



**Sichangi & 3 others v Wangusi (Miscellaneous Application
E005 of 2024) [2024] KEELC 6819 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E005 OF 2024
EC CHERONO, J
OCTOBER 17, 2024**

BETWEEN

**ANDREW WAFULA SICHANGI 1ST APPLICANT
PETER WASIKE SICHANGI 2ND APPLICANT
EDWARD SIMIYU WASIKE 3RD APPLICANT
CHRISTOPHER SICHANGI 4TH APPLICANT**

AND

NEWTON WEKESA WANGUSI RESPONDENT

RULING

1. By a Chamber Summons Application brought under Order 11(2) of the Advocates Remuneration order dated 18th of April 2024, the Applicants seek the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to set aside the taxing officers ruling delivered on the 20th day of March, 2024 as directed by her letter dated the 12th day of April, 2024 relating to item 1 of the bill of costs dated 6th day of October, 2023.
 - d. That this honourable court do retax the bill of costs as it relates to item .1 i.e. the instruction fees and fees for getting up for trial.
 - e. That in the alternative this honourable Court be pleased to order that the 1st Defendants bill of costs dated 6th day of October 2023 with respect to item 1 be taxed afresh by another Taxing Master.



- f. That costs of this application be provided for.
2. The Application is premised on grounds set out on the face of the Application Supported by the affidavit of Christopher Sichangi, the Applicant herein sworn on 18th April 2024. In his supporting affidavit, the Applicant contends that the Respondents bill of costs dated 16th October 2023, was taxed on 20th March, 2024. He stated that the taxed instruction fees and fees for getting up for trial were excessive since the value of the subject land is estimated at Kshs.200,000/=.
 3. The Application is opposed through a Replying Affidavit sworn by Newton Wekesa Wangusio on 25th April 2024. The Respondents contend that the Taxing Master exercised her discretion properly in arriving at the said fees wherein she gave the reasons for arriving at the impugned figures. It was argued that the value of the subject matter was never disclosed and that the Applicant herein did not raise any objection or tender any evidence to the Party and Party bill of costs despite being served and notified of the same. The Respondent argued that the Applicant in this reference was introducing new evidence without leave of the court thus the same was an afterthought, lacking in merit, incompetent and therefore ought to be dismissed with costs.
 4. When the instant application came up for directions, parties agreed to have the same canvassed by way of written submissions. The Applicant through the Firm of Were & Company Advocates filed his written submissions dated 10th June, 2024 and 2nd July, 2024. It was submitted by the applicant that the Taxing Master in taxing off the bill of costs dated 20th March, 2024 erroneously assessed the instruction fees at Kshs. 250,000/= and the getting up fees at Kshs. 83,333/= despite the value of the subject matter i.e. land parcel no. Bokoli/Chwele/259 being Kshs.200,000/= as recognized in the court judgment. It was contended that the instruction fees ought to have been taxed under the provisions of Schedule 6(1)(b) of the Advocates Remuneration Amendment Order 2014 at Kshs. 75,000/= and the getting up fees at Kshs. 25,000/=.
 5. The Applicant agreed that the Taxing Master is clothed with wide discretion but contended that the same is to be exercised judiciously. He argued that the Taxing Master ought to have been guided by the fee prescribed under schedule 6(1)(b) of the Advocates Remuneration Amendment Order 2014 having noted that the suit did not raise any novel or complex issues. It was argued that the Taxing Master erred in finding that the suit was protracted thus arrived at an erroneous conclusion on the applicable instruction fees. Reliance was placed in the case of Akhtar Shahid Butt & Another vs. David Kinusu Sifuna t/a SIFUNA & Company Advocates (2009) eKLR. In his supplementary submissions the Applicant argued that the reference herein had been filed within time.
 6. The Respondent filed his submissions dated 1st July, 2024 through the firm of Hammerton Maloba & Co Advocates. He framed three issues and submitted on the same. On the first issue, it was argued that the Applicant filed these reference 33 days after the Taxing Master's ruling while the law in paragraph 11 of the Advocates (Remuneration) Order allows a period of 14 days and therefore the same was time barred. Reliance was placed in the case of Nyakundi & Company Advocates vs. Kenyatta National Hospital Board (2005) eKLR National Oil Corporation Ltd vs. Real Energy & Another (2016) eKLR and Twiga Motor Limited vs. Hon. Dalmis Otieno Anyango (2015) eKLR. The Respondent argued that it took the Applicants 19 days to seek clarifications on the Taxing Masters reasoning and as such they were not proactive on the matter.
 7. On the second issue, it was submitted that despite being notified of the bill of costs, the Applicants failed to participate by tendering their objection to the same and as such, they cannot be allowed to raise an objection at this point by introducing fresh evidence at the reference stage. They cited the



case of Showcase Property Limited vs. Mugambi Company Advocates (2020) eKLR, Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited 92020)eKLR.

