



Miyare t/a Miyare & Company Advocates v Nkonge (Miscellaneous Application E060 of 2020) [2022] KEHC 15864 (KLR) (Family) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15864 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E060 OF 2020
MA ODERO, J
NOVEMBER 25, 2022
IN THE MATTER OF THE ADVOCATES ACT, CHAPTER
16 LAWS OF KENYA
IN THE MATTER OF TAXATION OF COSTS BETWEEN
ADVOCATE & CLIENT

BETWEEN

GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES ADVOCATE

AND

CATHERINE GICUKU NKONGE CLIENT

JUDGMENT

1. Before this court is the chamber summons dated December 9, 2021 by which the advocate/applicant George Miyare & Company Advocates seeks for the following orders that:-
 - (a) The Taxing Officers ruling delivered on November 23, 2021 be set aside or varied.
 - (b) In the alternative to prayer (a) the honourable court be pleased to remit the advocate/applicants bill of costs dated November 17, 2020 for taxation by a different Taxing Officer.
 - (c) Costs.
2. The summons which was premised upon paragraph 11 of the *Advocates (Remuneration) Order* – 2009 and all enabling provisions of the law was supported by the affidavit of even date sworn by Esther Mwikali an Advocate of the High Court of Kenya practicing with the applicants firm of Advocates.
3. The respondent/client Catherine Gichuku Nkonge opposed the summons on the following grounds:-



1. That the applicants application is totally without merit.
2. That the applicant has not laid down any plausible grounds to warrant the courts interference with the decision of the Deputy Registrar/Taxing Master.
3. That the Taxing Master correctly assessed and reduced the instruction fees and other items by taking into consideration all relevant matters in the case in arriving at the decision.
4. That the Taxing Master did not commit any error in principle in arriving at her decision on the instruction fees and was justified in taxing the bill of costs dated November 23, 2021.
5. That the court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle which the applicant has failed to prove."

Analysis and Determination

4. I have considered this summons, the reply filed thereto as well as the written submissions filed by both parties. This revision arises from the ruling delivered by Hon Sitati Deputy Registrar following taxation of the advocates bill of costs dated November 17, 2020. The Hon Taxing Officer taxed the bill of costs at Kshs 1,778,336.58. The applicant challenges the amount taxed under the heading of instruction fees which was Kshs 1,275,000.
5. The circumstances under which a court can interfere with the decision of a Taxing Officer were set out in the case of *First American Bank Of Kenya – vs – Shah & others* [2002] IEA 64 where the court held as follows:-

“Firstly, I find that the 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; secondly, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction the trial judge; thirdly, if the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is entitled to upset a taxation because in its opinion, the amount awarded was high; fourthly, it is within the discretion of the Taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”

6. Therefore the High Court will only interfere with the decision of the Taxing Officer where there has been an error of principle. Where the dispute relates only to the matter of quantum then the courts are reluctant to interfere as the Taxing Officer is deemed to be best suited to handle matters relating to taxation.
7. As a general rule an Advocate is entitled to receive legal remuneration for services rendered to a client. The amount of remuneration payable to an Advocate will depend on the value of the suit property, the amount of work done by the Advocate and the value of the subject matter. However, each case must still be decided on its own merit.



8. The above stated principles were also re-affirmed by the Court of Appeal in *Joreth Limited v Kigano and Associates* [2002] I EA 92 where the court stated 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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances. That is what CK Njai Esq did when he said:

‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’

9. In cases where the value of the subject matter is clearly discernible from the pleadings, the taxing master will assess the instruction fees based on the *Advocates Remuneration Order*. However, where the value of the subject matter is not clearly discernible from the pleadings the taxing master may exercise his discretion in assessing the instruction fees.
10. In *Peter Mutboka & another – vs – Ochieng & 3 others* [2019] eKLR the Court of Appeal stated as follows:-

“It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”

11. The question then is whether the value of the subject matter was clearly discernible from the pleadings in this case. Acting upon instructions issued by the client the Advocate filed the originating summons in Nairobi Civil Case No 53 of 2019 seeking the following orders:-
- a. An order of declaration, declaring the client/respondent as sole owner of property LR No 1159/410 and the matrimonial home thereon.
 - b. An order directing the Registrar of Titles to immediately correct the land register relevant to property LR No 1159/410 and register the client/respondent as the sole proprietor thereof, in enforcement of prayer (a) above.
 - c. An order of declaration, declaring the client/respondent as the sole and beneficial owner of properties:-
 - i. LR No 1150/461;



