



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISC. PETITION APPLICATION NO. 13 OF 2019

DENNIS K.N. MAGARE AND BEN MUSUNDI

T/A MAGARE MUSUNDI &

CO. ADVOCATES.....ADVOCATES/APPLICANTS

VERSUS

ARMAJIT SINGH GAHIR.....1ST RESPONDENT/CLIENT

SURINDER SINGH SIHRA.....2ND RESPONDENT/CLIENT

JASPAL SINGH VIRDEE.....3RD RESPONDENT/CLIENT

SARWAN SINGH KALSI.....4TH RESPONDENT/CLIENT

HARJINDER SINGH ROOPRA5TH RESPONDENT/CLIENT

EAST AFRICA RAMGARHIA BOARD....6TH RESPONDENT/CLIENT

RULING

1. By a chamber summons dated 8th November, 2019, the applicants Dennis K. N. Magare and Ben Musundi T/A Magare Musundi & Co. Advocates, challenges the decision delivered on 9th October, 2019 by the Taxing Master, L. A. Mumassabba, in respect of the Advocate-Client Bill of Costs dated 21st February, 2019. Through the application the applicants seek orders as follows:

- a) That the Honourable Court be pleased to enlarge time and grant leave to the Applicants to file this reference out of time;
- b) That the Ruling and Orders of the Taxing Master dated 9th October, 2019 be set aside;
- c) That the Petitioner's Bill of Costs dated 25th February, 2019 be taxed afresh by this Honourable Court; and
- d) That the costs of this Application be provided for.

2. The application is supported by the grounds on its face and an affidavit sworn by Ben Musundi. In summary, the applicants' case is that the taxation is very low as the taxing officer did not consider the applicants' written submissions relating to instruction fees and also proceeded with the taxation on the wrong principles without taking into account the provisions of the Advocates (Remuneration) (Amendment) Order, 2014 and the facts of the case.

3. The brief history of the matter is that the applicants and the respondents had an advocate-client relationship that did not end well. The relationship was in respect of the case of **Satinderjit Singh Matharu v Armajit Singh Gair & 5 others [2016] eKLR** where the respondents herein had been sued by Satinderjit Singh Matharu for violating his right to fair administrative action. The Court found in favor of Satinderjit Singh Matharu and also awarded him costs.

4. At the conclusion of the trial, Satinderjit Singh Matharu filed a party and party bill of costs dated which was taxed at Kshs. 800, 996.67. The respondents herein who were the respondents in the said petition instructed the applicants who were at that time their advocates to challenge the taxation through a reference. The reference was successful and the party and party bill of costs was reduced to Kshs. 400, 996 in a ruling delivered on 3rd October, 2018 by Okwany, J.
5. The record shows that the applicants later filed an advocate-client bill of costs dated 21st February, 2019 against the respondents herein. The taxation of the bill of costs resulted in the ruling delivered by L. A. Mumassabba on 9th October, 2019 which is the subject of the instant application.
6. In support of their prayer for leave to file their reference out of time, the applicants aver that after the taxing officer delivered her ruling, they sought the ruling through a letter dated 18th October, 2019 but the court file could not be traced by the registry staff. It is deposed that by the time the file was traced the time prescribed in law to file a reference had lapsed. The applicants additionally state that the record does not reflect the issuance of a certificate of taxation by the taxing officer following the ruling dated 9th October, 2019.
7. Turning to the substance of the reference, the applicants aver that the taxing officer failed to take into account their written submissions in regard to the instruction fees. It is their argument that the instruction fees should be increased by one half as provided by Schedule VI Part A & B of the Advocates (Remuneration) (Amendment) Order, 2014.
8. The applicants' case is that instruction fees of Kshs.100,000 and the total taxation at Kshs.222,578.60 are manifestly low compared to the party and party costs taxed at Kshs.400, 996. It is their contention that the amount of costs they should have been awarded should have been at least Kshs.601, 449. It is their case therefore that the bill of costs was not taxed in accordance with the rules of taxation as stipulated in the Advocates (Remuneration) (Amendment) Order, 2014.
9. The record reflects that although served, none of the respondents filed any response or submissions in regard to the instant application.
10. The applicants filed written submissions and a list of authorities dated 18th December, 2019 in support of their application. The applicants submit that in addition to erroneously interpreting Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, the taxing officer failed to consider the complexity of the matter. According to the applicants, they had to do extensive research in defending the respondents and conducted a full hearing where witnesses gave oral evidence. They state that this is in addition to the fact that they were later instructed to file a reference to the party and party bill of costs.
11. It is further the applicants' submission that in determining what is reasonable the taxing master should consider the skill, labour and responsibility involved on the part of the advocate. To support this averment, they relied on the case of **Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W'Njuguna & 6 others (2006) eKLR**. It is their argument that allowing the bill of costs as taxed will be prejudicial to them as they will not be able to recover the amounts expended in defending the respondents in the primary suit.
12. From the pleadings and arguments placed before this Court, the only issues for the determination of the Court are whether the Court should extend the time for filing of the reference and whether the applicants have established sufficient grounds to warrant the setting aside of the decision of the taxing officer.
13. In support of their application for the enlargement of time for filing the reference, the applicants averred in the supporting affidavit dated 8th November, 2019 that the taxing officer had scheduled the ruling for 10th October, 2019 but the ruling was instead delivered a day earlier on 9th October, 2019 since the scheduled date was a public holiday. They further deposed that having been absent on the date the ruling was delivered they later wrote to the registry seeking a copy of the ruling but the file could not immediately be traced, and when a copy of the ruling was eventually supplied, the time prescribed for filing the reference had already lapsed.
14. Rule 11 of the Advocates Remuneration Order, 2009 which requires a reference to be filed within 14 days from the date the reasons for the taxation are issued, grants the court the discretion to extend the time for filing a reference. In order for the court to extend the period for filing a reference, the party intending to challenge the taxation must give satisfactory reasons for not filing the reference within the provided 14 days.
15. The reason given as to why the reference was not filed within 14 days is that the applicants did not access the ruling within the time prescribed for filing the reference. I find it necessary to reproduce the averments of Ben Musundi in the supporting affidavit sworn on 8th November, 2019. He avers:
- “4. THAT upon confirmation that both parties had filed and served their Written Submissions, the Taxing Master set the Ruling date as 10th October, 2019 and the Ruling was instead delivered on 9th October, 2019 as 10th October, 2019 was a public holiday.**
- 5. THAT I thereafter tried to trace the Court file to find out what had transpired on 9th October, 2019 but the Court file was missing and or could not be found by the Registry Staff within the Registry and we finally traced the File when the time within which to file the reference had lapsed.”**
16. There is a letter dated 18th October, 2019 addressed to the Deputy Registrar of the Constitutional and Human Rights Division in which the applicants are asking to be furnished with a copy of the ruling delivered on 9th October, 2019. However, the letter is a floating document as it is not identified in the supporting affidavit and neither is it marked as an exhibit.

