



**Muthui v Board of Governors /Management Kithingiisyo
Secondary School & 2 others (Miscellaneous Civil Application
E033 of 2021) [2024] KEHC 5403 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E033 OF 2021**

MN MWANGI, J

APRIL 19, 2024

BETWEEN

ELIZABETH MUENI MUTHUI PLAINTIFF

AND

**THE BOARD OF GOVERNORS /MANAGEMENT KITHINGIISYO
SECONDARY SCHOOL 1ST DEFENDANT**

THE PRINCIPAL KITHINGIISYO SECONDARY SCHOOL 2ND DEFENDANT

MICHAEL KITHEKA MUSYOKA 3RD DEFENDANT

*(A Reference from the Ruling of Hon. F. N. Nyakundi, Senior Resident
Magistrate, dated 8th October, 2021, arising from taxation of a bill of
costs in Voi Principal Magistrate's Court Civil Suit No. 171 of 2017)*

RULING

1. The plaintiff/applicant filed a Chamber Summons application dated 3rd December, 2021 seeking the following orders -
 - i. That the taxing-off of the plaintiff's Kshs. 95,539.75 from the bill of costs dated 30th August, 2021 on 8th October, 2021 by Hon. F.M Nyakundi, Senior Resident Magistrate, be and is hereby set aside;
 - ii. That this Court do proceed and tax the bill of costs dated 30th August, 2021 as drawn; and
 - iii. That the costs of this application be provided for.



2. The application has been brought on the grounds on the face of the Summons and is supported by an affidavit sworn on 3rd December, 2021 by Elizabeth Mueni Muthui, the applicant herein. In opposition thereto, the respondents filed grounds of opposition dated 21st September, 2022.
3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 1st November, 2022 by the law firm of M/s Mutunga & Muindi Company Advocates whereas the respondents' submissions were filed by the law firm of Mogaka, Omwenga & Mabeya Advocates on 13th January, 2023.
4. Mr. Muindi learned Counsel for the applicant submitted that the Taxing Master delivered a ruling to the applicant's bill of costs dated 30th August, 2021 on 8th October, 2021. He stated that on 19th October, 2021, the applicant requested the Taxing Master for reasons of taxing off 17 items. That on 22nd October, 2021 the Taxing Master directed the applicant to be supplied with a certified copy of the ruling which had reasons for the taxing off the 17 items she was objecting to.
5. Counsel stated that a certified copy of the said ruling was supplied to the applicant on 29th November, 2021. He referred to Order 50 Rule 3 of the *Civil Procedure Rules*, 2010 and stated that the applicant had 14 days to file the Reference herein from 29th November, 2021, and as such, she ought to have filed this reference on or before 12th December, 2021 which was a Sunday followed by a public holiday on 13th December, 2021, hence this reference is properly on record, having been filed on 14th December, 2021, which was the next working day. Mr. Muindi urged this Court to set aside the taxing off of the 17 items and tax the bill of costs dated 30th August, 2021 as drawn at Kshs.266,916.00.
6. Mr. Abaja, learned Counsel for the respondents submitted that pursuant to Order 11 of the *Civil Procedure Rules*, 2010, the application herein ought to have been filed within fourteen days from the date when the Court gave directions. He relied on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, and stated that the applicant having received the Court's directions on 22nd October, 2021 ought to have filed the application on or before 11th November, 2021. He contended that the application herein having been filed way after the statutory timelines is a non-starter.
7. Mr. Abaja also contended that the Taxing Master considered all the relevant factors in arriving at his decision as he exercised his discretionary powers judiciously. He cited the case of *First American Bank of Kenya Ltd v Gulab P. Shab & 2 others* [2002] eKLR to support his submission that the applicant must demonstrate that the Taxing Master's decision was based on an error of principle before this Court can proceed to set aside the said decision.
8. He stated that the applicant had failed to demonstrate how the Taxing Master's decision was based on an error of principle. He urged this Court to dismiss the application herein with costs.

Analysis and Determination.

9. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the respondents and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.
10. In the affidavit filed by the applicant, she deposed that pursuant to the Court's direction, she filed a bill of costs dated 30th August, 2021 with a total of 56 items. Subsequently, the bill of costs was taxed on 8th October, 2021 at Kshs.171,376.25 thus taxing off 17 items which is equivalent to Kshs.95,539.75.



