



Onyango & 2 others ((All suing as the administrators on behalf of the Estate of Patrick Otieno Okech(Deceased)) v Okech (Environment and Land Miscellaneous Application E002 of 2021) [2022] KEELC 12760 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2021
AY KOROSS, J
SEPTEMBER 29, 2022**

BETWEEN

ELIJAH P. ONYANGO 1ST APPLICANT

FREDRICK OMOLLO OCHANG' 2ND APPLICANT

ROSE ONYANGO 3RD APPLICANT

(ALL SUING AS THE ADMINISTRATORS ON BEHALF OF THE ESTATE OF PATRICK OTIENO OKECH(DECEASED))

AND

GEORGE OTIENO OKECH RESPONDENT

RULING

Applicant's case and submissions

1. Aggrieved by the decision of the taxing officer in Bondo ELC CASE No 21 of 2021, the applicants filed a reference dated 7/02/2022. It was made pursuant to the provisions of rule 11 of the [Advocates Remuneration Order](#) ("the order"). The reference is the subject of this ruling. In the chamber summons, they sought the following reliefs;
 - a. The ruling and decision of the honourable taxing officer delivered on 9/12/2021 be and is hereby set aside and vacated with respect to items 1,3 (a, f, h, i, j and k) and items 5(a, b and d) of the party and party bill of costs dated 1/11/2021;
 - b. The honourable court be pleased to render an assessment of costs payable with respect to items 1,3 (a-f, h, i, j and k) and items 5 (a, b and d) of the party and party bill of costs dated 1/11/2021; and
 - c. Costs of the application be borne by the respondent.



2. The reference is in respect of a ruling rendered by the taxing officer on 9/12/2021 on a party and party bill of costs dated 1/11/2021. The summons is supported by the affidavit of the 1st applicant Elijah P Onyango sworn on 7/02/2022 together with his supplementary affidavit. He made several depositions on the decision of the taxing officer; he failed to consider the suit was defended and assessed instruction fees at Kshs 50,000/- and failed to take judicial notice of the value of properties in Bondo. In addition, and contrary to the provisions of rule 5 of the order, note 2 of schedule 7 of the [Advocates Remuneration order](#) (2014) (“the Remuneration”) and note 1 schedule 7B of the Remuneration, the taxing office did not consider the importance and complexity of the matter.
3. As directed by the court, the applicants who were represented by counsel Mr Jaoko canvassed the summons by way of written submissions dated 9/05/2022. He asserted that in consonance with the provisions of schedule 7A (1)(c) of the Remuneration, the applicants were entitled to a minimum fee of Ksh 90,000/-. He contended that though the defendant did not file a defence and counterclaim, he filed a replying affidavit and grounds of opposition and this amounted to denial of liability. He asserted that the taxing officer failed to consider the provisions of rules 5 and 16 of the order. Counsel urged the court to reassess the bill and tax it as drawn.

Applicants’ case and submissions

4. Despite service, the respondent neither filed a response nor filed written submissions and essentially, the applicants’ summons is unopposed. However, this court is called to determine it on its own merits.

Analysis and determination

5. I have carefully considered the summons, the grounds thereof, supporting affidavit, supplementary affidavit and written submissions and in my considered opinion the only issue for determination is whether the summons is merited.
6. The first port of call in a taxation of a bill of costs is the taxing officer. It is trite law that a judge will not ordinarily interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR) or satisfy herself the fees awarded is manifestly excessive.
7. The applicants filed their party and party bill of costs within the provisions of schedule 7A of the Remuneration.
8. On instruction fees, the taxing officer considered the bill costs and ruled as follows on the items that are challenged by the applicants and this forms the substance of this reference;

“...counsel had indicated the value of the property to be Kshs 3,000,000/=. A perusal of the pleadings I note that the value is not disclosed and find the applicable rule of schedule 7 is rule 2 and tax the same at Kshs 50,000/- as the suit was undefended. Instruction to opposes (sic) application dated 4/4/2019, 1/7/2020, 16/4/2021...each is taxed at Kshs 3,000/= making a total of Ksh 9,000/-.”
9. This court has scrutinized the plaint and the value of the subject property was not disclosed. Despite the respondent entering appearance, he did not file a defence.
10. The provisions alluded to by counsel that is schedule 7A (1)(c) only applies in circumstances where the value of the subject matter is discernable from the pleadings, judgment or consent. Where the value of the subject matter is not discernable, the applicable provision is schedule 7A (2) in which the assessable amount is at a minimum of Kshs 20,000/- and a maximum Kshs 50,000/-. The guiding principles



that guided the taxing officer in assessing the fees on the higher scale Kshs 50,000/- was nature of the case, its complexity and urgency. The applicants were awarded the maximum capped sum. The taxing officer disclosed the schedule and clause he applied in his assessment and he gave his reasons. He was bound by the parties' pleadings, judgment or settlement and he could not peg his assessment on a value alluded to in the applicants' submissions as that would amount to considering extraneous factors. It is my considered view that he did not err.

11. As for instructions on applications, schedule 7A (5) applies. The amount is capped at Kshs 3,000/-. The taxing officer taxed each application at Kshs 3,000/- which was in accordance with the legal provision. I find the taxing officer did not err on principle and on this I rely on the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* (*Supra*) where the Court of Appeal upheld the decision of the taxing officer and stated thus;

“However, the value of the two properties was not stated. The learned judge found that the taxing officer erroneously still used the value of the subject matter of the suit supplied by the appellants' counsel in assessing the instruction fee...We are satisfied that the learned judge exercised his discretion on sound findings which were amply supported by the contents of the ruling of the taxing officer.

12. I further rely on the Court of Appeal decision of *Joreth Limited v Kigano & Associates* [2002] eKLR where the court stated thus;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”

13. Counsel submitted that the taxing officer failed to consider rule 5 of the order. This provision states that in exceptionally complex and important matters, an advocate is entitled to special additional fees. My humble understanding of this provision of law is that it is applicable in assessment of advocate- client costs and not party & party costs. This similarly applies to schedule 7B and therefore these provisions are inapplicable to the circumstances of this case. Rule 5 (1) of the order reads as follows;

“In business of exceptional importance or of unusual complexity an advocate shall be entitled to receive and shall be allowed as against his client a special fee in addition to the remuneration provided in this order”. Emphasis mine

14. On items 3 (a-f, h, i, j and k), the taxing officer pegged his assessment at Ksh 1,400/- per attendance, though the taxing officer did not disclose the provision of law he applied, the applicable provision is schedule 7(6) and the amount awardable is Kshs 1400/- per attendance. I see no reason to disturb the taxing officer's decision.
15. The taxing officer taxed off items 5 (a, b and d) on grounds that they were not provided for. The question that begs to be answered is, were they? These items were governed by schedule 7 (6) and had



already been taxed under item 2 and the taxing officer properly struck them off. This provision of law states as follows.

“On any application, notice of motion, chamber summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing”

16. In conclusion, I find and hold that the taxing officer properly assessed the bill of costs. I find no merit in this reference. The respondent did not participate in these proceedings and I will not award him costs.

17. Ultimately, I issue the following disposal orders:

a. The chamber summons dated 7/02/2022 be and is hereby dismissed with no orders as to costs.

b. File is marked as closed.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 29TH DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

29/9/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Jaoko for the applicants

N/A for the respondent

Court assistant: Ishmael Orwa

