



REPUBLIC OF KENYA



**Njenga & another v Njenga & another (Miscellaneous Application E526 of 2021)
[2022] KEHC 11254 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E526 OF 2021**

WA OKWANY, J

MAY 26, 2022

BETWEEN

MONICAH WANGUI NJENGA 1ST APPLICANT

DAVID KINYANJUI MATHU 2ND APPLICANT

AND

DAVID KINYANJUI NJENGA 1ST RESPONDENT

DANDORA MILLERS LIMITED 2ND RESPONDENT

RULING

1. The applicants herein were dissatisfied with the ruling, on taxation, made by hon E Tanui (DR) particularly on items 2 and 3 of the party and party bill of costs dated January 21, 2020. They therefore filed the application dated July 14, 2021 seeking the following orders: -
 - a. This honourable court be pleased to tax the party and party bill of costs dated January 21, 2020 in accordance with the Advocates Remuneration Order
 - b. In the alternative to order (b) above, the honourable court be pleased to refer the party and party bill of costs dated January 21, 2020 for fresh taxation before a different taxing master.
 - c. Costs of this reference be provided for.
2. The application is supported by the applicants' affidavits and is premised on the main grounds that: -
 - i. The applicants are dissatisfied with the taxation of hon.
 - ii. The learned taxing master, hon Tanui (DR) committed an error in principle by taxing off instruction fees from Kshs 200,000 to Kshs 150,000 instead of Kshs 15,000 as provided for



under schedule 6 paragraph (1) (f) (iii) of the [Advocates \(Remuneration\) \(Amendment\) Order, 2014](#) for proceedings brought under the [Companies Act](#).

- iii. By increasing instruction fees as provided for under the said schedule from Kshs 15,000 to Kshs 150,000 the learned taxing master made a tenfold increase thus committing a gross error in principle in disregarding the nature of the subject matter that entailed correction of the register of the company register of the 2nd respondent.
 - (iv) The learned taxing master, the hon E Tanui (DR) failed to apply well laid down principles of taxation hence awarded an exorbitant sum to the respondents in terms of instruction fees and getting up fees.
3. The respondents opposed the application through the replying affidavit of their advocate Mr Githui John who confirms that the applicants filed the originating notice of motion seeking the reduction of the 1st respondent's shareholding in the 2nd respondent's company. He states that the motion was however very broad in nature as the applicants also accused the 1st respondent of, *inter alia*, breach of fiduciary duties and fraud.
 4. He further states that respondent filed a preliminary objection to the notice of motion and that upon full consideration of the matter, the court struck out the originating motion, with costs, and made a specific finding that issues such as fraud and breach of fiduciary duty cannot be tried by way of a notice of motion. It is the respondents' case that the bill of costs was taxed in accordance with the well-established parameters that include the nature and interest in the suit, novelty of the matter and the time taken before the conclusion of the matter.
 5. It was the respondents' case that even though the Taxing Master made a specific finding that the applicable provision of the [Advocates Remuneration Order](#) (ARO) is schedule 6 paragraph (1) (f)(iii) thereof, she exercised her discretion and assessed instructions fees at Kshs 150,000/ bearing in mind the nature of the case.
 6. I have considered the objection to taxation, the respondents' response and the parties' submissions. The main issue for determination is whether the application meets the threshold set for setting aside the decision of the Taxing Master.
 7. The applicants' case was that the Taxing Master committed an error in principle by awarding instruction fees that was manifestly excessive thus warranting this court's interference with the assessment. For this argument, the applicant cited the decision in [First American Bank of Kenya Ltd vs Gulab P Shah 2 Others](#) Nairobi HCCC No 2255 OF 2000 where the court held: -

“...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.”

8. On their part, the respondents submitted that the taxing master was perfectly within the limits of her discretion in making the award on costs. The respondent cited the decision in [Rachuonyo and Rachuonyo Advocates vs National Bank of Kenya Limited](#) [20211 e-KLR wherein the court, while approving the ratio in the case of [Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board](#) NRB CA Civil Appeal No 220 of 2004 [20051 e-KLR, stated as follows: -

“On a 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497,



the predecessor of this court said at page 492 paragraph "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases"•

9. It is trite that a court will not interfere with the decision of the Taxing Master 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.
10. It was not in dispute that the subject matter of the application that precipitated the filing of the party and party bill of costs was an originating notice of motion seeking the reduction of the shareholding of the 1st respondent in the 2nd respondent's company.

Schedule 6 paragraph (1) (f) (iii) of the [Advocate Remuneration Order](#) provides as follows on costs to present or oppose proceedings under the [Companies Act](#).

(f) Companies

(iii) To present or oppose any other proceedings under the [Companies Act](#) 15,000

11. In the present case, I note that the Taxing Master correctly found that the instructions fees due to the respondent in respect to the notice of motion was Kshs 15,000. She however went on to enhance the instructions fees from Kshs 15,000 to Kshs 150,000 thus precipitating the filing of the instant application in which the applicant contends that the tenfold enhancement of the instruction fees is not justified. When faced with a similar scenario in the case of [Nolly K Musango vs Peter Odanga Another](#) [2021] eKLR Munyao J affirmed the principles of taxation set out in case [First American Bank of Kenya vs Shab](#) and Others (supra) and held that: -

“The only issue I need to address is whether the increase of fees from Kshs 6,300/= to Kshs 200,000/= was manifestly excessive. I think this is an enormous increase of fees, and although reason for the increase has been given, in my view, the increase is manifestly excessive. I have mentioned that there was no value attached to the subject matter, since this was a case over boundaries, and to me, the closest equivalent would be a matter of zero value, thus falling within the scale of Kshs 0 - Kshs 500,000/= within the context of schedule VI (l) (b), where the fees payable would have been a maximum of 49,000/= if the case was defended. I think this figure would have constituted a good reference point on what would be reasonable. Kshs 200,000/= is more than four times this amount of Kshs 49,000/= and that is why I am of the opinion that the award of it as instruction fees in the circumstances was manifestly excessive. Even if one takes into consideration the other factors that the taxing officer properly took into account, still, Kshs 200,000/= would appear to be way off the mark.”

12. In the present case, I find that even though the Taxing Master had the discretion to enhance the instruction fees, if she deemed it necessary, an increment of more than 1000% is manifestly excessive more so considering that no justification was given for such a wide margin. I note that the application that gave rise to the taxation of the party and party bill of costs was a simple and straightforward application that was dispensed with expeditiously when the court stuck it out for want of form. I am therefore not persuaded that the taxation arose out of complex or taxing litigation that would call for tenfold increment of the instruction fees.
13. I find that the present application is merited and I therefore allow it. Consequently, I set aside the ruling on taxation delivered by the Taxing Master on May 31, 2021 and re-tax the party and party bill of costs



at Kshs 15,000 in accordance with the ARO which I enhance to Kshs 50,000 considering the nature of the dispute. I make no orders as to the costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of:-

Mr. Ondieki for Applicant.

Ms Aoi for Githui for Respondent

Court Assistant- Sylvia

