



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO.76 OF 2018

PROF.TOM OJIENDA.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

(AS CONSOLIDATED WITH MISCELLANEOUS NO. E004 OF 2020)

COUNTY GOVERNMENT OF MERU.....APPLICANT

VERSUS

PROF.TOM OJIENDA.....RESPONDENT

RULING

1. This court is called upon to determine chamber summons brought under certificate of urgency by the applicant herein, County Government of Meru, (hereinafter referred to as the client) dated 30/09/2020 pursuant to **Rule 11 (2) of the Advocates (Remuneration) Order, 2014**. In it, the client seeks inter alia stay of execution of the certificate of taxation dated 23/07/2020 in **Meru H.C MISC APPL. NO.76 OF 2018**, the setting aside of the ruling on taxation delivered by the taxing master on 16/07/2020 with respect to **Items Nos. 1, 7 and 14** of the bill of costs dated 19/03/2018, that the said items in the bill of costs dated 19/03/2018 be taxed by this honourable court in such other sums as may appear to be reasonable or in the alternative, the said items in the bill of costs be remitted to another taxing officer for re-taxation.

2. The grounds upon which the application is premised are set out in the body of the application and echoed in supporting affidavit of Irah K. Nkuubi, the client’s Ag Chief Legal Officer, sworn on 30/09/2020. It is contended in that affidavit that the respondent, (henceforth referred to as the advocate) having filed an Advocate-Client Bill of Costs dated 19/03/2018 vide H.C Misc. Appl. No.76 of 2018 in the sum of **Kshs 18, 138,219** on account of having represented the client in **Meru H.C Constitutional Petition No.32 of 2014**, the taxing master by a ruling delivered on 16/07/2020 had the bill taxed in the sum of **Kshs 7,604,937.60**. The client was aggrieved by the decision and by two letters dated 29/07/2020 and 16/09/2020 requested for the taxing master’s reasons of taxation which reasons were sent via email on 16/09/2020 at 4.16 P.M. The grievance is with the decision of the taxing master on Items Nos.1, 7 & 14 upon which the current application was filed.

3. In the application, the client contends that the sum of Kshs 6,000,000 awarded under item 1, for instruction fees, is colossal and excessive bearing in mind the matter before court was of a constitutional nature. That the items 7 & 14 are unnecessary expenses which ought not to be passed on to the client. The third point for faulting the taxing master is alleged failure to factor in the amounts already paid to the advocate despite having been furnished with proof of payment.

4. The application was opposed by the advocate by the affidavit sworn and filed on the 29/10/2020 whose tenure and gist was that no demonstration had been made out that the taxing master committed any error in law to merit courts interference with the exercise of discretion. The position taken was that the discretion was properly exercised and the award ought to stand and remain.

5. The application was canvassed by way of written submissions filed by both parties. For the client, submissions were made to the effect that the matter under litigation was not complex to warrant the excessive amount of Kshs 6,000,000 awarded under item 1 for instruction fees. It was added that there was nothing novel about H.C Pet No.32 of 2014 from which the said costs emanated an reliance placed on the decision in **Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W’njuguna (2006)eKLR, and First American Bank of Kenya v Shah & others (2002) 1 E.A.64** to support its position with the stress being that where instructions fees is increased by the taxing master must state cogently and with conviction on the novelty and complexity placing added responsibility on counsel beyond the ordinary calling. It is however instructive that no submissions, at all, were offered on the items 7 and 14 of the Bill of costs.

6. For the advocate, it was submitted that items Nos. 7 & 14 were properly drawn to scale taking into account the complexity, novelty and the time demanded of counsel to protect the interests of the client and urged the court not to interfere with the same. It was then pointed out and asserted that no error been attributed to the taxing master's findings nor is the value of the subject matter disputed by the client. The implored the court to find that the amount awarded by the taxing master was fair and just and the same should never be disturbed but the client's application should be set aside and the certificate of taxation dated 23/07/2020 be enforced as drawn. The advocate cited to court the decisions in Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No.3)[1972]EA 162 as cited in the case of Brampton Investment Ltd v Attorney General & 2 others (2013) eKLR, Simpton Motor Sales (London) v Hedon Corporation (1964) 3 ALL E.R, Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna (2006)eKLR, Kagwimi Kang'ethe & Company Advocates v Penelope Combos & anor as cited in the case of Governors Balloon Safaris Ltd v Skyship Company Ltd & Anor (2015)eKLR on when the court would disturb the decision by the taxing master to support his submissions.

