



REPUBLIC OF KENYA



**Mereka & Co Advocates v Kiereini & another (Miscellaneous Application E113 of 2022) [2024] KEHC 194 (KLR) (Family) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E113 OF 2022  
PM NYAUNDI, J  
JANUARY 19, 2024**

**BETWEEN**

**MEREKA & CO ADVOCATES ..... APPLICANT**

**AND**

**DOUGLAS KIEREINI ..... 1<sup>ST</sup> RESPONDENT**

**NJERI KIEREINI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is the Chamber Summons dated 9<sup>th</sup> February 2023 seeking the following orders;
  1. That the Ruling of the Taxing master delivered on 16<sup>th</sup> December 2022 in so far as it relates to the entire Advocates/Client Bill of costs dated 3<sup>rd</sup> June 2022 be set aside.
  2. That the court be pleased to refer the matter back to a different Taxing Master for re-taxation of the Bill of Costs.
  3. That the costs of this application be borne by the Respondents.
2. The Summons was premised upon Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* Paragraph 11 (2) of the *Advocates Remuneration Order* and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by David Mukii Mereka, an advocate practicing in the firm of the Applicant and a further affidavit sworn on 24<sup>th</sup> July 2023.
3. The Applicant challenged the impugned ruling on the following grounds
  1. That the ruling dated 16<sup>th</sup> December 2022 refers to an Advocate/ Client Bill of Cost dated 6<sup>th</sup> March 2021 while the Advocate/ Client Bill of Costs herein is dated 3<sup>rd</sup> June 2022



2. That the taxing master misapprehended the scope of the instructions and specifically by concluding that the Applicant offered an advisory opinion. In so doing the Taxing master applied the wrong scale and therefore the wrong principle in assessing the fees.
  3. That in arriving at the ruling the Taxing Master failed to consider the value of the estate and the volume of the work undertaken by the Applicant
  4. That the taxing master erred in law and in principle in summarily dismissing the engagement of Senior Counsel C. W. Gatonye
4. The Respondents opposed the reference through the following Grounds of Opposition dated 14<sup>th</sup> July 2023;
1. The Applicant has not established any error of principle committed by the taxing officer.
  2. The exercise of discretion by the taxing master is explained in the ruling specifically and cogently and it ought not to be substituted.
  3. The decision of the taxing master cannot be interfered with merely because the applicant thinks that the amount taxed is low.
5. The Summons was disposed of by way of written submissions. The Applicant filed written submissions dated 8<sup>th</sup> August 2023 whilst the Respondents submissions are dated 23<sup>rd</sup> August 2023.

### Summary

6. The Respondent's consulted the Applicant's firm on the running a trust in the will of the late Jeremiah Gitau Kiereni. The applicant thereafter filed an Advocate/Client Bill of Costs dated 3<sup>rd</sup> June 2023. The Taxing master Hon. Catherine Ng'ang'a delivered a ruling on 16<sup>th</sup> December 2022 in which she taxed the Bill at Kshs.488,394.00. The applicant subsequently filed a Reference by way of this Chamber Summons seeking that the High Court set aside the decision of the Taxing Officer and that the Bill of costs be remitted back to a different Taxing Officer for taxation.

### Analysis And Determination

7. I have considered the ruling on the bill of costs delivered on 16<sup>th</sup> December 2022, the application, the supporting affidavit, the response, submissions before me and the authorities cited by both sides.
8. I discern the following as the issues for determination
  1. Whether the reference by the Taxing Master to a Bill of costs dated 6<sup>th</sup> March 2021 in ruling dated 16<sup>th</sup> December 2022 renders the ruling incurably defective and for setting aside
  2. Whether the taxing master erred in law and in principle in the assessment of instruction fees
  3. Whether the taxing master erred in law and in principle in dismissing the engagement of Senior Counsel C.W. Gatonye
9. The principles of setting aside the decisions of Taxing Master were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92. These include;
  - a. That there was an error of principle.



- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy.
  - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred.
  - d. That so far as practicable there should be consistency in the award.
10. The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low; and the court can interfere if there is proof that the taxing officer followed a wrong principle in reaching his decision.
  11. I am alive to the fact that the discretion of the Taxing Officer should not be interfered with unless it appears that the Taxing Officer is wrong in principle or has not exercised his/her discretion judicially and has exercised it improperly (see *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR).
  12. In the case of *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, Odunga J emphasized that the circumstances under which a Judge of the High Court interferes with the taxing officer's exercise 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 manifested 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 Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;
      - 1) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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."
  13. In light of the foregoing I observe that in the impugned ruling it is at paragraph 7 that the taxing master made reference to a bill of costs dated 6th March 2021. In the preceding paragraphs there is no doubt that she was making reference to the bill of costs dated 3<sup>rd</sup> June 2022 and particularly in paragraph 6 where she set out each of the items in the Bill and her ruling on each.
  14. It is evident that the Applicant was in no doubt that the Bill being taxed was their bill dated 3<sup>rd</sup> June 2022. There were in no way prejudiced by this error and I agree with the Respondents that the error does not go to the merits.
  15. On the 2<sup>nd</sup> issue, the Applicants submits that the taxing master erred in law and in principle in misapprehending the scope of the instructions. It is evident that the Respondent's approached the



Applicants to intervene and resolve a dispute between them and the Trustees on the management of the Trust.

16. This involved corresponding with the trustees and their counsel. It is clearly a matter that falls under Schedule 5 of the remuneration order. The Applicant does not dispute this. The taxing matter in referring to rule 18(f) of the Remuneration Order found that Schedule 5 of the Advocates Remuneration Order was the Applicable schedule. This is evident from paragraph 6.
17. The Applicant submits that the Taxing master should have considered the value of the estate. I have considered the Bill of costs; the value of the estate is not provided for. It would be speculative of the taxing master to place a value on the estate. In the circumstances I am unable to find that the taxing master erred in this regard. I have also considered the narration of the scope of the assignment and find that the taxing master correctly assessed the scope of the instructions. For this reason and the reasons stated below I will not disturb the decision of the taxing master,
18. The Applicant states that the Taxing Officer did not apply her discretion judiciously. In Joreth Limited – vs- Kigano & Associates [2002] E.A, the court stated as follows:-

“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, 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 assets such instruction fee as he considers just, taking in to 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. That is what CK Njai Esq did when he said:

“As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the Taxing Officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.” [own emphasis]

19. In the Ruling dated 16<sup>th</sup> December 2022, the Hon. Taxing Master justified the sum awarded as Instruction Fees as follows: -

“I have considered the amount of work done by the Applicants, the meetings held, the research conducted and consultations. I note that the Applicants firm only offered consultative services to the Respondents. they never petitioned nor participated in the confirmation. I will award Kshs. 400,000 for the services offered by the Applicant firm to the Respondents.”

20. The Taxing Master justified and explained her award for instruction fees. I am satisfied that the discretion was judiciously exercised.
21. There is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle, or the sums awarded are either manifestly high or low as to lead to an injustice. In James v Nyeri Electricity [1961] 492, it was stated at pages 492 – 293 as follows: -

“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim (4) 1956, 23 EA.C.A.313, in which an instructions fees of the 9,000/= was considered



so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles.” [own emphasis]

22. On the dismissal of fee payable to Senior Counsel C. W. Gatonye, the taxing master stated that there was no evidence of instructions and agreement of retainer by the Respondent to the Senior Counsel. The participation of Mr. Gatonye in the matter is not denied. I have had opportunity to see screenshot of WhatsApp communication by the Respondents on this issue in the group ‘Guka’s Estate’
23. The Respondents have not denied the message of 9<sup>th</sup> May 2022 and 11<sup>th</sup> May 2022. For this reason, I find that the taxing master erred in dismissing this claim when it had been negotiated and agreed upon.
24. For this reason, I would partially allow the reference by varying the ruling to include the sum of Kshs 950,000 as the fees payable to C W Gatonye.
25. Each party will bear their own costs

It is so ordered

**SIGNED, DATED and DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

**P. NYAUNDI**

**JUDGE**

