



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E015 OF 2020
BETWEEN
DR. ALUTALALA MUKHWANA T/A DR. ALUTALAI A
MUKHWANA & CO. ADVOCATES.....APPLICANT
VERSUS
TOM NDECHE.....1ST RESPONDENT
PETER MAYENDE.....2ND RESPONDENT
RULING

The Application

1. This ruling is on an application by Tom Ndeche, the 1st Respondent herein, which is brought way of a Chamber Summons dated 2nd November 2020. The 1st Respondent is seeking orders therein that this Court be pleased to review and set aside the Taxing Officer's ruling delivered on 29th October 2020, and that the costs of this application be awarded to him. The application is supported by the grounds on its face, a statutory statement and an affidavit sworn by the 1st Respondent on 2nd October 2020.
2. The 1st Respondent averred that on 27th July 2020 the Applicant/Advocate filed a Bill of Costs dated 27th July 2020 and a ruling was delivered thereon on 29th October 2020 taxing the said Bill of Costs against the 1st Respondent to a total sum of Kshs. 200,337.50/=. It is further averred that the 1st Respondent, through a replying affidavit dated 7th September 2020 and submissions, opposed the Bill of Costs and attached evidence of payment of legal fees made to the Applicant/Advocate which was in excess of Kshs. 77,278/=. In addition, that it was the taxing officer's obligation to verify and ascertain if indeed the disbursements claimed to have been made were indeed true.
3. It is the 1st Respondent's case that the taxing officer did not consider the evidence he gave, which evidence was not opposed by the Applicant who only pointed out in his written submissions that the said M-pesa statement were not stamped. It was deponed that the taxing officer misdirected herself on the principles of law applicable, exceeded and abused her discretion, and failed to give reasons or any basis for the assessment done in favour of the Applicant. Lastly, that the fee awarded was manifestly high and unfounded and thus a reconsideration of the same is justified.

The Response

4. The Applicant/Advocate filed a replying affidavit sworn by Dr. Alutalala Mukhwana dated 5th November 2020. It was averred therein that the excess payment of Kshs. 77,278/= referred to by the 1st Respondent was vehemently opposed in the Applicant/ Advocate's replying affidavit dated 15th October 2020, wherein it was clearly stated that no excess amount was received. Further, that the statements produced as evidence by the 1st Respondent were opposed as they did not contain an official stamp or mark from Safaricom to confirm authenticity. The deponent averred that no evidence was produced to prove the alleged excess amount contrary to the basic rules of evidence.
5. The Applicant/Advocate contended that the obligation of the taxing officer is to tax the bill as presented which is what the taxing officer did in this matter, and that the taxation was done in line with the Advocates Remuneration Order 2006. Further, that the taxing officer taxed off Kshs. 118,807.50/= from the Applicant/Advocate's Bill of Costs that was initially taxed at Kshs. 319,145/=. and the 1st Respondent's assertions that the Applicant/Advocate received the alleged sum of Kshs. 163,350/= are false. Therefore, that the 1st Respondent's reference

dated 2nd November,2020 does not have any triable issues of law, and is meant to deny the Applicant/Advocate the opportunity to enjoy the fruits of its merited judgement.

The Determination

6. The 1st Respondent's reference was canvassed by written submissions, and his advocates on record, Ojienda & Company Advocates, and the Applicant/Advocate's advocates Alutalala Mukhwana Advocates both filed submissions dated 16th November,2020. There are two issues arising from the pleadings and submissions filed by the parties, namely whether *the taxing officer made an error of law and principle in taxing the Applicant's Bill of Costs, and* secondly, whether the taxing officer failed to consider relevant evidence provided by the 1st Respondent.

7. On the first issue, the 1st Respondent submitted that on the subject of Instruction fees the taxing master had relied on the Advocates Remuneration Order,2006 and yet the instructions were given to counsel on February,2015 after the coming into force of the Advocates Remuneration Order,2014, under the authority of Legal Notice No. 35 published in the Kenya Gazette Supplement 42 of 11th April,2014. It was further submitted that the Kshs. 100,000/= taxed as instruction fees was excessive, illegal and unjustifiable, since the taxing master had indicated that the matter was not overly complex.

8. The 1st Respondent, in submitting on the principles that govern the computation of instruction fees counsel cited the e Ugandan case of **Mukambi & Another vs Sole Electric (U) Ltd (1990-1994) EA 306, Green Hills Investment Ltd vv China National Complete Plant Export Corporation (Complaint) T/A Covec [2004] 1 KLR 74** where the Court held that the taxing master's discretion must be exercised judicially and not whimsically. On the issue of reasonableness in the context of taxation counsel cited the case of **Rogan-Kamper v Grosvenor [1989] KLR 362** and the case of **Premchand Raichand Ltd and Another V Quarry Services of East Africa Ltd and Others (No.3) [1972] EA 162** as cited by Majanja J, in **Brampton Investment Limited v Attorney General & 2 Others [2013] eKLR** where the Court held that the costs must not be allowed to rise to such a level as to confine access to the courts to the wealthy.

