



**Kitheka & another v Nyaki (Suing as the Legal Representative of the Estate of Morris Rutere Njagi (Deceased) & another (Miscellaneous Civil Application E042 of 2021) [2022] KEHC 11355 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS CIVIL APPLICATION E042 OF 2021  
LM NJUGUNA, J  
MAY 25, 2022**

**BETWEEN**

**JULIUS MUTHUI KITHEKA ..... 1<sup>ST</sup> APPLICANT**

**SPIN KNIT DAIRY LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MIKA NJAGI NYAKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MORRIS RUTERE NJAGI (DECEASED)) ..... 1<sup>ST</sup> RESPONDENT**

**MWANIKI ANDERSON AKA. MWANIKI MUCHANGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is a chamber summons dated August 6, 2021 wherein the applicants seeks for orders that:
  - i. The decision of the taxing master delivered on June 21, 2021 making an award of costs on the applicants Bill of Costs amended on April 19, 2021 be set aside.
  - ii. The honourable court be pleased to refer the matter back for re-taxation of the applicants' amended Bill of Costs amended on April 19, 2021 with proper directions thereto.
  - iii. In the alternative to prayer two (2) above, the honourable court does exercise its inherent jurisdiction and be pleased to re-tax the applicants' Bill of Costs amended on April 19, 2021 afresh.
  - iv. Costs of this reference be granted to the appellants/ applicants.



2. The application is premised on the grounds on its face and it's supported by the annexed affidavit sworn by counsel for the appellants/applicants. Their case is that they had lodged an appeal in Embu HCCA No. 42 of 2014 against the judgment in Embu CMCC No. 194 of 2008 which arose from a claim for damages resulting from a fatal road traffic accident. That the appellants/applicants succeeded partly when the award of general and special damages in Embu CMCC No. 194 of 2008 was substituted with an award of Kshs. 576, 800/= and half the costs of the appeal. It is their case that they proceeded to draw and file a Bill of Costs amended on April 19, 2021 in a bid to enforce the orders of the court and which the taxing master proceeded to tax.
3. That after delivery of the impugned ruling, the appellants/ applicants advocates on record registered an objection in that the taxing master had misapprehended the Bill of Costs amended on April 19, 2021. Further that, the taxing master erred in law and principle by taxing off disbursements on account of lack of material justification by failing to exercise her discretion under Rule 74 of the Principal Order by calling for vouchers. In the end, the appellants/applicants prayed that this application be allowed.
4. The parties took directions that the application be dispensed with by way of written submissions and which directions were complied with by the applicants.
5. The applicants submitted that the application is properly before court given that it was filed within the statutory timelines. That the applicants through their advocates on record gave notice to the taxing officer of their objection to the taxation and made an oral application for the reasons of the taxing officer's decision. Further, a letter requesting for a copy of the ruling was forwarded to court on July 26, 2021 and the applicants came about an uncertified copy of the ruling bearing the taxing master's decision on July 26, 2021 and filed the instant reference on August 9, 2021, well within the fourteen day period in support of the reference.
6. On whether the tax master is functus officio, it was submitted that the office of the taxing officer would well be borne by another qualified judicial officer who may proceed to re-tax the applicant's bill of costs amended on April 19, 2021. Reliance was placed on the case of *Otieno Cleveland Okoth Ayayo & another vs Juni Awiti Asiyo* 920160 eKLR. The applicants are of the view that in case this court agrees with the respondents, then this court has inherent jurisdiction to proceed to tax the applicant's amended bill of costs afresh. In the end, the applicants prayed that this court ensures a proper taxation of the applicants' amended party and party bill of costs.
7. I have considered the application herein and the applicants' submissions and it is my view that the main issue for consideration is whether the application herein is merited.
8. The beginning point is whether the taxing officer properly exercised her discretion in determining the party and party bill of costs.
9. In the case of *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92, this court addressed the issue thus;
 

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”



10. As to whether the taxing officer was obliged to apply the instruction fees discerned in the party and party bill of costs or to exercise her discretion to arrive at the instructions fees, requires that I turn to the Advocates Remuneration Order 2014, which is the relevant version of the Order, for guidance.
11. 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%.
12. 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 02.12.2020, the court instead found an amount of Kshs. 576,800/= to be reasonable compensation in regards to the general damages suffered by the respondent.
13. In the case herein, the value of the subject matter was ascertained by the High Court and assessed at Kshs. 576,800/= and going by the Remuneration Order, the instruction fees ought to have been assessed at Kshs. 90,000/=.
14. On getting up fees, it was submitted that the same should be awarded given the importance of the matter. An amount of Kshs. 40,000/= was suggested. Paragraph 3 of Schedule 6A of the Advocates (Remuneration) Order 2014, provides as follows:  

In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing master may allow such fee in addition to the instruction fee and such a fee shall not be less than one third of the instruction fee.
15. In regard to the getting up fees, the Taxing Master stated that the appeal was straight forward. I equally adopt the same reasoning given that the matter herein never exhibited any complex or novel issues that were to be determined. In that regard, I find that the taxing master never erred by taxing off the said item. [See *Republic v Kenyatta University & another Ex parte Wellington Kihato Wamburu* [2018] eKLR].
16. In regard to the various items in the bill of costs, I have taken the liberty to peruse through each item and the submissions filed by the applicants in respect to the said items. It is my considered view that the following items are properly drawn; 2, 3, 4, 5, 6, 10, 11, 14, 17, 18, 22, 23, 24, 25, 28, 32, 33, 38, 45, 46, 49, 50, 54, 57, 60, 63, 72, 76, 102, 103, 105, 106, 107, 108, 77, 78, 79, 80, 81, 82, 83, 84, 85.
17. The rest of the items are either overcharged or not taxed as per the remuneration order. With regard to items Nos. 86 – 101, as already pointed out, the applicants were under a duty to produce proof. The taxing officer did not err in failing to award the claimed amounts.
18. Whether the taxing master erred in failing to exercise her discretion under Rule 74 of the Principal Order by calling for vouchers. Having perused the court record, I note that the applicants have faulted



the tax master for failing to exercise her discretion under section 74 but failed to show how that discretion has been used capriciously. The reason given for this is that she ought to have called for vouchers in support of disbursements. I totally disagree with this submission and hold the view that a party is under legal duty to present all the evidence to court and not to expect the court to call for the same. I have looked at paragraph 74 relied upon by the applicants and it reads as follows:

“receipts or vouchers for all the disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer.”

19. The word used is “if required by the taxing officer”. It is not the duty of the taxing officer to call for them but he/she can do so, if he/she deems it fit. The paragraph, in my view, does not impose a ‘duty’ on the taxing officer to call for receipts/ vouchers. In Misc Application No. 51 of 2001 Muthoga Gaturu v Naciti Engineers Limited, Ochieng’ J was of the view that:

The inability to produce proof rests completely at the Advocates door and found that no fault on the part of the Taxing Master.

[Also See [Luka Wagana & 2 others v Charles Alexender Kiai & another](#) [2020] eKLR].

20. On the issue of the court being functus officio, I start by defining functus officio. In [Black’s Law Dictionary](#), 9th Edition, *functus officio* is defined as “Latin ‘having his or her office’ (Of an officer or official body) without further authority or legal competence because the duties and functions of the original have been fully accomplished. It is a Latin word for “a task performed”. It means that once the court, tribunal or panel has issued a final and binding order, it becomes functus officio and lacks any further power to revisit issues once it has ruled. The general rule is that a final decision of a court cannot be reopened. This was illustrated in the case of [Tanzania Telecommunications Co. Ltd and others v TRI Telecommunications Tanzania Ltd](#) (Civil Revision No. 62 of 2006) [2006] Court of Appeal of Tanzania at Pp 5-7. The rule applies only after the formal judgment or ruling has been drawn up, issued and entered.

21. The ruling herein was delivered on June 21, 2021 by the Deputy Registrar, Hon J. Ndengeri, sitting in her capacity as a Taxing Officer and whereas the instant reference was filed on August 9, 2021 is a clear indication that the applicants were not satisfied with the ruling rendered. As already pointed out in the body of this ruling, there exists omissions that were occasioned by the taxing master in rendering her ruling and in my view, the applicants should not suffer the prejudice of having their grievance heard because of the said omissions. [See [Philip Chemowolo & another v Augustine Kubende](#) (1982-88) 1 KAR 103]. Furthermore, this court is enjoined at all times to do justice to the parties and in the circumstances of this case, I am persuaded that the court should exercise its discretionary power to enable the applicants herein be heard on the items of the bill of costs as provided by statutory legislation/s applicable herein. [See [Otieno Cleveland Okoth Ayayo & another v Juni Awiti Asiyo](#) [2016] eKLR; also [Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co. Ltd](#)].

22. In the end, the orders that are commendable to me are as follows:

- i. That the Bill of Costs herein be remitted to the taxing master to be taxed afresh in regard to the items that were not properly taxed as per the directions given hereinabove. The same to be placed before a different taxing officer.
- ii. No order to costs.

23. It is so ordered.



**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF MAY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Respondents

