



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISC. APPLICATION NO. 10 OF 2018**

**B. W. KENZI & CO. ADVOCATES.....ADVOCATE**

**VERSUS**

**PHILIP MUTISO MAKAU.....CLIENT**

**Coram:Hon. Justice R. Nyakundi**

**Muriu, Mungai Advocates for the client/applicant**

**B. W. Kenzi advocate for the respondent**

**RULING**

This application by the applicant was brought by the firm of **Muriu Mungai & Company** dated 17.10.2019 in which they sought this Court intervention on a taxation cause No. 10 of 2019. In that reference, the applicant challenges the taxed but of costs awarded in favour of **B. W. Kenzi Advocates**.

In this said reference the applicant has averred as follows being the basis of this Court's intervention:

- (a). The taxing officer erred by inordinately enhancing the basic fee under item 1 without consideration on the subject matter which was expressly stated in the primary pleadings.*
- (b). The taxing officer, being a Deputy Registrar of the High Court, erred in Law by holding that she has jurisdiction to tax costs arising from services rendered in the Court of Appeal hence usurping the jurisdiction of the Deputy Registrar of the Court of Appeal.*
- (c). The taxing officer erred in her interpretation of Rule 111 of the Court of Appeal Rules whereas she had no jurisdiction on matters handled before the Court of Appeal.*

In support of the application is also an affidavit by **Peter Munge**. At the hearing of the reference, directions were taken of filing submissions. In the said submissions, the applicant contended that the taxing master took into account irrelevant matters and thus arrived at an unreasonably high assessment.

Further, the applicant counsel argued and submitted that the total outcome of the taxation arising out of the various awards was essentially erroneous. In support of the submissions, applicant counsel placed reliance on the following authorities: **Jelic Munyasya v Bricks Security Services {2018} eKLR**; **Njeri Onyango & Co. Advocates v Ufundi Co-operative Society Limited {2014} eKLR**; **Odera Obar & Co. Advocates v Aly Enterprises Limited & 3 others {2016} eKLR**; **Ms. Aminga, Opiyo & Masese Advocates v Herbert Ocholla Ojwang & Another {2017} eKLR**; **Mumias Sugar Company Limited v Tom Ojienda & Associates {2018} eKLR**.

Apparently, despite proper service being effected there wasn't a response from the respondent.

**Resolution**

Suffices to say that from the dicta in **Kenya Ports Authority v Modern Holdings Ltd EACJ Taxation Reference No. 4 of 2010**:

*“The principles regarding review of taxation orders by the Courts is well settled. According to a wealth of authorities, 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 so manifestly excessive as to justify the interference that it was based on an error.* (See also **Alcor international Ltd v Standard Chartered Bank (UG) & Others Taxing Reference No. 1 of 2014**) EACJ). The Court in **Canada in Reese v Alberta {1993} 5 A.L.R. 40** pronounced itself as follows:

*“While the allocation of costs of a law suit is always in the discretion of the Court, the exercise of that discretion must be consistent with established principles and practice. The costs recoverable are those fixed for the steps in the proceeding by a schedule of fees, plus reasonable disbursements.* (See also **R v Ministry of Agriculture & 2 others exparte Muchiri W’Njuguna & 6 others {2006} eKLR**).

In respect of this reference, I have reviewed the record and subsequent taxing master decision on the questionable bill of costs. I agree with the chronological account given by the applicant that no sufficient reasons are provided for an enhancement of the basic fee under item (1). Second, that the dispute in the primary suit was for a consideration of 5 – 5.5. Million. However, this is in contrast to the pleading in the bill of costs premised at a value of the suit property at Kshs.10,000,000/= with an addition that the subject of the entire property estimated value of Kshs.300,000,000/=.

As can be discerned, both parties are reading from different scripts specifically in respect of what constituted the value of the subject matter for a legitimate taxation on the bill of costs presented by the respondent. This therefore does manifest on the issue of instruction fees as one of the contested items in this appeal. On proper evaluation of the taxing master’s ruling against this particular argument by the applicant, it is not difficult to discern that the value of the subject matter was placed at Kshs.30,000,000/=. Whereas, in the bill of costs the value is indicated at Kshs.10,000,000/= and as whole the value estimate of the two properties was asserted to be in excess of Kshs.300,000,000/=.

Consequently, I reiterate that given the differentia in perspectives, its difficult to ascertain the value of the subject matter in absence of a valuation report in the circumstances of the contentious issues on instruction fees. It is immaterial that the suit was for declaratory orders. It is also not in doubt that the subject matter value on taxation of the bill of costs ought not to be the actual value of the property but the value that is ascertainable from the pleadings in Court. In the Ruling, the taxing master talks of Kshs.30,000,000/= being the subject matter value, which is in contrast with the averments in the bill of costs. It is therefore worthy noting that the taxing master exercised discretion on a conflicted subject matter value to determine the basic fee on instructions.

These circumstances raises concerns whether the taxing master took into account a wrong factor or principle to occasion an erroneous award on basic fee. In the instant reference, the applicant argue and submit that the bill of costs attributable to the taxing master reflects manifest excessive enhancement. In view of the grievances and what I have just said on subject matter value, it’s pertinent that this reference succeeds, the value of the subject matter be ascertained, and the value of work done be the basis of a fresh taxation. The net effect is that the bill of costs be remitted back for a fresh taxation before **Hon. Analo (RM)**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 24<sup>TH</sup> DAY OF DECEMBER 2021**

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**R. NYAKUNDI**

**JUDGE**