



REPUBLIC OF KENYA



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Ogeto t/a Ogeo & Ogeto Advocates v Muchiri (Environment and Land Miscellaneous Application E20, E21, E25, E26, E27, E28, E29, E30, E31 & E32 of 2021 (Consolidated)) [2022] KEELC 3239 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3239 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E20,
E21, E25, E26, E27, E28, E29, E30, E31 & E32 OF 2021 (CONSOLIDATED)**

LA OMOLLO, J

JULY 28, 2022

BETWEEN

PETER ONSONGO OGETO T/A O GEO & OGETO ADVOCATES .. APPLICANT

AND

GRACE MUCHIRI RESPONDENT

RULING

Introduction

1. This ruling is in respect to the Respondent/Applicant's Chamber Summons application dated 14th February, 2022. The said application is expressed to be brought under Rules 11(1) and (2) of the Advocates Remuneration Order, Sections 3A of the Civil Procedure Act and Article 159 of the Constitution.
2. The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the decision of the taxing master delivered on 25th January, 2022 in so far as the same relates to reasoning and determination pertaining to the Taxation of the Bill of costs dated 6th July, 2021 relating to Misc. ELC No. 20 of 2021, 21 of 2021 and 25 of 2021, 26 of 2021, 27 of 2021, 29 of 2021, 30 of 2021, 31 of 2021 and 32 of 2021 be set aside.
 - iv. That the Honorable court be pleased to refer the matter back for re-taxation of the Bill of Costs and with proper directions thereof.



- v. That the cost of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 14th February, 2022 by Patrick Magivoi Nyangweso the Respondent/Applicant in Misc. Appl. No. E32 of 2021 with authority from the Respondents/Applicants in Misc. Application No. 20, 21, 25, 26, 27, 28, 29, 30 and 31 of 2021(Consolidated).

Factual Background.

4. The Respondents/Applicants were Defendants and Interested Parties in Nakuru ELC case No. 157 of 2013 and were represented by the Applicant/Respondent.
5. ELC case No. 157 of 2013 was dismissed on 17th January, 2018 for non-attendance of the Plaintiffs.
6. On 6th July, 2021, the Applicant/Respondent filed Misc. Application No's 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of 2022.
7. Misc. Application No's 22, 23, 24 and 28 were marked as settled on 13th October, 2021 while Misc. Application No's 20, 21, 25, 26, 27, 29, 30, 31 and 32 were consolidated and Misc. Application E20 of 2021 set as the lead file.
8. The court delivered its ruling on 25th January, 2021 where it taxed the Advocate-Client Bill of costs dated 6th July, 2021 at Kshs. 399, 355/= and indicated that the ruling applied to file numbers 21, 25, 26, 27, 29, 30, 31 and 32.
9. Being dissatisfied with the said taxation, the Respondent/Applicant filed the Chamber Summons application dated 14th January, 2022.
10. The application came up on 16th February, 2022 and prayer 2 of the application was granted. It was a prayer seeking orders of stay of execution of certificate of costs in Advocate/Client bill of cost taxed by the taxing master on 25th January, 2022.
11. On 28th February, 2022 the Applicant/Respondent was directed to file its response within seven days and the court directed that the application be disposed of by way of written submissions.

Respondent/applicant's Contention

12. The Respondent/Applicant contends that the various Misc. Applications were consolidated by the consent of the parties on 11th August, 2021.
13. He contends further that their advocates filed written submissions in respect of the matters as consolidated and the court reserved its ruling for the 17th January, 2022.
14. It was his contention that the ruling was not read as earlier scheduled but the same was delivered on 25th January, 2022 without notice to their advocates.
15. He contended further that on 28th January, 2022, their advocates received a letter from the Applicant/Respondent informing them of the delivery of the ruling.
16. He also contended that on 31st January, 2022 their advocates wrote to the Taxing Officer requesting for the reasons in support of the taxation. He deposes that he is advised by his advocates on record which advise he believes to be true that his advocates have not received a copy of the ruling and the reasons thereof.