8. On the third and final issue, the Respondent submitted that the Taxing Master exercised her jurisdiction properly in ascertaining the subject matter of the suit. Reliance was placed in the case of First American Bank of Kenya vs. Shah & Others (2002)1 EA, Karen & Associates Advocates vs. Caroline Wangari Nioroge (2019) eKLR in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet & Ohaga Advocates vs. Adopt Light Ltd. HC Misc 729 Of 2006*, Joreth Limited vs. Kigano & Associates (2002) 1 EA 92 among others. The Respondents argued that the Applicants have failed to demonstrate sufficient grounds to warrant this court interfere with the Ruling of the Taxing Master and the application therefore ought to be dismissed.

Legal Analysis and Decision

9. I have considered the pleadings, the rival written submissions, the cited authorities and the relevant provisions of law and find the following issues commend for determination
 - a. Whether the application is time barred.
 - b. Whether the application is merited.
 - c. Who should bear the cost of this application.
10. From the pleadings, the Applicants are challenging the taxation of the bill of costs on account of the instruction and getting up fees for trial. Before delving into this, it is important to highlight the principles for varying or setting aside a Taxing Master's decision. In First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd V Kigano and Associates, (2002) 1 EA 92, it was held that a Taxing Master's judicial discretion can only be interfered with on account of an error of principle, or where the fee awarded is manifestly excessive based on an error of principle and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.
11. The Court of Appeal in Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004, [2005] eKLR held that: "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.
12. As to what constitutes an error of principle, this Court aligns with the finding in Republic V Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna, (2006) eKLR. Ojwang, J (as he then was) expressed himself as follows:

"Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. ...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved..."
13. I now proceed to consider the issues raised by the applicant in this application.
14. The Applicants contends that the Taxing Master in reaching her decision on the award for instruction and getting up fees erred in principle by not considering the alleged available evidence with regards to the subject matter of the suit therefore arrived at an erroneous and excessive figure in the circumstances.



It was their contention that in its judgment, the court acknowledged that the value of the subject matter was Kshs.200,000/= and further the sale agreement presented as evidence equally indicated that the subject matter of the suit was Kshs.200,000/=.

15. The Respondent on the other hand argued that the Applicants' application was filed out of time and that the Applicants' were barred from introducing new issues at this stage, particularly since they chose not to participate in the taxation proceedings. The Respondents opined that the Taxing Master properly directed herself in making her decision.
16. Regarding the first issue, the Applicants contend that in delivering the ruling dated 20/3/2024, the Taxing Master failed to provide the rationale behind the decision. The Applicant claimed to have written a letter on 12/4/2024 requesting clarification from the court but received only a response indicating that the reasoning was contained within the ruling. The date of the letter from the Taxing Master was not disclosed, and none of the mentioned documents have been submitted to the court. However, I note that the Applicants filed an objection to the taxation decision on 25/3/2024, to which the Taxing Master responded with directions issued on 26/3/2024.
17. The Applicants are heard to be faulting the Taxing Master for the late filing of the current application. I note that the Taxing Master issued the directions on 26/3/2024 but the same were posted on the Court Tracking System Platform on 12/4/2023. This is when the Applicant claims to have seen them. It should be noted that the Applicant was expected to be proactive in following up the directions of the court. In the interest of justice, I shall proceed to consider the application on merit.
18. The second issue for determination is Whether the application is merited. Judicial pronouncements including the Court of Appeal decision in Joreth Limited V Kigano & Associates, [2002] eKLR and Peter Muthoka & Another V Ochieng & 3 others, [2019] eKLR, cement the fact that instruction fees are principally based on the value of the subject matter. The value of the subject matter should be ascertained from the pleadings, judgment or any settlement, depending on the stage at which the fees are being taxed. I have looked at paragraph 5 and 6 of the ruling by the Taxing Master where she addressed herself to the proper way to determine the value of the subject matter for purposes of taxation.
19. The Learned Taxing Master observed that the value of the subject matter for purposes of taxation could not be ascertained from the record. This court notes that the Applicant filed this application as a miscellaneous application separate from the primary suit and as such, this court is unable to consider the entire record. The Applicant has attached a sale agreement dated 16/3/2014 which shows that the consideration for land parcel no. Bokoli/Chwele/259 was Kshs.200,000/=. They have also attached an excerpt of the trial Court's judgment in the primary suit which contrary to their assertion that the Court made a finding that the subject matter was valued at Kshs.200,000/= the court simply took note of the evidence placed before it. The Respondent attached an amended plaint dated 29/4/2022. As can be seen from the said plaint, the subject matter is land parcel no. Bokoli/Chwele/3320 and not parcel no. Bokoli/Chwele/259. There is no mention of the value of the said subject matter i.e. land parcel no. Bokoli/Chwele/3320. There is therefore no evidence that the Taxing Master exercised her discretion capriciously or whimsically.
20. I see no merit in the application as the Taxing Master considered all the issues from all angles. The request for a re-taxation is not tenable in the circumstances.
21. In the result, it is my finding that the application dated 31.8.2024 lacks merit and the same is hereby dismissed with costs.
22. Orders accordingly.



DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Maloba for Respondent.
2. Mr. Were for Applicant.
3. Bett C/A.

