



Makhecha & Gitonga Advocates v Standard Group Limited (Civil Miscellaneous Application E130 of 2023) [2024] KEHC 2123 (KLR) (Civ) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E130 OF 2023
AN ONGERI, J
MARCH 1, 2024**

BETWEEN

MAKHECHA & GITONGA ADVOCATES APPLICANT

AND

THE STANDARD GROUP LIMITED RESPONDENT

RULING

1. The advocate filed a reference dated 16/6/2023 under paragraph 11 (1) of the Advocate (Regulations) Remuneration Order seeking for orders that this court varies or sets aside the decision of the taxing master dated 5/6/2023.
2. The application is based on the following grounds and supported by the affidavit sworn on 16/6/2023.
 - i. The advocate-client bill of cost was taxed at ksh.68,678/= on 5th June 2023.
 - ii. The taxing master erred in principles on the instruction fees
 - a. Failing to apply the correct principles on the instruction fees
 - b. Failing to consider the submissions of the applicant.
 - iii. The taxing master failed to appreciate that the legal fees should not be unreasonable or so low as to deter persons from adequate representation.
 - iv. It is in the interest of justice that the reference to be allowed.

That I am an advocate of the High Court of Kenya practicing as such in the firm of M/s Makecha & Gitonga Advocates. I am conversant with the facts of the matter having



represented the respondent/client as an advocate in HCCC No. 4014 of 2012, written the correspondence and drawn the fee note leading up to taxation.

That the plaintiff filed their plaint dated 18th July 2012 seeking the following prayers;

General damages for libel

Damages for footing of aggravated or exemplary damages

Costs of this suit

Interests on costs at court rates until payment in full.

That we received instructions on 6th August 2012 to represent the respondent pursuant to which we filed the relevant documents.

That the respondent withdrew instructions on 9th August 2019.

That the bill of cost is dated 2nd March 2023 in the amount of ksh.359,562/-.

That on 5th June 2023 the taxing master erred in law, principle and facts in taxing the bill of costs dated 2nd March 2023.

That this honourable court be pleased to vary or set aside the decision of the taxing master.

That what is stated herein is true and known to me of my own knowledge information and belief.

3. The applicant filed a similar application in Misc. Civil Application no. E131 of 2023 dated 29/6/2023 based on the same grounds and similar supporting affidavit.
4. A client filed grounds of opposition (GOO) in both application as follows;
 - i. Each item that the respondent was in dispute with, was well canvassed in the respondent's submissions in response to the applicant's Advocate-Client Bill of Cost.
 - ii. That the taxing master did not err in law by holding that it is not possible to ascertain the value of the subject matter, for purposes of determining instruction fees. This is because the suit was a defamation matter and the damages had not been quantified other than the general and exemplary damages pleaded by the plaintiff, which was to be determined by the Court at the conclusion of the suit.
 - iii. There was nothing so exceptional on the face of the pleadings that would make the applicant claim that the taxing master acted on the wrong principles in arriving at the KES. 389,359.50. The amount awarded to the applicant is fair and sufficient.
 - iv. It is now settled law as was held in *Joreth Ltd Vs Kigano and Associates* (2002) 1 EA 88, that where the value of the subject matter of a suit could not be determined from the pleadings, judgement or settlement, a taxing master was entitled to use his discretion fee in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial Judge and all other relevant circumstances.
 - v. Without prejudice to the above, the decision of the Taxing Master was sound in principle and should not be disturbed. In any event, the applicant has not demonstrated any error on the part of the Taxing Officer.



- vi. The Application is therefore vexatious, frivolous and an abuse of the Court process which should be dismissed with costs.
5. The parties filed written submissions as follows; the advocate submitted that in a defamation suit the value of the subject matter is the quantum of damages awarded or awardable if the plaintiff is successful. The Plaintiff in CMCC No. 4014 of 2012 was accused of being an arsonist contrary to section 332 of the Penal Code (Cap 63) where the punishment is life imprisonment. The advocate argued that that is closer to the minimum awarded for offences punishable by death especially now that the death sentence is not applied.
 6. The advocate submitted that if the plaintiff is successful in the case considering the inflation rate currently, he would be awarded a sum in excess of Kshs. 15,000,000 which would form the basis of instruction fees. The advocate submitted that all the items in the Bill of Cost dated 2/3/2023 are drawn to scale and the bill of costs should therefore be taxed as drawn.
 7. The client submitted that the taxing officer's decision was sound in principle. The primary suit is a claim for defamation that has not been concluded. Therefore, the value of the subject matter could not be ascertained from the pleadings. The taxing officer applied the relevant scale being the part dealing with "other matters" under paragraph 1 of part A of Schedule 6 of the ARO before determining the instruction fees for the matter.
 8. The client argued that argument raised by the Applicant has already been subject to this Court's determination in Makhecha and Gitonga Advocates v Standard Group PLC [2022] eKLR (Misc. Civil Application No. E065 of 2021) which approved that the value of the subject matter could not be ascertained and the taxing officer applied correct principle.
 9. The sole issue for determination in the two applications is whether the advocate was entitled to full instruction fees.
 10. I find that the advocate is entitled to full instruction fees the moment a defence is filed as held in First American Bank of Kenya vs Shah & Another (2002) 1 EA 64.
 11. I allow the reference and grant the advocate instruction fees as follows
 - a. In Misc. Civil Case no. E130/2023
 That value but does lower higher
 exceeds kes not exceed scale scale
 500,000 1,000,000 65,000 90,000
 1,000,000 2,000,000 90,000 12,000
 Over 2,000,000, a fee as for ksh.2,000,000 plus 2.5% in respect of the excess value for kes.2,000,000=120,000
 An additional 2.5% in respect of the excess:
 $2.5/100 \times 13,000,000 = 325,000$
 $120,000 + 324,000 = 465,000/=$
 - b. In Misc. Civil Case no. E131/2023
 That value exceeds kes but does not exceed Kes
 750,000 1,000,000 120,000



1,000,000 20,000,000 fees as for kes

1,000,000 plus an additional 2%

Value for kes 1,000,000=120,000

An additional 2%=2/100x14,000,000=280,000

120,000 + 280,000 = 400,000

12. Orders to issue accordingly.

13. I allow the reference and I set aside the award granted by the Taxing master and I replace it with Kshs. 465,000 in Misc.E130 of 2023 and Ksh. 400,000 in Misc. 131 of 2023.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