17. I have carefully perused the court file in order to determine the correctness of the averment by Ben Musundi that the ruling was brought forward from 10th October, 2019 to 9th October, 2019 because 10th October, 2019 was a public holiday. With utmost respect to counsel, I find that the record speaks otherwise. On 10th September, 2019, Mr. Musundi himself was present in Court when the taxing officer fixed the ruling for 9th October, 2019.

18. Immediately the taxing officer fixed the ruling date counsel for the respondents asked the Court to instead give them a mention date on the ground that she intended to file an application to the High Court to stay the ruling. This request was opposed by Mr. Musundi. In her ruling on this request the taxing officer stated, inter alia, that the **“ruling date of 9/10/2019 is hereby maintained.”** In the proceedings of 10th September, 2019, the taxing officer recorded twice that she was going to deliver her ruling on 9th October, 2019. The averment by the applicants that the ruling was to be delivered on 10th October, 2019 is therefore not supported by the court record. In the circumstances the failure by the applicants to attend the court for the delivery of the ruling on 9th October, 2019 is unexplained.

19. The claim by the applicants that the court file could not be traced is also not supported by the court record. The applicants have not placed before this Court any document to show the date they received the ruling from the Deputy Registrar. Considering the incorrectness of the averment of counsel, which has already been referred to in this ruling, I find that the word of counsel alone is not sufficient to make this Court accept that there was delay in the release of the ruling by the Deputy Registrar.

20. In view of the material that has been placed before the Court by the applicants, I am not convinced that they have any plausible explanation for filing their reference out of time. The Court is therefore not persuaded to exercise its discretion to enlarge the time for filing the reference in their favour. As such, there is no valid reference before this Court and the applicants' chamber summons application should be struck out at this stage. I will nevertheless consider the reference for purposes of completeness of the record.

21. Even though the reference is unopposed, the applicants still have an obligation to convince the Court that the impugned taxation should be set aside. The responsibility of taxation of litigation costs and the accompanying discretion is firmly placed upon the registrar or deputy registrars of the High Court as provided in rules 10 and 16 of the Advocates Remuneration Order, 2009. Rule 10 provides that:

The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

22. Rule 16 states:

Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.

23. It is important to emphasize that the circumstances under which this Court may interfere with the taxing officer's exercise of discretion are now well-established. Among the cases in which these principles were highlighted is **Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR** where it was stated that:

“These principles are, (1) 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 manifestly excessive as to justify an inference that it was based on an error of principle; (2) 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 by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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 not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) 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; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.”

