



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISCELLANEOUS CAUSE NO. 19 OF 2018

NDUNG’U GITHUKA & CO. ADVOCATES.....APPLICANTS

VERSUS

GEOFFREY MORIASO OLE MALOIY.....RESPONDENT

(Being a reference from the decision of the taxing officer dated 11th February 2013 presided over by Hon. R. N. Makungu)

RULING

This reference by Ms. Githuka & Advocates arises from the decision of the Deputy Registrar dated 11th February 2013. As per the chamber summons the appellant prays for the following orders:

- (1) That the decision of the Deputy Registrar who was exercising the jurisdiction of a taxing officer in HCC Misc. No. 203 of 2011 be set aside.**
- (2) That this Honourable court do tax the bill dated 22/8/2011 or in the alternative make any such orders as to meet the ends of justice.**

In support of the reference are the grounds in the body of the chamber summons and an affidavit deponed by the applicant appellant.

Being aggrieved with the certificate of costs the appellant premised the reference on 5 grounds stated as follows:

- (a) That the taxing officer injudiciously exercised her discretion in taxing the instruction fee and thereby offended the rule of precedent in such matters, to the detriment of the Applicants.**
- (b) That the taxing officer erred in taxing other items instead of the instruction fees only.**
- (c) That the taxing master erred in law in imposing a duty on the Applicants to furnish copies of the numerous documents without heeding the requirements of the Advocates (Remuneration) Order.**
- (d) That the taxing master, without any basis in the pertinent law, taxed off many items that ought to have been allowed thus divesting the Applicants of fees it properly is entitled to in law for work actually done.**
- (e) That the taxing master has by her decision aforesaid made rubbish of the hard labour of the Applicants.**

Mr. Githuka for the applicant argued and submitted that the taxing officer fell into error when she held that on instructions fees he was only entitled to Ksh. 42,075. According to learned counsel this was so inordinately low and did not reflect the legal services rendered and provided the Rules on this item. Learned counsel further contended that the requirements of the Advocates Remuneration Order under schedule VI was not strictly followed. He further submitted that the findings made by the taxing officer as to the stage of the proceedings for one to earn instructions fees was arrived at in contravention rules and the legal principles on taxation of costs. Thus, in support of this error learned counsel relied and cited the following authorities. **Joreth Ltd Versus Kigano & Associates Civil Appeal No. 66 of 1999.**

The respondent counsel in objection to the reference filed and grounds of application dated 19/8/2013. Mr. Koceyo for the respondent argued and contended that the taxing officer judiciously considered the bill of costs as per the referenced placed before the court. Mr. Koceyo further stated that contrary with the assertion by the applicants, parties had not considered or agreed on any of the items in the bill of costs. The position of Mr. Koceyo was that every item in the bill as drawn by the applicant was contested and only subject to the decision of the taxing officer.

I have before me the application by the applicants, an affidavit in support of the suit, the grounds of opposition and submissions on the matter. The High court on reference jurisdiction to interfere with the decision of the taxing officer is grounded by the well settled principles as stated in several authorities by the superior courts. In the case of **KEMERO AFRICA Ltd T/A Meru Express, Gathogo Khuea Versus A. M. M. & Another 1982-1988** the court held that:

“The principles to be observed by an appellate court in deciding whether it is justified in distinguishing the quantum of damages – read certificate costs awarded by a trial Judge withheld by the former court of Appeal of Eastern Africa to be that it must be satisfied that earlier the Judge in assessing the damages took into account on irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. (See also Butt Versus Khan 1981 KLR 349)”

The next question is whether the taxing officer considered the evidence presented by the parties to the bill of costs or whether she initiated the proceedings without the input of the parties to the disputed bill.

From a perusal of the record it is evident that it was not a case of one or two items. The bill of costs as filed contains avalanche of tabulated items on professional legal services rendered in the matter. The applicant had annexed some of the material as a foundational basis regarding the Advocate-client bill of costs. The only requirement would be for the respondent to file a rejoinder disputing any of the items as drawn in reliance with the services offered.

Thus, the evidential material to be considered by the taxing officer together with the provisions of the Advocates Remuneration Order for a proper assessment of costs due to the applicant remains the guide in dealing with issues of taxation. Thereafter the law mandates the taxing officer to issue a certificate of costs.

The applicant submitted that the perusal of the impugned ruling would show that the learned court erred in law and fact in applying schedule V, 1(h) on Instructions fees.

According to the applicant not only that the taxing officer failed to consider the relevant material but even the settled legal principles on such cases were also ignored. In support of his contention the applicant relied on the decisions articulated in the cases of **Paul Gicheru T/A Gicheru & Co. Advocates, Evans Gaturu Advocate Versus KCB and Nyamongo & Nyamongo Advocates Versus Kenya Bus Services (Supra)** on instructions fees and its assessment by the taxing officer.

In applying the legal principles in those authorities, I bear in mind that the taxing officer is clothed with wide powers and discretion in relation to taxation of the bill of costs. However, in discharging that duty the exercise of discretion must be exercised judiciously. In doing so the taxing officer must see to it that he or she balances the provisions of the law the competing interests of both parties to the disputed bill of costs.

As the court of Appeal has presented itself in the case of **Republic Versus Minister of Agriculture & others, Ex parte – W. Njuguna – 2006 EKLK** taxing of cases is not a mathematical exercise but an adjudicatory discretionary process succinctly anchored on well settled principles.

I have noted in this bill of costs, the taxing officer on instructions fees awarded Ksh. 42,075/= in favour of the applicant. In her ruling she appreciated the facts and nature of the claim subject matter of the taxation. Further she acknowledged that consecutively the applicant was entitled to Ksh 4, 210, 750 as instructions fees but went ahead to reduce it to Ksh. 42,075. Looking at the reasoning of the taxing officer to me the formulae used to assess the total instructions fee at a ratio of 10% did not take into account the importance of the action, nature and complexity of legal services required to safeguard the interest of the parties.

I am of the conceded view that the amount awarded by the taxing officer on instruction fee is unreasonable and inordinately low based on the facts of the case as presented by the applicant. It is also quite apparent from perusal of the ruling that the court taxed some of the costs without giving any reasons to support the reduction or enhancement of the items. Thus, in a case of this nature where costs are involved taxing officer is expressly provided with legal provisions to call for evidence in respect of certain items. The issue whether certain items should be taxed, increased or reduced is purely discretionary but must be done within the realm of the law.

In my judgement the taxing officer in her ruling in considering the bill of costs arrived at a wrong conclusion more specifically on instructions fees.

The taxing officer cannot just show figures at the applicant the approach has to exercise discretion reasonably in reference to the bill and the provisions of the Advocates Remuneration Order.

The sum total of that discretion can be summarized in the case of **Kipkorir Titoo & Kiara Advocates Versus Deposit Protection Fund Board Civil Appeal No. 220 of 2004** where the court held:

“We have no doubt that if the taxing officer fails to apply the formulae for assessing instructions fees or costs, specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso of the schedule VIA (1) that should be an error in principle. And if a Judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of the taxing officer”.

The Deputy Registrar should bear in mind the clear principles on instructions fees under the Remuneration Order and pay attention to the jurisprudence which is now well settled on this issue in the dicta stated in the cases of: **Paul Gicheru T/A Gicheru & Co. Advocates,**

Evans Gaturu Advocate Versus KCB and Nyamongo & Nyamongo Advocates Versus Kenya Bus Services (Supra).

In the foregoing, the reference is hereby allowed and the certificate of costs in favour of the applicant set aside with the direction that there be a re-taxation to the bill of costs.

Dated, delivered and signed in open court on 20th June 2018.

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R. NYAKUNDI

JUDGE

Representation:

- Mr. Kamau for Mr. Githuka for the applicant
- Mr. Mateli: Court Assistant
- The Respondent - Absent