17. It is his contention that he is further informed by his advocates that on 10th February, 2022, his advocates requested to peruse the court file and read the ruling of the Taxing Officer and the reasoning thereof.
18. He contended that he was also informed by his advocate herein that the taxing master did not consider the submissions made on their behalf in the matter.
19. He further contends that his advocates informed him that the taxing master ordered that each of the Respondents/Applicants to pay separate instruction fees and getting up fees to the advocates notwithstanding that the instructions were joint and the defence and other pleadings filed by the advocates were filed jointly.
20. He also contends that there was a serious misdirection on points of law affecting the taxation as consolidated that require the intervention of the court.
21. He further contended that had the taxing master considered their submissions and the authorities cited on their behalf, she would have reached a different decision on taxation.
22. He also contends that the effect of the taxation unless varied by this court is to enrich their former advocate as against his former clients. That requiring each of the Applicant to pay to the advocate Kshs. 399,355/= is oppressive and unfair bearing in mind the nature of the dispute before the court.
23. He contends that the taxed costs unless set aside by this court and a lawful taxation ordered, will have the effect of sending away the Respondents/Applicants from the seat of justice.
24. He ends his deposition by praying that the court reviews the ruling by the taxing master and give appropriate directions on how to charge the instruction fees in the circumstances of this matter.

Applicant/Respondent's Contention.

25. The Applicant/Respondent contends that he has read and understood the application by the Respondents/Applicants dated 14th February, 2022 and the ruling that is subject of this application.
26. It is his contention that the court was clear that the instruction fees arises at the time of instructions and each party should pay its own instruction fees as they instructed the Advocates separately and not as a group.
27. He contends further that this finding is the right position in regard to taxation and that there is evidence that each party instructed the advocates separately.
28. He also contends that each party paid their own instruction fees as was documented by receipts issued to each party by the Advocates showing various payments by each party which payments were different.
29. It is his contention that each party had its own land which was of a different value and this can be clearly seen by the agreements attached to the Respondents/Applicants submissions in the consolidated files and urges the court to look at them and establish that each party had his/her piece of land of different value.
30. It is his further contention that it is on those grounds that he equally asks the court to look afresh at the bills and tax the same according to the value of each party's land as per the attached agreements.



31. It is also his contention that the Act says that if the value of the subject matter in a case can be ascertained, then the said value is used as the measure of the costs payable and the higher the value, the more the costs.
32. He contends that in regard to costs which can be shared by the parties in a suit the court was very clear in its ruling and rightly observed that in regard to attendance anywhere and any other work done once, the parties should share costs.
33. He also contends that that is the right position in law as regards multiple parties in a suit and that it is clear each party has his own distinguishable interest which was properly measurable.

Applicant's response to the replying affidavit.

34. In response to the Applicant/Respondent's Replying Affidavit, the Respondent/Applicant in Misc. Appl. No. E21 of 2021 filed a further affidavit sworn on 18th March, 2022 with the consent of his Co-Applicants.
35. He contended that it is not true that they gave separate instructions to their advocates as claimed in the replying affidavit sworn by the advocate on 9th March, 2022.
36. It was his contention that that they appointed the Applicant/Respondent on 5th September, 2013 after they had been served with summons to enter appearance and a Further Amended Plaintiff.
37. He ended his deposition by stating that the Amended Plaintiff is clear on what was in dispute before the court and that the taxing master while taxing the bill should have considered the dispute that was before the court.

Applicant/Respondent's Submissions.

38. The Applicant/Respondent submitted that the court was very clear that the instruction fees arises at the time of giving instructions and each party should pay its own instruction fees as they instructed the advocates separately and not as a group, adding that this is the correct legal position.
39. The rest of the Applicant/Respondent's submissions reiterate the contents of his replying affidavit.
40. The Respondent/Applicant did not file submissions.

Analysis and Determination.

41. After considering the application, Replying Affidavit, Further Affidavit and the submissions filed by the Applicant/Respondent, the only issue that arises for determination is whether the Respondent/Applicant has raised sufficient grounds to interfere with the Taxing Officer's ruling delivered on 25th January, 2022.
42. The Respondent/Applicant is challenging the decision of the taxing master delivered on 25th January, 2022 on the ground that each of the Respondents/Applicants was ordered to pay separate instruction fees and getting up fees to the advocates notwithstanding that the instructions were joint and further that the defence and other pleadings filed by the advocates were filed jointly.
43. The Applicant terms that the costs of Kshs. 399,355 taxed and required to be paid by each Applicant is exorbitant, unfair and oppressive, bearing in mind the nature of the dispute.



44. On the other hand, it is the contention of the Applicant/Respondent that instruction fees arises at the time of giving instructions and that each party should pay its own instruction fees as they had instructed the advocate separately.
45. The Taxing Officer in her ruling delivered on 25th January, 2022 stated that the instruction fees and getting up fees were to be paid by each client/Respondent as they had instructed the advocate while the rest of the items in the Bill of Costs would be shared among the Respondents.
46. The instruction fees were taxed at Kshs. 150,000/= while getting up fees was taxed at Kshs. 50,000/= . The entire bill of costs was taxed at kshs. 399,355/=. Therefore, according to the Taxing Officer’s ruling, each of the Respondents/Applicants was to pay Ksh.200,000/= as instruction and getting up fees while the balance of Kshs. 199,355/= was to be shared equally among them.
47. There are numerous decisions that offer guidance on circumstances under with a Judge determining a reference may interfere with the discretion of a Taxing Officer.
48. There are, also, numerous decisions offering guidance on the principles to be employed in charging instruction fees where there are numerous Plaintiffs and also the charging of fees for getting- up for trial.

Taxing Officer’s Discretion.

49. In *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal stated thus;

“On a 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.”

50. In *Republic vs Kenya Medical Supplies Authority & another; Medox Pharmaceuticals Limited (Interested Party); Ex parte Nairobi Enterprises Limited* [2019] eKLR, the Learned Judge cited with authority various decisions on the applicable principles as regards setting aside or varying a taxation of a bill of costs. It was status thus;

“The principle is that a Court cannot interfere with the Taxing Officer’s decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference.

These legal parameters were laid down in *First American Bank of Kenya Vs Shah and Others* [2002] 1 E.A. 64 at 69 by Ringera J. (as he then was) who delivered himself thus; “First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

These principles reiterate the position of the Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002) 1 EA 92, wherein the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or



where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.”

51. In *Premchand Raichand Ltd vs Quarry Services of East Africa Ltd* (1972) EA 162 the Court outlined the principles of taxation as follows:

- “(a)) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.
- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- (d) so far as practicable there should be consistency in the award made and
- (e) The Court will only interfere when the award of the Taxing Officer is so high or so low as to amount to an injustice to one party.”

52. Having addressed my mind to these principles is my considered view that the Respondent/Applicant is not challenging the instruction fees awarded but is only challenging the Taxing Officer’s decision requiring each of the Respondents/Applicants to pay instruction and getting up fees.

Instruction Fees.

53. In *Nyamogo & Nyamogo Advocate Vs Kenya Bus Service & another* [2006] eKLR while relying on Rule 62 (2) of the Advocates Remuneration Rules stated as follows:

“Where the same advocate is employed by 2 or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two or more such Plaintiffs or Defendants separately, the Taxing Officer shall consider in the taxation such advocate’s Bill of Costs either between party or party or between advocate/client whether such separate pleadings or other proceedings were necessary or proper and if he is of the opinion that any part of the costs occasioned thereby had been unnecessarily incurred the same shall be disallowed.”

That there were two defendants represented by the advocate herein as submitted before me is not enough to warrant a higher fee without there having been a duplication of pleadings or proceedings as is clearly required in the above cited rule. Counsel having not demonstrated that indeed that was the case I have no reason to interfere with the Taxing Officers’ discretion in regard to that point.

54. Further the court in the case of *Nguruman Limited Vs Kenya Civil Aviation Authority & 3 others* [2014] eKLR the Learned Judge affirmed the principle that an advocate is entitled to separate fees in respect to each party he represents in a suit notwithstanding that he acts for them in a single suit and agreed with the determination of the Taxing Officer as follows:

“This does not mean that the advocate has one instruction. Receival of instructions from a client is a separate exercise from drawing of pleading and preparation of documentation for filing. To me, there is nothing wrong in receiving two sets of different instructions from different clients in the same matter and executing those instructions vide single pleading.



That does not in any way make instructions one and does not disentitle the executing advocate from demanding payment for each of the separate instructions received...”

55. Rule 62(2) of the Advocates Remuneration Rules requires the Taxing Officer to disallow costs unnecessarily or improperly incurred when the same advocate is employed for two or more Defendants and separate pleadings are delivered. The Taxing Officer was well aware of this principle and it is for this reason that she ordered that other costs other than the instruction fees and getting up fees be shared among the Applicants.
56. On the question of separate instruction fees, in the case of Nguruman Ltd (Supra) the learned Judge upholds the observation made by the Taxing Officer which is as follows;

“To hold that these set of instruction ought to be considered as one on grounds that the same pleading was filed for both the 1st and 2nd Respondent is erroneous.

What if the 2nd Respondent had instructed the same advocate as the 1st Respondent but only at a later stage in the proceedings, only necessitating that advocate to amend the pleadings already filed as to include the 2nd Respondent? What if one of the two Respondents had withdrawn the instructions before the conclusion of the case?

This would have meant that the advocate would have been entitled to full instruction fees from the remaining Respondent, and to instruction fees on minimum scales, from the withdrawing client. There are separate instruction fees.

One can also consider a situation where the Petitioner herein had won the case. He would certainly have sought to claim for costs from the Respondents separately.

It is incorrect to hold that an advocate who belabours to execute instructions from two clients should be entitled to instruction fees as if he only did work for one client, merely because the two clients did not instruct separate law firms and because the pleading drawn was the same. (Emphasis is mine)

If the entire case of the two Respondents can be captured in a single set of pleadings, it would save the Court's time drawing and filing one set of pleading rather than two, and this ought not in any way disentitle the advocate representing them from claiming his instruction fees for each of the Respondents.” (Emphasis is mine)

57. In view of the foregoing I find no reason and the Applicant has not been able to convince this court to interfere with the award of the Taxing Officer in respect of instruction fees.

A. Getting-up Fees

58. Schedule 6 Paragraph (2)(i) of the Remuneration Order provides as follows:

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that—

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;



- (ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
- ii. in every case which is not heard the Taxing Officer must be satisfied that the case has been prepared for trial under this paragraph.”

- 59. My interpretation of paragraph 2 of Schedule Six is that a denial of liability is all that is required for getting-up fees to be payable. Therefore, the Taxing Officer was right in awarding getting-up fees.
- 60. Having found that the Respondent is entitled to instruction fee from each client from whom it received instruction, it follows that it is also entitled to getting-up fees from each client.
- 61. As I have stated in the preceding paragraphs the reference is in respect of entitlement of the Respondent to the instruction fees and getting up fees from each client and not so much whether the sums were properly taxed and awarded.
- 62. The duty of a Taxing Officer is an exercise of lawful discretion. I have no reason to question the exercise of discretion by the Taxing Officer in this matter or to find that the discretion conferred was not exercised judiciously. I also find that the Taxing Officer did not proceed on wrong principles.

Disposition.

- 63. The Respondent/Applicant has not established a basis upon which this court should interfere with the Taxing Officer’s award.
- 64. Consequently, it is my finding that the Respondent/Applicant’s Chamber Summons application dated 14th February, 2022 lacks merit and is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JULY, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Wangari for the Respondent/Applicant

Mr. Ogeto for the Applicant/ Respondent.

Court clerk; Miss. Jeniffer Chepkorir