- ii. LR No 1159/408 (inadvertently omitted from the prayers, though pleaded as instructed);
 - iii. LR No Dagoretti/Riruta/7009;
 - iv. LR No Dagoretti/Riruta/5853;
 - v. LR No Dagoretti/Riruta/5382;
 - vi. LR No Dagoretti/Riruta/5334
 - vii. LR No Dagoretti/Riruta/5385
 - viii. LR No Dagoretti/Riruta/6631
 - ix. LR No Dagoretti/Riruta/3484/97 (Unit 97 and 29 at Forest view Apartments);
 - x. LR No Dagoretti/Riruta/3484/98 (Unit No 98 and 42 at Forest View Apartments);
 - xi. Any/all developments on the above properties (including 234 apartment units, 18 office units and 7 commercial shop units at CASTAN APARTMENTS).
- d. An order directing the Registrar of Titles to immediately correct the land Registers relevant to the following properties and register the client/respondent as the sole proprietor thereof, in enforcement of prayer (c) above:-
- i. LR No 1150/461;
 - ii. LR No 1159/408 (inadvertently omitted from the prayers, though pleaded as instructed);
 - iii. LR No Dagoretti/Riruta/7009;
 - iv. LR No Dagoretti/Riruta/5853;
 - v. LR No Dagoretti/Riruta/5382;
 - vi. LR No Dagoretti/Riruta/5334
 - vii. LR No Dagoretti/Riruta/5385
 - viii. LR No Dagoretti/Riruta/6631
 - ix. LR No Dagoretti/Riruta/3484/97 (Unit 97 and 29 at Forest view Apartments);
 - x. LR No Dagoretti/Riruta/3484/98 (Unit No 98 and 42 at Forest View Apartments);
 - a. An order of declaration, declaring the client as owner of the following properties and/or interests thereon:-
 - i. Apartment unit at Riara Apartments on Riara Close, occupied by the defendant (Stanley M'ngaruthi Nkonge), his mistress and son;
 - ii. Apartment units at Flora Court – Ngong Road, Nairobi (details to be ascertained);
 - iii. 5 acres parcel of land at Ok-Keri in Ngong (details to be ascertained);
 - iv. Motor vehicle registration No KCQ 313U – Toyota Vanguard.



12. The orders sought in the originating summons were therefore ‘declaratory orders’. The suit was not for a liquidated sum. Therefore, the instruction fees ought to have been taxed in accordance with schedule VII (1) of the Advocates (Remuneration) Order.
13. In the Republic – vs – Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 others, Hon Justice J B Ojwang (as he then was) held as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.....The court cannot interfere with the taxing office’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle(own emphasis)
14. In Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR the Court of Appeal held 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.”
15. Likewise in Arthur v Nyeri Electricity undertaking [1961] EA 497 it was held that:-

“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”.
16. In her ruling the Hon Taxing Master did take into account the nature and quantity of work carried out by the Advocate contrary to what was submitted by the applicant. In finding that the value of the subject matter was not ascertainable the Taxing Master observed as follows:-

“But is the value of the subject matter ascertainable herein? The properties comprised of motor vehicle (no valuation done), bank accounts (no specificity of monies considered to be the subject).....There is a valuation report for the suit properties however I agree with the respondents line of submissions that with valuation alone after filing of the bill of costs and not forming part of the parent file then same should be disregarded as there is a high likelihood that the value was exaggerated for purposes of taxation.....”
17. Given the finding above the learned Taxing Master proceeded to conclude thus:-

“Given that the parent suit was compromised prior to the confirmation of the first hearing date I would invoke the provisions of schedule VI(A) and 9(c) and award Kshs 1,275.000 (at 85%) as instruction fees.....”
18. I find no grounds upon which to fault the findings and/or conclusion of the Taxing Master. I find there was no error of principle. I am therefore not inclined to interfere with the assessment of the Taxing Mater with regard to the Instruction fees.



19. Finally I find no merit in the chamber summons dated December 9, 2021. The same is dismissed in its entirety and costs are awarded to the client/respondent.

DATED IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

.....
MAUREEN A. ODERO

JUDGE

