the main issue for determination is whether the application is merited.

10. Paragraph 11 Rules (1) and (2) of the Advocates Remuneration Order and which I believe are relevant in this case provides that: -

"(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 this objection.

11. What the above provisions mean is that before a person can object the decision of the taxing officer, he ought to give notice in writing to the taxing officer of the items of taxation which he objects. The taxing officer is then required to forthwith record and forward to the objector the reasons for his decision. The objector has discretion to file his reference within 14 days.

12. I am alive to the decisions of superior courts to the effect that lack of the taxing officer's reasons will not make the reference incompetent more so where the reasons appear on the face of the decision of the taxing master. Odunga J, in Evans Thiga Gaturu Advocate v Kenya Commercial Bank Limited [2012] eKLR, held that

"It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing officer was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference".

(See also Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Oensin Scheme & 8 others [2017] eKLR and In Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd (2) (2006) 1 EA 5.

13. Even taking the ruling as having reasons on its face (by virtue of the reasons that the taxing officer had explained the reasons for item No. 1 in her ruling and that the application seems to be targeting only item one as can be seen from the supporting affidavit); it is trite that this court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna [2006] eKLR, Ojwang J. (Retired) stated as follows: -

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...The 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 manifestly excessive as to justify an inference that it was based on an error of principle."

14. Therefore, the Bill of Costs before the trial court related to an appeal to the High Court. Taxation of the Bill ought to have been done under Schedule 6 (A) (b) which provides as follows;-

That value exceeds Kshs But does not exceed Kshs.

-	500,000	75,000
500,000	750,000	90,000
750,000	1,000,000	120,000
1,000,000	20,000,000 fees as for Kshs.1,000,000 plus an additional 2%.	

Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.

15. The instructions were to appeal a judgment that was previously issued in the lower court and at the end of the day via a judgment dated 11.11.2020 the court instead found an amount of Kshs. 600,000/= to be reasonable compensation in regards to the general damages suffered by the appellants.

16. In the case herein, the value of the subject matter was ascertained by the High Court and assessed at Kshs. 600,000/= and going by the

Remuneration Order, the instruction fees ought to have been assessed at Kshs. 90,000/=.

17. It is my view that the taxation on item 1 was not sound or proper in law. The taxing officer erred in principle in assessing the said item at Kshs. 60,000/=.

18. In the premises, the application is hereby allowed with no orders as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JANUARY, 2022

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent