



Jumuia Hotel v Stephen Ndanyi & Juliana Chausiku Osogo (Suing as the legal representatives of the Estate of Catherine Atemo Ndanyi - Deceased) & another (Civil Appeal 24 of 2019) [2022] KEHC 12742 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 24 OF 2019
FA OCHIENG, J
AUGUST 26, 2022**

BETWEEN

JUMUIA HOTEL APPELLANT

AND

STEPHEN NDANYI & JULIANA CHAUSIKU OSOGO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CATHERINE ATEMO NDANYI - DECEASED) 1ST RESPONDENT

PERIHAB ACADEMY 2ND RESPONDENT

(eing an Appeal from the Ruling on the 1 st Respondent's Party to Party Bill of Costs of Hon. Lina Akoth, Deputy Registrar delivered on 13 th May 2021 in Kisumu HCCA No. 24 of 2019)

RULING

1. By a ruling dated May 13, 2021, the learned taxing officer taxed the 1st respondent's bill of costs in the sum of Kshs 162,760/=.
 1. The appellant was dissatisfied with the said ruling and filed the reference which is the subject of the ruling.
 2. By its reference, the appellant asked the court to review, set aside or vary the decision which the taxing officer made in respect to the following items; 5, 6, 7, 8, 12, 15, 17, 18, 19, 21, 22, 23, 25, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49.



Lack of Proof

3. The primary complaint of the appellant was that the 1st respondent failed to provide documentary proof to prove the claims of;
 - a. Service of various documents;
 - b. Perusal of various documents;
 - c. Attendance in court; and
 - d. Disbursements.

Overcharging for Perusal

4. The appellant submitted that the 1st respondents had overcharged for perusal of their own authorities.
5. However, the appellant did not specify the impropriety in the said decision.
6. I find that the appellant did not show that the taxing officer had applied the wrong principles in respect to this issue.
7. There was no indication of any irrelevant factors which the taxing officer had taken into account.
8. There was also no indication that the taxing officer had failed to take into account some relevant factor.

The Law

9. It is well settled that the court will not interfere with the exercise of the taxing officer's discretion unless it is shown that the taxing officer had not exercised the discretion judicially. Examples of instances which would lead to the setting aside of the decision of the taxing officer include;
 - a. The disregard of relevant factors;
 - b. Taking into account irrelevant factors;
 - c. Applying the wrong principle;
 - d. Wrongly interpreting the applicable rules of law;
 - e. Awarding either such a high or low sum that no taxing officer who was acting reasonably could have granted.
10. In a nutshell, unless it is shown that the taxing officer had acted in a manner that was inconsistent with established principles and practice, the court would not interfere with the decision of the said taxing officer.

Did the Taxing Officer Exercise Her Discretion Judicially or Not?

11. The taxing officer expressed herself in the following manner;

“I have considered the items in the party and party bill of costs and it is my considered view that the items therein are drawn to scale and/or are



reasonable in consonance with the sixth schedule of the Advocates Remuneration Order (ARO) 2014, as such are taxed as drawn, save for the following items;

12. According to the 1st respondent;
“..... this paragraph and indeed the entire ruling, stating the reasons leaves no doubt that the taxing master addressed her mind to the complexity of the case, adopted a flexible and sensible approach to the task of striking the balance, while taking into account the particular features of the appeal.”
13. Frankly, I failed to trace, in the ruling, the consideration which the 1st respondents alluded to in their submissions. The taxing officer made no reference to the complexity of the case.
14. She did not talk about adopting a flexible or sensible approach to the task of striking the balance.
15. Furthermore, the taxing officer did not make reference to any particular features of the appeal.
16. The ruling was precise. It taxed the party and party of costs as drawn, because it had been drawn to scale and/or because it was reasonable, in consonance with the sixth schedule of the Advocates Remuneration Order.
17. Assuming that the taxing officer was very right, regarding the fact that the bill of costs was drawn to scale, that cannot be a sufficient answer to the reference herein.
18. I so find because during taxation the appellant had already pointed out that some of the fees claimed by the 1st respondent were not supported by evidence that would show the actual services rendered.
19. As was held in the case of Desai, Saruia & Pallan Advocates Vs Jambo Biscuits (kenya) Limited [2014] eKLR;
“Taxation of a bill of costs, like all other aspects of litigation, is based largely on evidence. It is also an adversarial process. As the bill was contested, it behoved the applicant to present to the taxing master all



documents and materials in support
of its claim.”

20. I would add that even when the bill of costs was not opposed, it is imperative that the taxing officer verifies matters such as whether or not the applicant attended court on the dates cited in the bill; whether or not the disbursements claimed were backed with receipts; and whether or not the trial court had awarded costs of a particular application or a particular attendance, to the applicant.

21. In the case of *Mumias Sugar Company Limited Vs Tom Ojienda & Associates* [2019] Eklr, The court held as follows;

“

“76. When the taxing officer ordered for the payment of money which had allegedly been disbursed by the advocate, on behalf of the client, yet the taxing officer had not verified whether or not the funds had been disbursed, that was an error in principle.”

22. It cannot be right to award to an applicant an amount which he claimed as a disbursement, if he did not provide proof of such disbursement.

23. In the case of *Hezron Odhiambo Abok Vs Prajapat Pravinbhai Jivabhai* Hc. Misc. Application No 84 OF 2018, Musyoka J held that;

“..... it was incumbent upon the applicant to prove the disbursements he claimed. There is no evidence by way of receipts as to how he came to the same, and I hold that the taxing officer cannot be faulted for taxing off item 47.”

24. In this case I find that the taxing officer did not verify whether or not the 1st respondents had attended court on all the instances when they claim to have done so.

25. In the circumstances I find that there are grounds for interfering with the decision of the taxing officer. Therefore, I allow the reference, set aside the ruling dated May 13, 2021, and order the hon Lina Akoth to undertake the task of tasking the bill of costs afresh.

26. Ordinarily, a fresh taxation would be conducted by a different taxing officer; but because the error in this case is one which requires verification, I find that there would be no prejudice to any of the parties if the same taxing officer conducted the requisite process of verification.



27. As regards the costs of the reference, I order that the same shall await the fresh taxation. If the exercise yields a result that is less than the sum awarded earlier, the 1st respondent would pay the costs of the reference.
28. On the other hand, if the results remain the same as earlier awarded, the appellant shall pay to the 1st respondent the costs of the reference.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE

