



REPUBLIC OF KENYA



KENYA LAW
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**Nanak Hospital Management Services Limited v Munene Wambugu
& Kiplagat Advocates (Environment & Land Miscellaneous Case
112 of 2019) [2022] KEELC 15162 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 112 OF 2019**

JA MOGENI, J

NOVEMBER 23, 2022

BETWEEN

NANAK HOSPITAL MANAGEMENT SERVICES LIMITED APPLICANT

AND

MUNENE WAMBUGU & KIPLAGAT ADVOCATES RESPONDENT

RULING

1. Before court is a reference by way of chamber summons application dated April 4, 2022. The applicant in filing the reference expressed dissatisfaction with the taxing officer's decision dated March 5, 2022. The applicant is seeking the following:
 - a. Spent
 - b. The applicant is dissatisfied with the ruling of the taxing officer Hon IN Barasa on instruction fees and the entire bill. Therefore, the Senior Deputy Registrar be ordered to vacate the entire ruling dated March 5, 2020.
 - c. Any other orders that the court may deem fit.
2. In response to the application, the respondent who is the advocate/deGREE holder filed grounds of opposition on July 5, 2022.

Applicant's Case/Submissions

3. The applicant in their submission sought the court to issue the above prayers in their chamber summons application and their supporting affidavit.



4. The gist of the applicant submission is that the taxing master in arriving at the fee of Kshs 2,285,085 = misdirected herself and that the ruling is contrary to the law and the Evidence Act and that the decision of the taxing officer was an error.
5. It was the applicant's submission that items 1 and 2 of the bill of costs of Kesh 750,000 and Kesh 400,000 for the counter-claim is very unfair and in excess since the applicant was forced to engage another advocate due to the non-attendance of the respondent herein.
6. Further the applicant has invited the court to use it is discretion to reconsider the miscellaneous award amounting to Kesh 194, 692 which is awarded as a miscellaneous figure that includes damages.
7. The applicant contends that the taxing master's award is excessive and failed to take into consideration the fact that the respondent herein never appeared in court which forced the applicant to engage another advocate. Therefore, the instruction fees should not be paid to the respondent since the new advocate asked the applicant to pay the instruction fees to them. That the taxing officer failed to take into account the fact that the respondent never attended court to represent the applicant and is not entitled to the fees.
8. Further the taxing master failed to note that the advocate on record was paid the initial deposit and that the respondent here who was acting both as an advocate and the agent collected rent and then he would subtract legal fees and then return the balance to the applicant. He has attached a receipt and demand letter as evidence.
9. The advocate in opposing the application stated that the client has not demonstrated error of principle that was committed by the taxing master to warrant the setting aside of the ruling. Further the client is introducing new allegations that were not raised before the deputy registrar. He contends that the application is frivolous, vexatious and an abuse of the court process.
10. Further the advocate submitted that in any event, the reference application together with the supporting affidavit filed herein by the client/respondent does not disclose sufficient grounds as to why the court should interfere with the bill of costs as taxed by the taxing master; that the superior court is not allowed to interfere with the discretion vested upon the taxing master when taxing the advocate-client bill of costs and that the sole responsibility of the superior court is to consider if the taxing master did invoke the right principles when taxing bills of costs.
11. The reference was argued by way of written submissions.

Analysis and Determination

12. Both the applicant and the advocate in their respective written submissions have cited cases which explicate the principles governing and directing the assessment of costs in the application of the schedules under the Advocates (Remuneration) Order. The applicant cited the case of Ratemo Oira & Company Advocates vs Magereza Sacco Society Ltd [2019] eKLR. On the other hand, the advocate cited the cases of Otieno, Ragot & Company Advocates vs National Bank of Kenya Ltd [2020] eKLR, First American Bank of Kenya vs Shah and others [2002] 1 EA 64 and Joreth Ltd vs Kigano Associates [2002] 1 EA.
13. The firm of Munene, Wambugu & Kiplagat Advocates filed the applicant/advocate's party and party bill of costs dated July 16, 2019. In the said bill of costs, the applicant/advocate prayed to be awarded Kesh 1,353,000 for receiving instructions to file and claim mesne profits of Kesh 290,000 per month from September 15, 1995 to April 22, 2009 adding up to Kesh 46,400,000.
14. The taxing master heard the matter and delivered her ruling on March 5, 2020.



15. Although the applicant's advocate has submitted that the firm of Munene, Wambugu & Kiplagat Advocates is not entitled to the instruction fees because they never went to court to represent the applicant and that the applicant had to instruct the law firm of Nyawara & Company Advocates, the letter written to the advocate-client herein on September 30, 2013 testify to the fact that there was a case already filed. I also note that issue of representation of the applicant was not raised before the taxing master.
16. Indeed, the issue of whether the firm of Munene, Wambugu & Kiplagat Advocates Munene, Wambugu & Kiplagat Advocates was entitled to instruction fees was not addressed at all by the taxing master.
17. Circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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; (3) if the court considers that the decision of the taxing officer discloses errors of principle, the normal practise 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya vs Shah and others* [2002] 1 EA 64.
18. It has also been further held that the court should interfere with the decision of the taxing officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the taxing officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated



but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

19. In the case of *Joreth Limited vs Kigano & Associates* Civil Appeal No 66 of 1999 [2002] 1 EA 92 the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 the 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. It is not really in the province of a judge to re-tax the bill. If the judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The judge ought not to interfere with the assessment of costs by the taxing officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The taxing officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to tax bills of costs.
20. There is no evidence presented by the applicant showing any excess amounts or errors made by the taxing officer which would persuade me to want to set aside the decision of the taxing master dated March 5, 2020. The applicant only states that he is dissatisfied with the instruction fees and the entire bill. I also note that the taxing officer explained each item that she taxed and also taxed off to remove any ambiguity in her award. The ward is self – explanatory.
21. The Court of Appeal in *Butt & another vs Sifuna t/a Sifuna & Company Advocates* Civil Appeal No 45 of 2005 [2009] KLR 427, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees. However, the mere fact that this court or any other court being in the position would have awarded a slightly higher or lower figure does not necessarily justify interference with the taxing master’s undoubted exercise of discretion.
22. Given the foregoing, I have considered the application and the objections raised and I am not persuaded that this court on a reference should interfere with taxing master’s decision. I have no reason to believe that the taxing master erred on any principle nor was her award excessive. Therefore, since I am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference, I find no merit in this reference.
23. For those reasons, I dismiss the application dated April 4, 2022 with costs to the advocate/respondent.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI ON THIS 23RD DAY OF NOVEMBER 2022

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MOGENI J

JUDGE

In the virtual presence of

Sanjay Bhansali for the Applicant

Mr Kiplangat for the Advocate/Applicant

Caroline Sagina: Court Assistant



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MOGENI J
JUDGE

