



**Aoro v Were (Miscellaneous Reference Application E019 of 2022)  
[2022] KEHC 14628 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
MISCELLANEOUS REFERENCE APPLICATION E019 OF 2022  
RE ABURILI, J  
OCTOBER 31, 2022**

**BETWEEN**

**FREDRICK ONYANGO AORO ..... APPLICANT**

**AND**

**MARY AUMA WERE ..... RESPONDENT**

**JUDGMENT**

1. Before me this Court for determination is the Applicant's Chamber Summons application dated 18<sup>th</sup> July 2022 brought under section 89 of the Civil Procedure Act, Schedule 7 of the Advocates Remuneration Order (2014) and section 11 of the Advocates of the Remuneration Order. The applicant seeks the following orders:
  - a) Spent
  - b) That pending the hearing and determination of this application and further orders of the court, this Honourable Court be pleased to order stay of execution of the Respondent's Bill of Costs dated 26/04/2022 in Bondo Civil Suit No. 35 of 2020 arising from the Taxing Officer's ruling on taxation delivered on 13th July, 2022.
  - c) That the decision of the Honourable Magistrate dated July 13, 2022 on the with respect to Item 2 (V.A.T.), 4 (swearing verifying affidavit), 9,10,24,33,38,41,42,45 (Services), 19,22,26,27 (witness expenses), 31 (adjournment costs), 44,46 (Court Attendance fees), 36 (instruction fees on drawing bill of costs), 43,47 (Filing) and 48 (further court fees).(sic)
  - d) That the ruling delivered on July 13, 2022 on the respondent's party and party Bill of Costs dated 26/04/2022 be set aside and taxed afresh by this Honourable Court.



- e) That costs of the Application be provided.
2. The application is predicated on the grounds set out on the face of the application and on the supporting affidavit dated July 18, 2022, sworn by Joan Turgut advocate. The applicant claims that following the judgement in Bondo Civil Suit No. 35 of 2020 delivered on the April 20, 2022, the respondent prepared a Bill of Costs dated April 24, 2022 which was opposed by the applicant.
  3. That consequently, the respondent's Bill of Costs came up for taxation on the 8/06/2022 when the applicant's counsel sought time to file written submissions which was granted and a mention to confirm filing of submissions on the July 13, 2022 granted.
  4. That subsequently, the applicant filed an application dated May 23, 2022 for stay of execution of the trial court judgement delivered on the 20/4/2022 and aforementioned taxation proceedings pending determination of the appeal in Siaya High Court Civil Appeal No. E024 of 2022.
  5. The applicant asserts that when the taxation matter came up for confirmation of filing of submissions on the 13/07/2022, his counsel informed the court of the pending appeal as well as their application for stay of execution and taxation proceedings, but that the honourable magistrate ordered that they avail the High Court order but proceeded on the 26/04/2022 to tax the respondent's Bill of Costs as drawn at Kshs. 121,185.
  6. It is the applicant's case that he is aggrieved by the taxing officer's assessment and that they wrote to her notifying her of their objection to Item 2 (V.A.T.), 4 (swearing verifying affidavit), 9,10,24,33,38,41,42,45 (Services), 19,22,26,27 (witness expenses), 31 (adjournment costs), 44,46 (Court Attendance fees), 36 (instruction fees on drawing bill of costs), 43,47 (Filing) and 48 (further court fees) as the award was excessive but that the said items were awarded without giving any justification.
  7. The applicant further contended that the taxing officer failed to consider the scale of fees prescribed under schedule 7 of the *Advocates (Remuneration) Order* 2014 in the award of court attendances and services.
  8. The applicant submitted that the honourable magistrate made serious errors and thereby arrived at the wrong decision and that the said taxation was irregular and ought to be set aside.
  9. It was the applicant's case that he was apprehensive that the respondent would execute the said costs as there was no stay of execution.
  10. The application was opposed vide a replying affidavit dated September 12, 2022 sworn by Geoffrey O. Okoth, the respondent's advocate. It is the respondent's contention that the applicant's application lacks merit, is bad in law and fatally defective on grounds that the applicant failed to comply with the provisions of order 21, rule 9B of The *Civil Procedure (Amendment) Rules* 2020 as he failed to file any response and even further failed to do so despite being given more than a month by the Taxing Officer to file the said submissions on items that he wished to object to in the respondent's bill of costs.
  11. The respondent further contends that the applicant failed to follow the laid down procedure for objection to a decision on Taxation and appeal as is clearly set out under section 11 of the *Advocates Remuneration Order* 2014 and further that the applicant had not annexed any notice he did to the Taxing officer of the items of taxation to which the applicant objects.
  12. It was the respondent's case that the applicant has not annexed the reasons advanced by the Taxing master on the basis of the taxation and that the instant application was an abuse of the court process and ought to be dismissed.