24. According to the decision in **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (1972) EA 162**, the principles of taxation are that costs should not be allowed to rise to a level as to confine access to justice as to the wealthy; that a successful litigant ought to be fairly reimbursed for the cost he has had to incur; that the general level of remuneration of advocates must be such as to attract recruits to the profession; that so far as practicable there should be consistency in the award made; and, that the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

25. The advocate and client costs are governed by Part B of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014. The provision sets out the parameters to be considered by the taxing officer in determining the costs payable to the advocate for professional legal services rendered to a client. It states as follows:

As between advocate and client the minimum fee shall be—

(a) the fees prescribed in A above, increased by 50%; or

(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

26. In taxing the bill of costs, the taxing officer is required to be guided by the provisions of the Advocates Remuneration Order, 2009, as amended in 2014. The Ugandan Court of Appeal in **Makula International v Cardinal Nsubuga & another [1982] HCB 11** provided guidance on how a taxing officer should proceed in taxing a bill of costs by stating that:

“According to the decided cases, the taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI (sometimes referred to as the basic fee), next, he should consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased...When the taxing officer has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved...Lastly he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

27. The applicants contend that the taxing officer erroneously interpreted Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 by holding that instruction fees payable was Kshs. 100,000. Their argument is that a reading of both parts A and B of Schedule 6 shows that the instruction fees should be at least Kshs. 601,449 being the party and party costs awarded in the primary suit plus one half thereof.

28. A perusal of the taxing officer’s impugned ruling shows that she taxed the first item being the instruction fees at Kshs. 100,000 based on Schedule 6, and guided by the ruling in respect of the party and party costs delivered by this Court (Okwany, J) on 3rd October, 2018 in which she found that instruction fees of Kshs. 100,000 was reasonable.

29. In reaching her decision the taxing officer noted the taxation principles as set in law and highlighted the factors that ought to be considered thereby showing a clear appreciation of the principles governing taxation. The taxing officer correctly identified the Schedule to be applied. It is also clear from the ruling that the taxing officer increased the taxed amount by half and therefore complied with the requirements of Part B of Schedule 6. It therefore follows that the taxing officer properly addressed her mind to the legal strictures established and exercised her discretion prudently.

30. Nevertheless, the applicants’ argument is that the taxing officer ought to have simply increased by 50% the party and party bill of costs which was already taxed at Kshs. 400, 996. Their argument may have some basis. For instance, in the case of **Mumias Sugar Company Limited v Professor Tom Ojienda & Associates [2019] eKLR**, the Court observed that:

“It is only when Party & Party Costs have been taxed that the taxing officer may determine the related Advocate/Client costs by adding 50% to the Party & Party Costs.”

31. A similar observation was made in **Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR** as follows:

“With respect to the increase under part B of Schedule VI my understanding is that such increase is only applicable where there has been a determination of the party and party fees under part A of the said schedule in which case instead of taxing the advocate/client bill the court may simply decide to increase the amount of party and party costs under Part A as provided under part B...”

32. In my view, the Court in **Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Pension Scheme & 8 others [2017] eKLR** succinctly captured the law as follows:

“In view of the foregoing analysis, the correct position is that the instruction fees of an Advocate is depended on the choice of the advocate while drawing his bill either based on the value of the suit (the prescribed fees under part A of schedule vi of ARO), or party and party costs taxed (costs ordered by the court), or the agreement between the parties under paragraph 57 of the ARO. In either of the 3 options, the amount is increased by 50%. It follows therefore that if an advocate draws his bill based on the value of the suit under Part A of the VI Schedule, he is not bound by the proceedings under party and party bill of costs. The Taxing Officer must consider all the items charged under the Advocate-Client bill and determine it on merits including the item of getting up or preparing for trials, all proper attendances on the client and all necessary correspondences.”

33. In the case at hand, the applicants presented an advocate and client bill of costs to the taxing officer who proceeded to tax the same and increase it by 50% as required. She cannot now be faulted for proceeding that way in circumstances where the applicants did not ask her to simply increase the already taxed party and party bill of costs by 50%. In any case the party and party bill of costs is presented to the court by the party awarded costs and the costs of the successful party cannot be exactly the same with that of the party on the other side. Therefore, the best way to arrive at a just award of costs is to tax the advocate and client bill of costs presented to the taxing officer by the advocate, as was done in this case, and increase the taxed amount by half as required by Part B of Schedule 6. In the circumstances I find that the taxing officer did not commit any error in proceeding in the manner she did.

34. Apart from saying that the taxing officer did not comply with the principles of taxation, the applicants have not provided any evidence to show such failure. In her decision the taxing officer clearly stated that the work done by the advocate was not complex as it was an ordinary dispute of a member of a society challenging the decision of the board of the society. In awarding Kshs. 100,000 as the instruction fees she also stated that she was guided by the fact that the instruction fees of Kshs. 500,000 awarded in the party and party bill of costs in the same matter was reduced to Kshs. 100,000 on reference to the High Court. The taxing officer cannot therefore be blamed for abiding by the decision of the High Court.

35. In summary I find no fault in the manner in which the taxing officer proceeded with the taxation of the bill of costs presented to her by the applicants. She exercised her discretion properly and there is no reason why this Court should set aside the impugned taxation. This reference therefore fails for the reason that no case has been made to warrant the granting of leave to file the reference out of time. Additionally, a consideration of the reference on merit leads to the conclusion that the applicants have not established sufficient grounds for disturbing the discretion of the taxing officer.

36. Since the applicants' chamber summons application was unopposed, the appropriate order is to dismiss the application with no order as to costs, and I so do.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MAY, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT