



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Grace Ruguru Mwangi v Peter Mwangi Njuguna (Miscellaneous Application
E016 of 2021) [2022] KEELC 3957 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION E016 OF 2021**

LN GACHERU, J

JULY 28, 2022

BETWEEN

GRACE RUGURU MWANGI APPLICANT

AND

PETER MWANGI NJUGUNA RESPONDENT

*(Being an application to vary or set aside the decision of the taxing master contained
in her ruling delivered on November 1, 2021, in ELC Appeal No 20 of 2017.)*

RULING

1. *Vide* a chamber summons application dated November 20, 2021, the applicant herein Grace Ruguru Mwangi, sought for orders;
 - a. That this honourable court be pleased to vary or set aside the decision of the taxing master contained in her ruling delivered on November 1, 2021, in ELC Appeal No 20 of 2017.
 - b. That the costs of this application/reference be provided for.
2. The application is premised on the grounds set out on the face of the said application and on the supporting affidavit of the applicant herein, Grace Ruguru Mwangi, sworn on November 20, 2021.
3. The applicant contends that by a ruling given on January 25, 2021, the taxing master taxed the applicant's party to party bill of costs, dated January 30, 2021. That she is informed by her advocates which advice she believes to be true that the taxing master erred in principle while taxing the 3rd respondent's bill of costs dated January 30, 2021, in particular by ignoring the provisions of the [Advocates \(Remuneration\)\(Amendment\) Order, 2014](#), with regards to items Nos 3, 17-21 and 24 thereof.



4. That through an email dated November 9, 2021, the Deputy Registrar of this court communicated the reasons for her ruling on record. That the amount awarded by the taxing master is so manifestly low as to constitute an error of principle, and to call for interference by this honourable court. That the Learned taxing master failed to consider relevant principles and erred in principle to warrant the intervention of this court vide the instant application.
5. The application is opposed by the respondent via a replying affidavit sworn by Peter Mwangi Njuguna on February 24, 2022. It is the respondent's disposition that the applicant's application is not based on a genuine complaint, but just a disagreement with the idea of having to pay costs, hence the instant application is unmerited. That the ruling of the taxing master shows that the taxing master allowed the lowest instruction fees Kshs 25,200/=. That the taxing master went into great detail in dealing with all the items in the bill of costs, whereby Kshs 117,740/= was taxed off from a bill of Kshs 199,995/= and therefore allowing a rather modest sum of Kshs 88,255/=. That the sum allowed was almost manifestly low as opposed to being too high and the applicant should have been happy with the results of taxation. That the application is vexatious and devoid of merit and it should be dismissed with costs.
6. The instant application was canvassed by way of written submissions.
7. The applicant did not file any submissions despite the court's directions.
8. The respondent on the other hand filed its written submissions dated March 11, 2022, through the law firm of JN Mbuthia & Co Advocates. The respondent relied on the case of *KANU National Elections Board & 2 others v Shab Yakub Farah* [2018] eKLR, where the court outlined several principles which the court would consider in deciding whether or not to interfere with the decision of a taxing master.
9. It is the respondent's submissions that the taxing master struck an overall balance between the interests of the parties in reaching the impugned ruling. That the applicant's application is without merit and the same should be dismissed with costs.
10. The court has considered the pleadings in general, the written submissions, the cited authorities and the relevant provisions of law and finds the following being the issues for determination
 - I. Whether the application dated November 20, 2021, is merited
 - II. Who should bear the cost of this application?

I. Whether The Application Dated November 20, 2021 Is Merited?

11. Rule 11 of the *Advocates Remuneration Order*, makes provision for the procedure that an aggrieved party must adopt. It provides:
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.



- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
12. The procedure contemplated above is
- a. The aggrieved party issues a notice within 14 days on the items objected
 - b. The taxing officer shall forthwith give reasons for his decision
 - c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
 - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
13. The procedure as drafted carries a mandatory requirement.
14. The court notes that the applicant has complied with all the requirements outlined in section 11, above and proceeds to look at the application on its merits.
15. The court finds that the only issue for determination is whether the ruling given on November 1, 2021, in Murang'a ELCA No 20 of 2017, should be set aside.
16. However, before analyzing the above issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This court will not interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice.
17. The court in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, was categorical that;
- On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
18. The proper exercise of discretion by the taxing officers was restated in *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] eKLR, Civil Appeal No 206 of 2006, where it was held that;
- .. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation, show that a judge will normally not interfere with the taxing officer's decision on taxation, unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside”
19. The applicant is seeking an order that the ruling delivered on November 1, 2021, be set aside.



20. The principles of setting aside the decisions of taxing master were well established in the cases of *First American Bank of Kenya v Shah and others* (2002) EA 64 and *Joreth Ltd v Kigano & Associates* (2002) 1 EA 92. These includes
- a. That there was an error of principle
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 - d. That so far as practicable there should be consistency in the award.
21. With these principles in mind, the issues for determination are whether, the taxing officer rightly exercised her discretion in delivering her ruling dated November 1, 2021.
22. It is the applicant's contention that the taxing master erred in principle while taxing the 3rd respondent's party and party bill of costs dated January 30, 2021, and in particular ignoring the provisions of the *Advocates Remuneration Order 2014*, with regards to items Nos 3, 17-21, 22 and 24.
23. The onus was on the applicant to substantiate her claim. The applicant neither substantiated this claim nor filed her submissions. Without any substantiation, the court is unable to critically analyze the real issues in question. The burden of proof was on the applicant to prove indeed the taxing master erred in principle. Section 109 of the *Evidence Act*, provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
24. Further in the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR , the court held as follows; -
- “As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act*, chapter 80 laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...”
25. Having perused the instant application, the court finds and holds that the applicant has failed to discharge her onus of proving that the taxing master erred in principle. Further, the court notes that the applicant failed to attach any pleadings which resulted in the bill of costs, making it difficult for the court to re-evaluate the bill of costs that was taxed by the Deputy Registrar.
26. Having analysed as above, the court finds and holds that the applicant has not demonstrated that this application meets the principles of setting aside the decision of the taxing master. To this end, the court holds and finds that the application dated November 20, 2021 lacks merits and is dismissed entirely.

(iv) – Who Shall Bear Costs Of This Application?

27. Section 27 of the *Civil Procedure Act* grants the court the discretion to grant costs. However, it is trite that costs usually follow the event unless special circumstances present themselves. In the instant case, the court finds no such special circumstances and therefore the respondent being the successful litigant, is entitled to the costs of the application.



28. Consequently, the final order of the court herein is that the chamber summons application dated November 20, 2021, by the applicant is found not merited and the same is dismissed entirely with costs to the respondent.

29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF JULY, 2022.

L GACHERU

JUDGE

In the presence of; -

Joel Njonjo - court assistant.

Applicant - absent.

JN Mbuthia for the respondent.

L GACHERU

JUDGE

July 28, 2022.