7. This reference attacks only items in contention are Nos.1, 7 & 14 of the bill of costs. I have perused the decision by the taxing master and I am satisfied that sufficient reason was given by the taxing master on how items Nos.5 &18 were taxed from Kshs 28,000 and Kshs 36,450 to Kshs 3,960 and Kshs 36,450 respectively. It is important to point out that the common character between the two items is that both relate to drawing and making copies of documents, being submissions and bill of costs. The client's objection is not on the quantum but that both were unnecessary to be sought from it. My finding is that both submissions and bill of costs are important and indispensable documents that could not be avoided to make the matter progress. Being such necessary documents, they cannot in good be termed unnecessary. But as said before no submissions were offered in that respect a sign that the fault could have been made half-heartedly. Moreover, it was not denied that the documents were indeed filed. I find no good faith in that fault and consider it was improperly taken. It cannot succeed and is thus dismissed for lack of merits.

8. The second limb of the reference faults sum awarded under item 1 for instruction fees as being excessive in the circumstances. The law remains that the task of taxing costs invokes judicial discretion and on reference this court can only interfere if it is satisfied that in coming to the conclusion it reached, the master made an error in principle, failed to take into account a relevant matter or took into consideration an irrelevant matter and thus reached a conclusion and a sum that was obviously too high or too low as to demonstrate an injustice upon one of the parties. In taxation, the master is expected to take into account the nature of the matters in dispute, the novelty and complexity involved and therefore responsibility upon counsel, the need to promote access to justice and the resultant development of jurisprudence in the new areas of like the system of government. Bills are taxed by the master pursuant to special jurisdiction vested upon the taxing master and the court must always refrain from always interference lest it be seen to usurp that special jurisdiction.

9. The circumstances in which a judge of the high court may interfere with the taxation of a taxing master are not unfettered but must be limited situations when the taxation is based on an error of principle which include failure to consider relevant factors^[1].

10. The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in Visser vs Gubb 1981 (3) 753 (C) to be that:-

“the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

11. While considering whether or not the taxing officer arrived at reasonable instruction fees, the court must always bear in mind that there is no mathematical formula by which to calculate the instruction fees and that the exercise involves weighing the diverse general principles, maintaining consistency in the level of costs and that bearing in mind all these intricate balancing acts, the reviewing court cannot lightly interfere with what in the taxing officer's opinion is reasonable fee. There has to be a compelling reason to justify such interference. **(See Meru High Court Misc Application No 75 of 2018, Prof Tom Ojienda & Associates vs County Government of Meru)**. The law remains that on questions of quantum, the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed. The court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different. On a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. Here I have not been convinced that an error was made which justifies my interference. I find that the taxing master gave sufficient and cogent reasons for reaching the determination and I am satisfied that he did exercise the vested jurisdiction properly. I find no reason to hold and consider the sum awarded as exorbitant nor excessive and consequently no merit in the application.

12. There was a third point that was put meekly and very vaguely at paragraph 12 of the Affidavit in support that the master failed to take into account sums shown to have been paid. This also a point that is taken half-heartedly and belatedly. Belatedly because the objection to taxation is succinct and does question the failure to take into account the sums allegedly paid. Half-hearted because other than the single mention in the affidavit, no other attempt was made to pursue the point not even in the submissions. I consider it a red herring flashed at the court. Being such red herring, it suffices not as a basis to disturb the taxing Master's decision. In any event, I do take judicial notice of the banking practice that a sum in excess of one million ought to have been paid by a bank transfer or at least four cheques and nothing would have been easier than to avail and exhibit evidence of such transfer or even copies of cheques. The taxing master found that no evidence of payment was made and my own reading of the file was not successful in laying my hand on any such evidence.

13. The totality of my analysis is that no basis has been laid to merit disturbance of the decision and the application dated 30/09/2020 is therefore dismissed with costs.

14. I award the costs of the reference to the advocate and, being aware that this is a matter on taxation on which no further bill of costs can be

lodged for another taxation, assess such costs at Kshs 30,000 to cover disbursements and attendances.

DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19TH DAY OF MARCH, 2021

PATRICK J O OTIENO

JUDGE

[\[1\] First American Bank of Kenya v Shah & others \(2002\) 1 E.A.64](#)