9. It was submitted that the Advocates Remuneration Order,2014 does not provide for fees for attending court to file documents and that costs awarded should be fairly adequate to compensate for work but should also not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution. Counsel submitted that on the item on service of documents the taxing master went ahead to tax the same at Kshs. 1,000 and not Kshs. 2,200 as had been pleaded or Kshs. 1,400 as provided for under the Advocates Remuneration Order, 2014.This counsel submitted was fair but based on the wrong law. It was submitted that the taxing master awarded Kshs.735 for drawing as opposed to Kshs. 1,000 which was pleaded. This according to counsel was fair. It was submitted that similarly the fee correspondence was taxed fairly, and that Court attendances were taxed all taxed as under the Advocates Remuneration Order,2006.

10. The Applicant/Advocate on its part submitted that the circumstances under which a Court can interfere with a taxing officer's judicial discretion were laid down in the case of **First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64**, where the Court held that a 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 manifestly excessive as to justify an inference that it was based on error of principle. The Applicant/Advocate submitted that the its Bill of Costs dated 27th July 2020 is taxed in accordance and conformity with the law and hence it is reasonable and justified. Further that the taxing officer's ruling dated 29th October,2020 be upheld.

11. I have considered the It is a general rule that Courts ought not to interfere with the findings of taxing officers. This is a principle that was elucidated in the case of **Joreth Ltd vs Kigano & Associates [2002] 1 EA 92, [2002] eKLR** where the Court held that unless the taxing officer had misdirected himself on a matter of principle, the judge sitting on a reference against the assessment ought not to interfere with the findings. Similarly, in the case of **First American Bank of Kenya vs Shah and others [2002] E.A. 64 at 69, Ringera J** (as he then was) observed as follows:

“First I find that on the authorities, this 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.”

12. Further on the same in the case of **Kipkorir, Tito & Kiara Advocates V Deposit Protection Fund Board [2005] eKLR** the Court of Appeal held as follows: -

“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.”

13. I have in this regard perused the ruling by the Taxing Master dated 29th October 2020 and note that it was held as follows therein as regards the applicable law:

“I have carefully considered the Bill of Costs filed by the Applicant herein. This is a matter that was filed in the year 2013 and hence the applicable Advocates Remuneration (Amendment) Order is that of 2006.”

14. However, a perusal of the Advocates /Client Bill of Costs dated 27th July 2020 filed by the Applicant and its supporting document show that the Applicant/Advocate was appointed by the 1st Respondent to represent him on 24th March 2015, and the items in the Bill of Costs are for services rendered from that date until 2nd June 2015. It is thus evident that the Taxing Master made an error of principle as regards the applicable period of taxation in respect of the Applicant/Advocate's Bill of Costs, resulting in the application of the Advocates Remuneration

(Amendment) Order of 2006, which was not in force at the time of the Applicant/Advocate's representation of the 1st Respondent. The applicable law in this regard was Schedule 6B of the Advocates (Remuneration) (Amendment) Order of 2014, which provides for advocate and client costs in proceedings in the High Court, and employs the scales and rates provided for in Schedule 6A of the said Order.

15. In the case of **Supply Linkages vs Hudson Mangeni [2020] eKLR** the Court while determining whether to set aside the trial court's order held as follows:

“In the instant case, the suit, in question, was filed on 2nd August 2007 and, therefore, the operational remuneration order at the time of filing the suit was the Advocates Remuneration(Amendment) Order, 2006. The suit was decided on 22nd November 2018, after the other remuneration order had become operational. It can be said, therefore, that the suit cut across two remuneration orders: the one in application at the time of filing to one operational at the time of judgment, that is to say that the Advocates Remuneration Order 2006, as amended in 2009, and the Advocates Remuneration Order, 2014. The learned trial magistrate ought to have applied the remuneration order that was relevant at each material time, and not flatly apply the order of 2014.

16. Similarly, in **Odera Obar & Co Advocates vs Jet Properties and Apartments Limited [2019] eKLR** the Court held as follows:

“The taxing officer's decision was further challenged on the ground that she used the Remuneration Order of 2009 to assess fees in respect of instructions given and work done after April 2014. It is indeed true that instructions to prepare an agreement between the developer and the contractor were given in July 2014. The 2009 Remuneration Order was replaced by the 2014 Remuneration Order on 11/4/2014. It was therefore an error of principle for the taxing officer to use the 2009 Remuneration Order to assess fees for instructions given and work done after April 2014. The material Bill of Costs properly indicated that the bill was drawn under the two sets of Remuneration Orders. 2014. The material Bill of Costs properly indicated that the bill was drawn under the two sets of Remuneration Orders.