13. The Reference was canvassed by way of written submissions.

### **The Applicant's Submissions**

14. On behalf of the applicant, it was submitted that the decision of the Honourable Magistrate in her taxation is opposed on the following items; Item 2 (V.A.T.), 4 (swearing verifying affidavit), 9,10,24,33,38,41,42,45 (Services), 19,22,26,27 (witness expenses), 31(adjournment costs), 44,46 (Court Attendance fees), 36 (instruction fees on drawing bill of costs), 43,47 (Filing) and 48 (further court fees) as the same were not provided for in the [Advocates Remuneration Act](#)
15. The applicant opposes Item 10 specifically on the grounds that it was served via e-mail and as such, the award of Kshs. 1,400 ought to be taxed off and substituted with one for Kshs. 10 as that would be sufficient to purchase 30mbs Safaricom data that would be sufficient to send an email.
16. Item 22 billed at Kshs. 5,000 being Police witness expense was specifically opposed on the grounds that the same was not provided for under Schedule 7 of the Advocates Remuneration Order.

### **The Respondent's Submissions**

17. It was submitted that the applicant's application lacked merit as the ruling on the Respondent's Bill of Costs in BONDO PMCCC NO. 35 OF 2020 dated the 26/04/2022 was delivered by the Taxing Officer on the 13/07/2022 in the sum of Kshs. 121,185/= as was presented since the applicant did not object to the said bill as at the date the same was coming up for assessment despite the assessment date having been taken by consent and the applicant having been given an opportunity to file written submissions if he wished to object to any items on the bill of costs.
18. The respondent further submitted that the applicant failed to file a response as provided for in Order 21, Rule 9B of The Civil Procedure (Amendment) Rules 2020 and even further failed to do so despite being given more than a month by the Taxing Officer to file the said submissions on the items he wished to object to in the respondent's bill of costs.
19. It was submitted that the applicant failed to follow the laid down procedure on objection to a decision on Taxation and appeal as is clearly laid out under paragraph/section 11 of the [Advocates Remuneration Order](#) 2014. The respondent submitted that the applicant failed to annex any notice that he gave to the Taxing officer within the required period of 14 days of the items of taxation to which the applicant objects and that similarly, he had not annexed the reasons advanced by the Taxing master on the basis of the taxation.
20. The respondent submitted that the respondent's bill of costs dated the 24/04/2022 was duly served upon the applicant on the 13-05-2022 to inform the applicant that the same was fixed for assessment on the 08-06-2022 and that the applicant had ample time of almost one month to file written submissions to the items the applicant opposed but failed to do so. The respondent further submitted that on the date when the respondent's bill was coming up for assessment on the 08-06-2022 counsel for the applicant sought and was granted time to file written submissions on the items she disputed but that on the date for mention to confirm compliance on the 13/07/2022, the applicant still failed to file written submissions on the opposing items which said pattern demonstrated that the applicant clearly was not opposed to the respondent's bill of costs as presented due to failure to comply as ordered by the trial court.
21. It was submitted that the court only gave an order of stay of execution of the decree made on 19/04/2022 before Bondo PMCCC No. 35/2020 pending hearing and determination of the appeal and that no order of stay was issued on the costs since as at the time of the hearing of the applicant's



application for stay of execution, the costs had not been assessed nor a certificate of taxation issued and as such this honourable court could not make any orders for stay of execution of the costs.

