



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

REFERENCE NO. E004 OF 2021

IN THE MATTER OF: TAXATION OF AN ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

STEPHEN K. KIBUNJA T/A KIBUNJA

& ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....RESPONDENT

CORAM: Hon. Justice Reuben Nyakundi

Kibunja & Associates Advocates for the Applicant

Bryan Khaemba, Kamau Kamau Advocates for the Respondent

RULING

The Applicant herein filed a chamber summons application dated 24th January 2021, displeased with the decision of the Taxing Master to tax his Bill of Costs dated 18th November 2020 at Kshs. 812,000/- as opposed to Kshs. 812,000,000/-. Counsel is seeking costs associated with the research for and drafting of a Constitution for the Respondent's football club. Mr. Kibunja prays for orders that:

- 1. That the reference filed herein be admitted as properly filed and leave be granted for its admission and determination out of time (if any)***
- 2. The order made by the taxing officer on 25th November 2020 taxing the Applicant's bill of costs dated 18th September 2020 at Kshs. 812,000.00 be set aside.***
- 3. That this Court proceeds to tax the Applicant's bill of costs dated 18th September 2020.***
- 4. In the alternative and without prejudice to prayer (2) the Applicant's bill of costs dated 18th September 2020 be referred back to the taxing officer with directions for fresh taxation.***
- 5. Costs of this application be provided for.***

The application is based on the grounds spelt out therein and further elaborated in the annexed supporting affidavit of Stephen K. Kibunja, sworn on the 24th January 2021.

It is argued that on 1st September 2020, Mr. Kibunja, Advocate filed a bill of costs dated 18th September 2020 against the Respondent for Kshs.8,120,000/-. By a Ruling delivered on 25th November 2020, the Taxing Master Hon. D. Wasike taxed the Advocate/Applicant's bill of costs dated 18th September 2020 at Ksh.812, 000/=.

According to Counsel, being aggrieved with the decision of the Taxing Master, he wrote a letter seeking for reasons in accordance with paragraph 11(1) and (2) of the Advocates Remuneration Order. He further states that vide an email dated 25th November 2020, he wrote to the Deputy Registrar and copied to the Respondent's Advocate informing her that he was dissatisfied with her decision and as such needed the certificate of taxation for purposes of filing a reference. It is contended that the Applicant received a copy of the Certificate of Costs on

30th November 2020. Further, it is averred that Hon. Wasike responded on 14th December 2020 stating that her reasons were contained in the Ruling. The Applicant points out that this Ruling had not been signed.

Mr. Kibunja appeals and challenges the decision of Hon. Wasike arguing that she erred in principle and in law by completely ignoring the submissions, items and entire bill filed by the Appellant and thereby arrived at decision that was not based on issues before court and the law. For Counsel, the learned Deputy Registrar fell into error, both in principle and in law by failing to exercise her judicial powers and discretion judiciously and failing to consider all relevant facts.

The Applicant is aggrieved by the fact that the learned Taxing Master erred in principle and in law in basing the Judgment on faulty appreciation of the law. That she failed to appreciate the submissions, documents, items and bill filed by the Applicant and additionally was unable to correctly relate them to the taxation and thereby failed to tax the bill as drawn.

As far as Mr. Kibunja is concerned, the instruction fees granted by the learned Taxing Master were manifestly very low in the circumstances of the case and failed to consider the complexity, skill, care and research involved. Moreover, the argument advanced was that the learned Taxing Master erred in principle and in law when he reached the decision that Mr. Kibunja was not entitled to charge instruction fees as drawn in items 2 to 13.

It is further contended that the Learned Taxing Master erred in principle and in law in proceeding on taxation of the bill of costs under a pretext that there was an agreement between the parties when in fact there was none.

According to the Applicant, the Learned Taxing Master erred in principle and in law in failing to tax items 14 and 15 as drawn and or at all.

The argument by the Applicant was that Hon Wasike's decision was based on an error of principle and amounted to wrongful exercise of discretion and as such, this Court was empowered to interfere with wrongful exercise of the taxing officer's powers.

Submissions, Analysis and Determination

I have duly considered the annexed Bill of Costs by Mr. Kibunja; the grounds upon which the instant application is premised; the arguments adverted to by both Counsels before the Taxing Master as well as the Ruling delivered by the Taxing Master on 25th November 2020. I will advert to the foregoing where the situation demands it.

The preliminary issue is whether the prayer seeking for the reference to be admitted out of time ought to be granted. Per the **Advocates Remuneration Order, 2006**, it is within the discretion of the Court to grant an enlargement of time within which a particular action ought to have been taken, notwithstanding the time seeking to be enlarged may have already expired. In the current instance, the Applicant sought for reasons and received a response from the Taxing Master on the 14th of December 2020 stating that the reasons were contained in the Ruling of 25th November 2020 delivered by the Taxing Master. After this, the Applicant had 14 days within which to file a reference to this Court objecting the decision of the taxing master. This time expired on 28th December 2020. However, the Reference was not filed until 28th January 2021 a month later.

In considering an application for extension of time this Court is bound to consider the factors set out in the Supreme Court decision in **Nickolas Arap Salat V Independent Electoral and Boundaries Commissions & 7 others [2014]eKLR** in which the court held as follows:-

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving part at the discretion of the Court.***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.***
- 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted.***
- 6. Whether the application has been brought without undue delay; and***

Similarly in **Leo Sila Mutiso V Rose Hellen Wangari Mwangi [1999] 2 EA 231** the court declared the factors for consideration to extend time to include the following:-

- 1. The length of the delay***
- 2. The reasons for the delay***
- 3. Whether there is an arguable case on appeal or in this case a reference***
- 4. The degree of prejudice to the other parties if time is extended.***

Notwithstanding the above factors in *Salat and Mutiso case* the court has unfettered discretion to extend time underpinned under section 1 (a) and 1 (b) on overriding objective to see to it that justice has to be done in the matter. The Applicant counsel in this matter has explained himself on the delay resulting on non compliance with the relevant rules for this court to intervene by way of a reference.

Taking the foregoing into account, I find that the delay was not so inordinate as to deny the Applicant the exercise of this Court's discretion to extend the time within which the Reference herein ought to have been filed and deem it as properly filed. Having held that the Reference herein be deemed as properly before the Court, I now turn to its merits.

Essentially, Mr. Kibunja is displeased by the finding of the Taxing Master that the work he had done was worth Ksh. 812, 000/- as opposed to his Bill of Costs, which he had taxed at Ksh. 8,120,000/. He therefore asks this Court to interfere with it. The range within which a High Court can circumscribe the decision of a taxing master's exercise of discretion is well established. In *Nyangito & Co. Advocates Vs. Donyo Lessos Cremaries Ltd [2014] eKLR* the court held thus:

The circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. 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 error of Principle or the fee awarded was manifestly excessive as to justify on interference that it was based on an error in 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 Advocates Remuneration Order itself, some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of Proceedings and any other direction by the trial Judge

I have had occasion to pronounce myself on such a matter, as I did in *CG Waithima & Co. Advocates v African Merchant Assurance Co. Ltd [2020] eKLR* in which case I stated:

It is important for each case instruction fees to be considered separately factoring in the advocates work, including taking instructions and preparing the case for trial or appeal. Further, the value of the subject matter has to be taken into account:

"The Law envisages further what is permissible are those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation." (See *Van Rooyen v Commercial Union Assurance Co of SA Ltd [1983] 2 SA 465*).

Having apprised myself of the Bill of Costs as drawn by Mr. Kibunja, the arguments in support and against the same and coupled with an in-depth appreciation of the Ruling by Hon. Wasike, I am satisfied that the Bill was taxed in accordance with the law. The Taxing Master correctly surmised that the agreement that existed between the Advocate and his Client fell within the ambit of **Schedule 5 Part II of the Advocates Remuneration Order**. The Applicant was of the similar view in his submissions to the Taxing Master but strangely, in his grounds for the instant application he seemed to prevaricate, taking an entirely divergent view. That is neither here nor there however, as I have held that the proper lens with which to scrutinize the Applicants business with the Respondent is **Schedule 5 Part II**.

I cannot fault with the Taxing Master as regards the reasoning behind her taxation of Instruction Fees. It should only be charged as a lump sum and ought not to be broken down into many parts that make up one process at the end of the day. In any case, her doing so was an intricate balancing act between the adversarial positions adverted to by both parties concerned for which the Hon. Wasike cannot be faulted.

However, considering the amount of skill required and the time spent in coming up with the Constitution for Nzoia Sugar Football Club, together with the fact that the remuneration for the services of an advocate of the High Court ought to inspire persons to pursue the profession, I am of the view that the taxation of Item 15, that is, the instruction fees, ought to be interfered with. The Bill as taxed between 2018 and 2019, including delivering the final draft of the Constitution was Ksh. 500,000/- down from Ksh. 2,000,000/- as billed by the Advocate. My position is the amount suggested by Mr. Kibunja was in tandem with the prevailing rate and circumstances of work at that time. I reinstate the same.

For avoidance of doubt, bar the antecedent finding, the decision by Hon. Wasike remains unblemished. This is to say that the Bill of Costs dated 18th September 2020 is taxed as follows:

Ksh.

Sub-total	2,200,000 (200,000+2,000,000)
Add VAT @ 16%	352,000
TOTAL	2,552,000/=

Having partially succeeded in his claim, I find that a judicious outcome as regards the Petition would be that each part bears their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 30TH DAY OF JUNE 2021.

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R. NYAKUNDI

JUDGE