17. These decisions underscore the error of principle and law made by the Taxing Master in the instant reference in applying the wrong Advocates Remuneration Order. In addition, it is notable that the Taxing Master in the ruling dated 29th October 2020 found that the prayers sought in the application filed by the Applicant/Advocate on behalf of the 1st Respondent was for prerogative orders, whereas the evidence presented by the Applicant/Advocate in the subject Bill of Costs shows that the application that was the subject of his instructions and of the said Bill of Costs was for joinder of the 1st Respondent and another party to the main suit.

18. Therefore, the item on instruction fees did not attract taxing at the rate of the basic minimum instruction fees provided for in Schedule 6A1(j) that was employed by the Taxing Master. The operative and applicable paragraph in this regard is the one titled “other matters” after paragraph (j) of Schedule 6A. This was thus an additional error of law made by the Taxing Officer. Lastly, the taxation of all the items in the Bill of Costs was also wrong in principle, as erroneous scales and rates were used arising from the application of the Advocates Remuneration Order of 2006 instead of the Advocates (Remuneration) (Amendment) Order of 2014.

19. On the second issue of whether the taxing officer failed to consider relevant evidence, the 1st Respondent submitted that the Mpesa statements in his Replying Affidavit dated 7th September 2020 have not been disputed, and that they are good evidence to satisfy section 107 of the Evidence Act. It was submitted that the taxing officer erred in not taking this evidence into consideration to absolve the Respondents of the claims herein, and reliance was placed on the decision in the case of **Bhagwanji Premchand and Others v J.M. Gomes and Others (1) [1956] XXIII E.A. C.A.P. 189** that once any facts are alleged to be untrue in a bill then the items are taxed off.

20. In reference to the production of Mpesa statements as evidence, the Applicant/Advocate cited section 35 of the Evidence Act which provides that for any documentary evidence to be admissible in Court, the same must be produced by the maker of the said document. Therefore, that the 1st Respondent's Mpesa statements are not admissible in Court as the 1st Respondent is not the author of the said documents.

21. Black's Law Dictionary Ninth Edition defines taxation of costs at page 1598 as “the process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded”. The process of taxation of a Bill of Costs therefore essentially entails consideration of a Bill of Cost by reviewing and assessing the items that are billed, and a decision on the quantum of costs payable by reference to the relevant scale of costs.

22. The costs of an Advocate in the Advocate Remuneration Order include professional fees, charges, disbursements and expenses. Any proven deposits or payments made by a client in respect of these costs must of necessity therefore be acknowledged and accounted for in the process of certification of the payable costs to an Advocate. This is one of the reasons why Rule 13A of the Advocates Remuneration Order gives powers and authority to the Taxing officer to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

23. Failure to take into account payments made by a client would result in unjust enrichment of an advocate, and that is why such payment is one of the relevant factors that needs to be taken into account in taxing instruction fees, as held by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others, (2006) e KLR**. The relevant factors to be taken into account by a Taxing officer in this regard were enumerated therein as follows:

“ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;

2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form."

24. A perusal of the ruling dated 29th October 2020 by the Taxing Master shows that the evidence of the payment in the Mpesa Statement and the issue of its admissibility, though pleaded and canvassed by both parties, was not addressed in the said ruling. The Taxing Officer therefore failed to take into account a relevant factor of any payments made by the 1st Respondent, and determine the same in the ruling.

The Disposition

25. In the premises, I find that the ruling of the taxing master delivered on 29th October 2020 was erroneous for applying the wrong provisions of the law, and for failing to take into account relevant factors. The errors of law and principle made by the Taxing Master therefore justify interference by this Court, and the remedies sought by the 1st Respondent are therefore merited. The 1st Respondent's Chamber Summons application dated 2nd November 2020 is accordingly allowed to the extent of the following orders:

I. The ruling delivered herein on 29th October 2020 by the Taxing Master upon taxation of the Applicant/Advocate's Advocate and Client Bill of Costs dated 27th July 2020 be and is hereby set aside.

II. The Applicant/Advocate's Advocate and Client Bill of Costs dated 27th July 2020 shall be remitted to another Taxing Master in the High Court at Nairobi for fresh taxation.

III. Each party shall meet their respective costs of the 1st Respondent's Chamber Summons dated 2nd November 2020.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the Applicant's and 1st Respondent's counsels email addresses.

P. NYAMWEYA

JUDGE