22. The respondent submitted that the Taxing Officer applied the relevant principles of taxation when awarding the respondent the costs herein bearing in mind that the applicant despite being given ample time to file written submissions on the items that the applicant's counsel was objecting to, failed to do so and that the taxing master adopted a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the entire suit, time taken and the expenses incurred.
23. Relying on the case of *Republic vs Ministry of Agriculture & 2 others Ex parte Muchiri W' Njuguna & 6 others* the respondent submitted that a court will not interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat was too high or too low; it will only interfere if it thinks the award was so high or so low as to amount to an injustice to one party or the other.
24. The respondent submitted that the applicant did not lay out the exact misapplication of the principles of taxation the Taxing Master committed while assessing the respondent's bill of costs.

### **Analysis & Determination**

25. I have considered the pleadings, the trial court records, the rival written submissions, the cited authorities and it is my view that the issue for determination is whether the instant application is merited.
26. It is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through Paragraph 11 of the *Advocates Remuneration Order*. In *Machira & Co. Advocates v Magugu* [2002]2 E.A, Ringera J (as he then was) held as follows:

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the *Advocates Remuneration Order*.”
27. Similarly, in *Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a* [2012] eKLR it was held thus: -

“I am also of the same school of thought as the learned judges' as expressed above. A reference is not an appeal although it may be in the nature of one. In a reference, the court is more concerned with whether or not the taxing master has misdirected himself on a matter of principle. If the same is found to have been the case the usual course is to remit the matter back to the taxing master with the necessary directions. The decision whether or not to proceed with taxation is an exercise of discretion and if he proceeds ex parte in circumstances in which he should not have so proceeded, in my view, that would amount to an error of principle and the Judge may remit the matter back with directions that the bill be re-tax in the presence of the parties. It is therefore my view, and I so hold, that the only recourse available to the client herein was to come by way of a reference.” [emphasis added]
28. Paragraph 11 of the *Advocates Remuneration Order* provides for the procedure an aggrieved party must follow in challenging taxation or assessment of costs. It provides that:

“ 11



- (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 his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

29. The procedure contemplated above is that:

- a. The aggrieved party issues a notice within 14 days on the items objected
- b. The Taxing Officer shall forthwith give reasons for his decision
- c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
- d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.

30. It is clear from the above provision that the only avenue available to a party who wishes to object to a decision following a Taxation would be to approach the Court under Paragraph 11 of the [\*Advocates Remuneration Order\*](#)

31. The applicant is seeking an order that the ruling delivered on July 13, 2022, be set aside.

32. The principles for setting aside the decisions of Taxing Master were well established by the Court of Appeal in the case of [\*Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board\*](#) [2005] eKLR that:

“On 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.”



33. The proper exercise of discretion by the Taxing Officers was restated in the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal 206 of 2006, where it was held that;

“...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”

34. Before turning to whether the taxing officer did or did not make an error of principle, I note that the respondent’s bill of costs dated the April 26, 2022 was filed on May 4, 2022 and was duly served upon the applicant on the May 13, 2022 and fixed for assessment on the June 8, 2022 and that the applicant had ample time of almost one month to file written submissions to the items that the applicant was opposed but failed to do so.

35. The respondent further submitted that on the date when the respondent’s bill was due for assessment on the June 8, 2022 counsel for the applicant sought and was granted time to file written submissions on the items she wished to dispute, on the date for mention for submission on the July 13, 2022, but that again, the applicant still failed to file written submissions on the opposing items hence the taxing officer proceeded to tax the bill of costs as filed and prayed.

36. In my opinion, the Taxing Officer was well within her discretion to proceed with the Taxation as she had given the applicant more than sufficient indulgence to challenge the bill which was before her. There is only so much that a court of law can do for a party whose intention in the proceedings is, clearly, to delay the disposal of those proceedings without any justification. I find no fault on the part of the trial magistrate proceeding to assess the bill of costs that was before her as she did.

37. The next question for consideration is whether sufficient grounds have been laid out to warrant the setting aside of the decision of the Taxing Officer.

