



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lessan v Laboso & another (Judicial Review E002 of 2022)  
[2022] KEHC 13258 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
JUDICIAL REVIEW E002 OF 2022  
AN ONGERI, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**W. K. NGENO LESSAN ..... APPLICANT**

**AND**

**SIMION KIPKURUI LABOSO ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFREY LABOSO NGETICH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed this Reference dated 7/2/2022 against the bill of costs taxed on 26/1/2022 by the taxing master in the sum of Kshs.216, 744/=.
2. The Application is supported by the Affidavit of Wycliffe Kipkemoi Ngenoh of even date in which it is deposed as follows:-
  - i. That on the 26<sup>th</sup> of January 2022, the honorable court taxing master rendered his decision on the taxation of the Advocate-Client bill of cost dated 8/7/2021;
  - ii. That he is dissatisfied with the said decision for the reason that the taxing officer in his ruling misdirected himself in both law and fact in arriving at a basic instruction fees of Kshs. 140,000 in respect of item 1 of the bill of costs;
  - iii. That costs were manifestly too low as the taxing officer failed to appreciate the value of the suit properties, yet the matter was before the high court which has jurisdiction of property above Kshs.20 million;
  - iv. That the learned taxing master misdirected himself in both law and fact, in that despite holding in his taxation ruling that the value of the subject property was to be considered in arriving at the basic instruction fees, he in fact failed to consider the value of the properties in dispute, which is approximately valued at Kshs. 1.3 billion;



- v. That the learned taxing master erred in law and in principle by taking into account irrelevant factors and strictly applying unjust principles when the law requires him to take into consideration the defining factors of each case, and to interrogate further and ascertain to himself the nature of the transaction entered between the applicant and the respondent and the nature of document presented in support, giving indications that the value goes beyond over Kshs. 1 billion;
  - vi. That the learned taxing master acted on wrong principles and arrived at a figure on the basic instruction fees manifestly too low and which was a failure on his part to exercise his discretion judiciously; and
  - vii. That the award contradicts the spirit and principle of the Advocates Remuneration Order with regard to fair and reasonable remuneration of advocates.
3. The Respondents filed a Replying Affidavit dated 18/6/2022 and a further Replying Affidavit dated 20/6/2022 in which it is deposed as follows:-
- i. That they had never given instructions to the applicant to undertake Succession Cause no. 102 of 2002 on their behalf and the applicant only approached them and informed them that he was willing to assist in the Succession Cause as a family friend;
  - ii. That they agreed to his request and further agreed that they would pay him a sum of Kshs. 50,000 since the applicant was only assisting them;
  - iii. That on the 18<sup>th</sup> of February 2016, out of the agreed Kshs. 50,000, they paid the applicant Kshs. 10, 000, wherein they asked the applicant to indicate how much was still owing and the applicant indicated that a balance of Kshs. 40,000 was owing.
  - iv. That on the 22<sup>nd</sup> of February, 2016, he cleared the owing balance of Kshs. 40,000, and the applicant disappeared from representing them, and only emerged when representing the objector, Fauna Chepkirui Ngetich.
  - v. That on raising the issue, the court ruled on the 29<sup>th</sup> of October, 2018, that there existed a glaring conflict of interest and as such the applicant was barred from the file; and it is after this incident that the applicant informed them that he would revoke any agreement as to payment of his fees and would bill them accordingly.
  - vi. That the estate of their deceased father is not as huge and vast as the applicant claims, and the value of Kshs. 1.3 billion as alleged by the applicant is extremely exaggerated and the applicant has not demonstrated where he got the figures of Kshs. 1.3 billion.
  - vii. That the learned taxing master did not err in anyway by basing the instruction fees on the disclosed amount contained in P & A 5 forms.
  - viii. That the taxing master can only base their findings on the value of the subject matter, but where the value of the subject matter could not be determined from pleadings, judgments or settlement, then the taxing master is entitled to use their discretion judiciously , taking into account the nature and importance of the suit including other factors.
  - ix. That the value of the estate was disclosed in the P & A 5 form as Kshs. 10 million, and that is the amount that the learned taxing master based his findings on.
  - x. That the reference application filed is a waste of judicial time and an afterthought, as the bill of costs which was taxed and allowed pursuant to the ruling of the court of the 26<sup>th</sup> of January,



2022, has since been settled and the applicant accepted settlement only to turn and file the reference;

- xi. That the reference application dated the 7<sup>th</sup> of February, 2022, is not made in good faith but is only meant to paint the honorable taxing master in bad faith and should be dismissed with costs to the respondent.
4. The parties filed written submissions in which they stated as follows:-

The applicant submitted that at no time did they enter into an agreement for fees, since the law prohibits undercutting as envisaged by section 4 of the *Advocates Act*, and that the receipts purportedly produced is not an agreement on fees but acknowledgement of down payment.
  5. It was submitted that the taxing master acted on wrong principles and arrived at a figure on basic instructions which contradicts the spirit and principle of the Advocate Remuneration Order with regard to fair and reasonable remuneration of advocates, and the remedy available is to remit the same for fresh taxation before another taxing master with direction that proper valuation be conducted to ascertain the same.
  6. The respondents on the other hand submitted that the instructions fees shall be pegged on the declared value of each claim, or if the same is unascertainable, then the honorable taxing master may use his discretion guided by the proper laid down principles to impose the instruction fees.
  7. It was submitted that the figures disclosed in the forms P&A 5, P&A12, together with P&A57, which forms the basis of the succession cause, is Kshs. 10 million, and it thus goes against the principle of billing if the applicant relies on a figure of Kshs. 1.3 billion to peg for his instruction fees whereas the same is clearly not disclosed from the pleadings on record.
  8. It was also submitted that the learned taxing master utilized the proper principles in arriving at the figure of Kshs. 140,000 as instruction fees and the reference should be dismissed.
  9. The issues for determination in this reference are as follows:-
    - i. Whether the instructions fee of Kshs.140, 000/= was proper.
    - ii. Who pays the costs of this Reference.
  10. I find that it is trite law that where the value of the subject matter cannot be determined from the pleadings, Judgment or Settlement, the taxing officer has to use his discretion.
  11. In the case of *Joreth Ltd -vs- Kigano & Associates* {2002} 1 E.A. Page 92 , the court stated as follows:-

“Where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances. In this instance, the taxing master had followed this course and had not erred in doing so.”
  12. In the current case, the P & A Forms disclosed a figure of 10,000,000/= and therefore the instruction fees was taxed to scale.
  13. I find that it is not clear how the Applicant arrived at a figure of 1,300,000,000/= as the value of the Estate.



14. The Reference has no merit and the same is dismissed.

15. On the issue of costs, I direct that each party bears its own costs of the Reference.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF SEPTEMBER, 2022**

**A. N. ONGERI**

**JUDGE**

