



REPUBLIC OF KENYA



Otiato v Odondo Awino & Co. Advocates (Miscellaneous Civil Case E019 of 2024) [2025] KEHC 1978 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL CASE E019 OF 2024
DK KEMEL, J
FEBRUARY 13, 2025**

BETWEEN

FRANCIS OTIATO APPLICANT

AND

ODONDO AWINO & CO. ADVOCATES RESPONDENT

(Being an application against the decision/Ruling/Order of Hon. L. Simiyu (SPM) at Siaya in High Court Misc. Application No. E020 of 2021, dated 15th November, 2023)

RULING

1. The Applicant herein filed the present application(reference) dated 26/8/2024 seeking the following reliefs:
 - i. Spent.
 - ii. That leave be granted to the firm of Otieno Okanda & Company Advocates to come on record in place of Felix Oketch & Company Advocates.
 - iii. Spent.
 - iv. Spent.
 - v. That the Honourable court be pleased to set aside the ruling of the Taxing matter delivered by Hon. L. Simiyu, Deputy Registrar on 15/11/2021.
 - vi. That this Honourable court be pleased to direct the Respondent's Bill of Costs be taxed afresh.
2. The application is supported by the grounds set out on the face thereof and by the supporting affidavit of the Applicant on even date.



3. The Applicant's gravamen is inter alia; that the Respondent received instructions to act on behalf of the Applicant in Bondo PMCC No. E014 of 2021; that the Respondent thereafter filed Advocate/Client Bill of Costs in Siaya High Court Misc. Application No. E020 of 2023; that the Applicant opposed the said Bill of Costs as was drawn and that parties therein canvassed the issue on the contested items by way of written submissions; that the Taxing Master delivered a ruling on the said Bill on 15/11/2023 taxing the bill at Kshs 133,003; that he was aggrieved by the said ruling and has filed the present reference; that the mode of service of the said warrants of attachment together with the proclamation was improper; that it is in the interest of justice that the orders be granted; that the bill as taxed is excessive and impedes access to justice.
4. That upon perusal of the record there is no response filed by the Respondent.
5. The application was canvassed by way of written submissions.
6. Learned counsel for the Applicant raised two issues for determination namely: whether the failure to issue an objection notice is fatal and whether the application has merit. As regards the issue of non-issuance of the notice, it is submitted that the failure to comply with Rule 11(1) of the Advocates Remuneration Order does not render the application incompetent even though the notice is intended to inform the taxing master of the items in respect of which the taxing master should give reasons for the decision already made. (*AM Kimani & Co. Ltd (2016) eKLR*). Learned counsel sought reliance in the case of *Evans M. Gakuu & 66 Others Vs National Bank of Kenya Ltd & 8 Others [2009] eKLR* where it was held that the failure to issue Notice is not fatal since the Applicant believed the reasons by the taxing master are contained in the ruling already made and hence there was no need to seek for reasons.
7. It was further submitted that the Respondent's taxed bill was excessive and that it did not consider the fact that the Respondent duly represented the Applicant half way before another counsel took over. Reliance was placed in the case of *Ratemo Oira & Co. Ltd [2019] eKLR* where the Court of Appeal held that an Advocate will be entitled to payment of reasonable fee which is commensurate with the work done.
8. The record indicates that no submissions were filed by the Respondent despite the assertions of the Respondent's counsel that they filed submissions on 17th December, 2024. There is none on the record.
9. I have considered the Applicant's application as well as the submissions filed by the Applicant. It is not in dispute that the Respondent presented his Bill of Costs which was duly responded to by the Applicant and that the parties finally canvassed the said bill culminating in the ruling by the Taxing Master dated 15th November, 2023. It is also not in dispute that the Respondent has since obtained a Certificate of Costs and has commenced execution for those costs leading to the present application. It is also not in dispute that the Applicant herein did not issue an objection notice to the taxing master to furnish reasons for the ruling. The issues for determination are firstly: whether leave should be granted to the firm of Otieno Okanda & Co. Advocates to come on record in place of Felix Oketch & Co. Advocates, secondly, whether the failure by the applicant to issue the requisite objection notice to the taxing master was fatal and thirdly, whether the application has merit.
10. As regards the first issue, it is noted that the Applicant has since appointed a new counsel namely Otieno Okanda & Co. Advocates who have filed the present application on behalf of the Applicant. Since these matters are post judgment activities, the provisions of Order 9 Rule 9 of the Civil Procedure Rules must be complied with. The Applicant's former advocates require to be consulted before the new advocate is appointed in which event the Applicant has the option to secure a consent from the former advocates or seek leave of the court for the same. A litigant is entitled to appoint an advocate of



his or her choice. As the Applicant herein has opted to appoint a new counsel, he has every right to do so. Hence, the leave sought ought to be granted. The Respondent will not suffer any prejudice if the same is allowed. I find merit in the prayer No. (ii).