38. There are two aspects to this Reference namely, whether the applicant wrote to the taxing master asking for reasons for taxation on specific items that the applicant was opposed to, as required by Paragraph 11 of the *Advocates Remuneration Order*. The other aspect is whether the now objected to items were properly assessed and awarded to the respondent.

39. Under Paragraph 11 of the *Advocates Remuneration Order*:

“ 11(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 his objection.



- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

...”

40. From the trial Court record which record is also before this Court on Appeal in HCCA E024 of 2022, whose judgment is also due for delivery today, and as was submitted by the applicant herein, the party and party bill of costs filed on May 4, 2022 was assessed on July 13, 2022. The application herein was filed on July 18, 2022 just five days later. There is nothing on record to show that the applicant herein wrote or gave Notice to the taxing master within the 14 days stipulated in the Paragraph 11 of the *Advocates Remuneration Order*, objecting to any specific items that had been assessed and asking reasons for such assessment. The applicant simply filed this application by way of reference before complying with the procedure required under Paragraph 11 of the *Advocates Remuneration Order*.
41. Furthermore, the applicant’s counsel herein is not being candid with the court in the sense that on record is a letter from their firm dated 16<sup>th</sup> March 2022 and purportedly received into court at Bondo on a single digit date that is not visible in the date stamp but ...July 2022, asking for reasons for taxation on specified item in the bill of costs. There is no way the reasons for taxation could have been asked for or be given in March 2022 yet the costs were filed on May 4, 2022 and assessed on July 13, 2022. I find that no Notice of objection was ever filed asking for reasons for taxation of any pf the item listed in the assessed bill of costs.
42. Even assuming that there was compliance with the provisions of Paragraph 11(1) above, which I find was not complied with, the other question is whether the award of VAT was justified and whether the award on service for various items particularised by the applicant and the award for court attendances were justified.
43. However, before answering the above questions, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in an injustice.
44. I will first consider whether the respondent herein is entitled to be paid VAT on instructions fees charged. It is the respondent’s counsel’s contention that he is entitled to VAT as he is statutorily mandated to remit the same to the Government. The applicant on his part opposes the same stating that this is not provided for in schedule 7 of the *Advocates Remuneration Order*.
45. The relevant statute on this is the *Value Added Tax Act*, Cap 476, Laws of Kenya. Section 9(3) of the said Act provides that:

“In calculating the value of any services for the purposes of Subsection (1) there shall be included any incidental costs incurred by the supplier of the services in the course of making his supply to his client provided that, if the commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.”



46. Courts have dealt with this issue in *Mereka & Co Advocates v New Kenya Co-Operative Creameries Limited* [2018] eKLR, where the court stated that:

“ 32. In regard to the question of whether VAT should be awarded when the same was not pleaded, the court’s view is premised on the case of *Amuga & Co. Advocates v Arthur Githinji Maina* Miscellaneous Application No 265 Of 2012 wherein the Honourable Judge made reference to the *AM Kimani & Co Advocates v- Kenindia Assurance Co. Ltd* holding that:

“...under the *Value Added Tax Act*, an advocate is entitled to charge VAT on instruction fees and also disbursements.” In *JP Machira t/a Machira & Co Advocates vs MDC Holdings Ltd & 2 others* Justice Ringera held that:

“As regards VAT it is a statutory requirement that legal services are chargeable with VAT.”

33. The court is guided by the aforementioned authorities in reasoning that the Advocate is entitled to VAT. The Applicant’s claims in this regard is therefore unfounded.”

47. In *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR, the court observed that:

“ 105. My view is that indeed; estoppel does not operate against the law. Equally, I am in agreement with the advocate that VAT is a statutory charge on legal services rendered to the client.

106. However, I do not agree that VAT is chargeable on the entire award. Neither do I agree that VAT is chargeable only on instructions fees.

107. VAT is a tax levy on advocates in respect of the professional fees they charge for legal services they render to their clients. It is a charge payable to the Kenya Revenue Authority and the advocate is only but a statutory agent for KRA. The levy once collected by the advocate for the legal services rendered is then remitted on a monthly basis to KRA.”

