



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 270 OF 2019

SUPPLY LINKAGES.....APPELLANT

VERSUS

HUDSON MANGENI.....RESPONDENT

RULING

1. I have gone through the record and rival submissions both parties, and, from my deduction, the following are the issues for determination:

- a. whether the learned trial magistrate had jurisdiction to tax the respondent's bill of costs;
- b. whether the learned trial magistrate allowed items in the bill of costs which are not provided for under Schedule 7 of the Advocates Remuneration Order, 2006 and/or 2014; and
- c. whether the learned trial magistrate ought to have awarded Kshs. 1,000.00 and not Kshs. 1,400.00 on the item of service.

2. On the first issue, as to whether the learned trial magistrate had jurisdiction to tax the respondent's bill of costs, section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya is relevant. It provides as follows:

“27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

3. “Court” is defined, under section 2 of the said Civil Procedure Act, as “... the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.”

4. It was stated, in *Bernard Gichobi Njira vs. Kanini Njira Kathendu & another* [2015] eKLR, as follows:

“17. On the question of jurisdiction, there is no dispute from both sides in this reference that magistrates or indeed subordinate courts in Kenya have jurisdiction to determine costs payable in cases filed before those courts. The Applicant conceded that magistrates also have jurisdiction to assess costs but on the same breath contended that they lacked jurisdiction to tax costs presented to them by way of Bill of Costs. For me this is simply a question of semantics because ‘taxation of costs’ and ‘assessment of costs’ means one and the same thing. The Black’s Law Dictionary defines “Taxation of Costs” as follows:

“The process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded.”

On the other hand, the same dictionary defines assessment of costs as follows:

“Determination of the rate or amount of something (costs in this instance) – imposition of something (costs) e.g. fines ...”

The Oxford English Dictionary defines “taxation of costs” as follows:

“To examine and assess the costs of a case.”

The same dictionary (Oxford) defines ‘assessment’ as follows:

“To evaluate or estimate the nature, value or quality ... to set the value of a tax, fine etc. for a person at a specified level.”

The above definitions clearly for me mean one and the same thing and is simply a question of semantics and practice in our courts at different levels. In the High Court determination of costs payable has always been referred to as taxation while court the determination of costs payable has been commonly referred to as ‘assessment’ but the two terminologies mean one and the same thing. Any of the terminologies can be used both by the High Courts and the courts below without any problem.

18. Now turning to the law, a look at the provisions of Section 27 of the Civil Procedure Act gives both the subordinate court and the High Court discretion and the jurisdiction to not only award costs but determine the extent at which those costs are to be paid and by which party. Paragraph 49 of the Advocates Remuneration Order clearly defines a “court” to mean both the High Court or any judge thereof or a Resident Magistrate’s Court or a magistrate sitting in a magistrate’s court. A court in Part III of the Advocates Remuneration Order is given the mandate to determine costs in contentious matters as between advocate and client and between party and party. It is therefore clear and indisputable that a magistrate’s court has jurisdiction to assess costs and as a matter of law, paragraph 51 of the Advocates Remuneration Order clearly gives the applicable scale to be used in the subordinate courts as Schedule VII ...

19. The question of whether a bill of costs can be presented before a magistrate’s court sitting as such is moot but a look at Schedule VII as compared to Schedule VI suggests that it is desirable and practical to file a bill of costs in the High Court cases in view of the extensive and laborious nature of the bill to enable a successful litigant and the taxing officer to comprehensively deal with ease all the taxable items on costs awarded. In the subordinate court however, the only discretion given is that court in relation to Schedule VII is under subsection 2 thereof and it relates to instructions fees on suits by the nature of which no specific sum is sued for. Otherwise the amounts in other taxable items are specified and in my view it is for that reason that it is desirable and practical for parties in whose favour costs are awarded to write to the subordinate court by way of letter asking the court to assess the costs as proposed or drawn. The subordinate court has a discretion either to assess costs ex parte and notify the parties or invite the parties and tax the same inter partes that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or the other.”

5. In Peter Njuguna Njoroge vs. Julius Naraniclak Ololgolomot [2010] eKLR where the respondent’s counsel drew a bill of costs in Narok Senior Resident Magistrate’s Court and had it taxed as if it were a matter which arose in the High Court. The applicant in a reference before High Court in Nakuru argued that since the case was before a subordinate court, a bill could not be drawn and taxed in the manner it was done. Justice Anyara Emukule made the following observations:

“I have examined the plaintiff’s bill (Bill of Costs) drawn on 21st December, 2005 and it substantially conforms to the requirements of Schedule VII of the Advocates Remuneration Order. Perhaps the only arguable departure is that it is termed a bill of costs. It might have been called the plaintiff’s or defendant’s costs and set out in conformity with the requirements of Schedule VII of the Advocates Remuneration Order. I do not propose to strike out the plaintiff’s Bill of Costs. I direct however, that because it was not assessed or ascertained in the presence of the plaintiff the same is remitted to the Senior Resident Magistrate Narok for assessment in the presence of the plaintiff or his counsel and the defendant or his counsel.”

6. I am in agreement, that a magistrate’s court has jurisdiction to assess and determine the extent to which costs are payable to a party. Therefore, the contention by the applicant, that the learned trial magistrate lacked jurisdiction to assess and determine the bill of costs filed by the respondent, has no merit and ought to be dismissed.

7. The second issue for consideration is whether the learned trial magistrate allowed items in the bill of costs which are not provided for under Schedule 7 of the Advocates Remuneration Order, 2006 and/or 2014. The principles upon which a judge of the superior court interferes with the taxing officer’s exercise of discretion are well settled. The same were *outlined*, in *Republic vs. Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* [2006] eKLR, as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... 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. Of course 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 take into

account include the nature and importance of the case 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. Needless to state, not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs....”

8. In *KANU National Elections Board & 2 others vs. Salah Yakub Farah* [2018] eKLR, it was said that:

... before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. (see *Ocean Commodities Inc and Others vs Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) and *Legal and General Insurance Society Ltd vs Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.)

It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (*Johannesburg Consolidated Investment Co. vs Johannesburg Town Council* 1903 TS 111).

The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for review/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.

The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.

It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (Per SMIT AJP in *Preller vs S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.)”

9. The applicant submitted that Schedule 7 of the Advocates Remuneration Order only provided for costs for “necessary” attendances for applications and hearings before a subordinate court, and that it is only in the High Court where all attendances before a judge are provided for. In this regard, the applicant submitted that items 4, 6, 10, 12, 14, 16, 17, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30 and 31 should be removed and taxed off.

10. Schedule VII, paragraph 6, provides for the fee of Kshs. 1,400.00 “on any necessary application to or attendance on magistrate in court or chambers.” This provision is open, and does not exclude attendances for mentions as was contended by the applicant. As per the said provision, attendances are not qualified, and it matters not whether it was for a mention, hearing or judgment, and since the said attendances for the mentions were not disputed by the applicant. I see no reason why I should interfere with this award.

11. On whether the trial magistrate ought to have awarded Kshs. 1,000.00, and not Kshs. 1,400.00, on the item of service, the applicant submitted that the applicable fee ought to have been Kshs. 1,000.00, for the item of service, as prescribed by Schedule VII, paragraph 8(a), of the Advocates Remuneration Order, 2006 and not Kshs. 1,400.00 as awarded by the trial court. The respondent submitted that the amount of Kshs. 1,400.00 was derived from the Advocates Remuneration Order, 2014. The question that confronts me is, which Advocates Remuneration Order was the applicable in the circumstances.

12. In *NO Sumba & Co Advocates vs. Piero Cannobio* [2017] eKLR, the court stated that:

“The applicable Advocates (Remuneration) Order ... would be that which was operational at the time of filing suit ...”

13. Similarly, in *Mwangangi & Company Advocates vs. Machakos County* [2018] eKLR, the court said:

“On the applicable schedule of the Advocates (Remuneration) Order, the suit giving rise to the taxation before the Taxing Officer namely Machakos High Court Civil Suit No. 255 of 2009 (originally Nairobi High Court Civil Case No. 2765 of 1998) was filed on

11th December 1998, and the applicable Order is thus the Advocates (Remuneration) Order of 1997.”

14. In *Mereka & Company Advocates vs. Tau Katungi* [2019] eKLR, it was held that:

“Basically, the award herein cuts across two remuneration orders i.e. 2006 as amended in 2009 and 2014. The taxing master then should assess each service rendered in accordance with the applicable remuneration order at the material time.”

15. 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 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. In the foregoing, it is my finding and holding that there is merit in the applicant’s reference, vide the Motion, dated 12th November 2019. The same is hereby allowed, with the result that the trial court’s order of 30th October 2019, assessing costs at Kshs. 137, 550.00, is hereby set aside. The respondent’s bill of costs, dated 8th January 2019, shall be assessed afresh, taking into account the applicable Advocates Remuneration Order at each material time. Each party shall bear their own costs of this reference. The trial court’s original records shall be returned to the relevant court registry for compliance with the order above, while the reference file herein shall be closed. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October, 2020

W. MUSYOKA

JUDGE