11. As regards the second issue, it is noted that upon the delivery of the ruling that the taxing master dated 15/11/2023, the Applicant did not issue the requisite objection notice pursuant to Rule 11(1) of the Advocates Remuneration Order. In deed the purpose for issuance of such a notice is meant to inform the taxing officer of the items in respect to which the taxing officer should give reasons for the decision he had already made. See the case of *AM Kimani & Co. Advocates v. Trident Insurance Co. Limited* [2016] eKLR. It is my considered view that the provisions of Rule 11 (1) of the Advocates Remuneration Order is not coached in mandatory terms. Hence, an Applicant who believes that he taxing master's decision is self-sufficient in terms of the reasons provided thereof, there is no need for them to seek for the reasons. A perusal of the ruling by the taxing master dated 15/11/2023 clearly dealt with the issue of reasons when she stated "All reasons are contained in the ruling. No additional reasons are available." It is therefore clear that the ruling by the taxing master did not elicit any need by an aggrieved party to seek for reasons behind the ruling. That being the position, I find the failure by the Applicant to issue the objection notice is not fatal to the application since the reasons were fully contained in the ruling of the taxing master.
12. As regards the second issue, it is noted that the Applicant has claimed that the costs arrived at by the taxing master are punitive and excessive. He also claims that the Respondent should not be allowed to be awarded unreasonably high and unjustified fees considering the fact that he only represented the Applicant half way in the case before the matter was taken up by another counsel. It would appear to me that the Applicant is aggrieved by the fact that the taxing officer has taxed the Respondent's Bill of Cost as if the Respondent had represented or acted for the Applicant to the conclusion of the matter. Further, the Applicant seems to be of the view that the Respondent who acted for him half way should only claim half of the costs under the Advocates Remuneration Order so that the other advocates who has taken over the matter can receive the other half of the costs. Basically, the Applicant takes exception by the ruling of the taxing master in awarding the Respondent full costs yet the Applicant has to contend with the fact that he must also sit with the incoming advocate get his fees at the conclusion of the matter. The Applicant therefore, seems to say that he has suffered double trouble. Whereas, the Applicant's concerns are genuine, the provision of the Advocates Remuneration Order provide the fees to be paid by the clients. In fact, the said remuneration order, has provided schedules/tables of the amounts to be charged by advocates upon their clients depending on the nature of the case. The said remuneration order does not provide that an advocate who represents a client half way must be paid less than the amount provided for in the schedule. These schedules does not contemplate that an advocate would cease to act mid-way in a case. The assumption is that an advocate once appointed is expected/deemed to represent the client upto the conclusion of the case and hence the amounts in the schedules become available to the advocates upon the presentation of a fee note or Bill of Costs to the Client. In the present scenario, the Applicant though aggrieved has no choice but to pay the Respondent his legal fees. Even though this is the position, the amounts should not be too high to the point of depriving many persons from having access to the courts and leave it for the rich. In the case of *Ratemo Oira & Co. Advocates vs. Magereza Sacco Society Ltd* [2019] eKLR, the Court of Appeal held as follows:

"Indeed, it is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client... However, it must be noted that an Advocate will be entitled to payment of a reasonable fee which is commensurate with the work done. The business of taxation of costs must ensure a delicate balance between the guiding principles aptly pronounced by the Premchand case which include the "court owes a duty to the general



public to see that costs are not allowed to rise to such a level as to deprive of access of courts but the worthy” and “general level of the remuneration must be such as to attract worthy recruits to the profession.”

13. The Applicant has claimed that all the amounts awarded by the taxing master are excessive. However, he has not pointed out which of the items the taxing master has awarded excessive amounts. Since the Applicant has not targeted or indicated any specific item, then it is the duty of this court to peruse the said items. I have perused all the 21 items and find that the same have been appropriately taxed by the taxing officer and that they are all according to scale. That being the position, I see no reason to interfere with the discretion of the taxing officer. The amounts arrived by the taxing officer are reasonable and that there is no evidence that the taxing officer considered irrelevant factors in arriving at the amounts.
14. In the result, it is my finding that the Applicant’s application dated 26th August, 2024 succeeds only in terms of prayer No. (ii) thereof. The rest of the prayers stand dismissed with costs to the Respondent.

DATED AND DELIVERED AT SIAYA THIS 13TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Okanda..... for Applicant

Odingo.....for Respondent

Ogendo..... Court Assistant