48. From the above authorities, it is clear that VAT is chargeable on the instruction fees and also on disbursements. Therefore, in the instant case, VAT of 16% was indeed chargeable on the instructions fees. I find the objection thereto misplaced.

49. As regards Items 9,10,24,33,38,41,42,45 (service), the applicant opposed taxation of the same at Kshs 1,400 on among other grounds, that the same is not provided for and that Ksh 10 would be sufficient as service was by way of email. The respondent argued that the fees charged for service was reasonable and justifiable.

50. I have reviewed the said items and considered the applicable law. The *Advocates Remuneration Order* provides for service of documents measured from subordinate court or district registry of the subordinate court and not from the advocates office as advanced by the applicant. Paragraph 10 of schedule 7 is clear on this.

51. In item 10, the applicant opposes the award of Kshs 1,400 on account that service was via e-mail. On her part, the respondent submitted that service via e-mail was service under the *Civil Procedure (Amendment) Rules*, 2020



52. Order 5 rule 22B of the [Civil Procedure Rules](#), which the applicant never referred to, Electronic Mail Service is provided for. The relevant provisions of the Rule states as follows:
1. “Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used e-mail address.
  2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
  3. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.” (emphasis added).
53. The starting point herein is to point out that whereas order 5 of the [Civil Procedure Rules](#) relates to service of summons, it applies mutatis mutandis to service of other court processes, which include applications and related documents. This provision, it should be noted, was necessitated by the advent of Covid-19 pandemic which made it impossible for personal and even postal service of documents or court processes.
54. For the above reasons, I hold that service via e-mail is still service and draws an award of Kshs. 1,400 in line with Paragraph 10 of schedule 7 of the [Advocates Remuneration Order](#). I find no error on the part of the taxing officer in awarding the respondent items 9,10,24,33,38,41,42,45 as drawn. Accordingly, the objection thereto is found to be devoid of any merit.
55. Regarding items 19,22,26,27 (witness expenses) as well as Item 31(adjournment costs) and Item 48 (further court fees), the same are provided for under Note 1 of Schedule 7 of the Advocates Remuneration order which provides that:
- “When an order has been made in general terms for the payment of costs by either party and an advocate has been employed, those costs, in addition to the court fees, shall be computed under this Schedule, which shall be the minimum fee, and shall include (except as may be provided) taking instructions, drawing or perusing documents, pleadings or similar documents, engrossing and filing documents, and all necessary attendance at court or chambers.
56. On items 44,46 (Court Attendance fees), billed at Kshs 2,100 and 1,400 respectively, the same are provided for in paragraphs 6 & 7 of schedule 7 of the [Advocates Remuneration Order](#).
57. On Item 36 (instruction fees on drawing bill of costs), the same is provided for in paragraph 5 of schedule 7 of the [Advocates Remuneration Order](#) at Kshs 3,000.
58. Finally, on Item 43 (Filing affidavit of service), the same is clearly provided for under paragraph 11 of Schedule 7 at Kshs 1,000 as billed.
59. The sum effect of the above is that I find no error on the part of the taxing master in assessing the respondent's bill of costs dated April 26, 2022, which was strictly drawn to scale without any exaggeration whatsoever.
60. I therefore find that there was absolutely no basis upon which the Reference herein, which does not even adhere to the procedure established under paragraph 11 of the [Advocates Remuneration Order](#) was filed. I find this application frivolous and vexatious and intended to delay the settlement of costs of the suit as properly assessed by the trial magistrate, Hon S Mathenge, SRM, which bill was also drawn to



scale by the plaintiff/respondent's counsel. I therefore hold and find that the Chamber Summons dated 18th July 2022 is devoid of any merit and the same is hereby dismissed with costs to the respondent Plaintiff, assessed at Kshs 15,000, payable within 14 days of this order in default, the respondent is at liberty to execute for recovery.

61. I so order

62. This file is hereby closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022**

**R.E. ABURILI**

**JUDGE**