11. The applicant averred that she asked for reasons why the Taxing Master taxed off the said 17 items from the bill of costs, and the reasons for the taxation were given to her on 29th November, 2021. On item 1 & 2, the applicant contended that they are initial filing fees and further Court fees for the plaint as per Note 1 in the Notes to Schedule 7, hence it cannot be taxed off. She stated that item No. 3 is the cost of service of summons, and a receipt was produced, hence it is chargeable under Schedule 7 Rule 10. She stated that items 9, 12 and 15 are filing fees for affidavits of service and they are recoverable under Note 1 to Schedule 7, as Court fees paid and receipts were issued. The applicant indicated that item 16 is Court filing fees on the plaintiff's supplementary list of documents after leave of the Court was granted and is chargeable under Note 1 to Schedule 7, whereas items 20 and 21 are Court fees for filing affidavits of service and request for witness summons after the defendant objected to production of documents and they are recoverable under Note 1 as Court fees paid. In regard to items 24, 28, 32 and 35, she stated that they are Court filing fees for affidavits of service and submissions, and they are recoverable under Note 1 to Schedule 7. That items 53, 54 and 55 are related to Court attendances by 2 Doctors and a Police Officer after objections were raised by the defendant, and whose attendance was crucial. The applicant averred that they produced receipts in Court to confirm that they had been paid to attend Court from Makueni and Makindu hospitals all the way to Voi. She indicated that she asserted that the amounts therein are fully recoverable under necessary attendances to Court as expert witnesses under Note 1 to Schedule 7. She explained that item 56 was party and party costs charged strictly as per Schedule 7.
12. The respondents opposed the application herein *vide* grounds of opposition dated 21st September, 2022, based on the following-
 - i. That the application is an affront to the provisions of Rule 11 of the [Advocates \(Remuneration\) Order](#);
 - ii. That the application is an affront to the provisions of Rule 16 of the [Advocates \(Remuneration\) Order](#) which grants the Taxing Master discretion;
 - iii. That the Taxing Master considered all the relevant factors in arriving at his decision;
 - iv. That the application does not satisfy the conditions that could justify setting aside the Taxing Master's decision of 8th October, 2021.
 - v. That the application is an abuse of the Court process, misconceived, lacks merit and ought to be dismissed with costs to the defendants/respondents.
13. Before I delve into the merits or demerits of the application, I will first determine whether the application herein is properly on record. Paragraph 11(1), (2) and (4) of the [Advocates Remuneration Order](#) provides as hereunder-
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons, apply to a judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.
 - (3)



14. The applicant's Counsel submitted that vide a ruling dated 8th October, 2021, the Taxing Master taxed off 17 items in her bill of costs dated 30th August, 2021. Subsequently, on 19th October, 2021, she applied to the Taxing Master for reasons as to why he had taxed off the said items. Counsel stated that the Taxing Master on 22nd November, 2021 directed that the applicant be supplied with a certified copy of the ruling dated 8th October, 2021 which contained his reasons. It was stated that the applicant was supplied with a certified copy of the said ruling on 29th November, 2021, and that is when time started running for the filing of a Reference. Counsel for the applicant cited Order 50 Rule 3 of the Civil Procedure Rules, 2010 which provides as hereunder-

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

15. From the above provisions, I agree with Counsel for the applicant that the application herein is properly on record since 14 days from 29th November, 2021 lapsed on 12th December, 2021 which was on a Sunday, hence the applicant was at liberty to file the instant application by close of business 13th December, 2021. However, the 13th December, 2021 was a public holiday and the applicant was left with no choice but to file the Reference herein on 14th December, 2021.

16. On the issue of whether the application herein is merited, this Court has jurisdiction to interfere with the Taxing Master's decision only where there has been an error in principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. This was the Court of Appeal's decision in the case of Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR, where the Court made the following observation-

“On 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.”

17. The applicant contends that the Taxing Master applied the wrong principles in taxing the bill of costs filed by the applicant. In his ruling that was delivered on 8th October, 2021, the Taxing Master stated that he agreed with the submissions by the respondents' Counsel and proceeded to tax the applicant's bill of costs dated 30th August, 2021 as proposed by the respondent's Counsel. The respondents in their submissions before the Taxing Master contended that items 1, 2, 16, 21, 28, 32, 53, 54 & 55 are not provided for under Schedule 7 of the Advocates Remuneration Order 2014, thus the same are not awardable.

18. They stated that item 3 is not awardable since no receipt was attached as evidence of payment, and items 9, 12, 15, 20, 24, 28 & 35 are not awardable. They further averred that the fees for drawing and filing of affidavits is already catered for under Schedule 7 in paragraph 11 at Kshs.1,000/=, hence awarding the said items amounts to double compensation.

19. This being taxation of a matter in the Subordinate Court, the Taxing Master ought to have been guided by and/or adopted the provisions under Schedule 7 of the Advocates (Remuneration) (Amendment) Order, 2014. Note 1 of the provisions under Schedule 7 provides that-

“When an order has been made in general terms for the payment of costs by either party and an advocate has been employed, those costs, in addition to the court fees, shall be



computed under this Schedule, which shall be the minimum fee, and shall include (except as may be provided) taking instructions, drawing or perusing documents, pleadings or similar documents, engrossing and filing documents, and all necessary attendance at court or chambers.”

20. It is not in dispute that in the case that forms the subject matter of the bill of costs, the applicant was awarded costs of the suit. Schedule 7 of the *Advocates (Remuneration) (Amendment) Order*, 2014 provides for Court fees. It is therefore evident that the Taxing Master applied the wrong principles in taxing off items 1, 2, 9, 12, 15, 16, 20, 21, 24, 28, 32 & 35 of the bill of costs as the said items were Court fees.

21. I agree with Counsel for the respondents that the fees for drawing and filing of affidavits is provided for under Schedule 7 in paragraph 11 as Kshs.1,000/=. However, by the applicant being awarded the said costs, it cannot be said to be double compensation since items 9, 12, 15, 20, 24 & 35 are Court fees for filing of affidavits of service, whereas items 8, 11, 14, 19, 23 & 34 are fees for drawing affidavits of service.

22. When it comes to item 3, it is a claim for service of summons at Kambu, Kibwezi Sub-County. The respondents and the Taxing Master agreed that it is not awardable since no receipt was attached as evidence of payment. I am of the considered opinion that this is another instance where the Taxing Master applied the wrong principles. I concur with my sister Kasango. J in *Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited* [2019] eKLR where she held that-

“The Taxing Master should have requested the Advocate to provide documents to support disbursements as set out in Paragraph 75 (1) of the Order. That Paragraph provides:

Paragraph 75(1)

“All drafts and other documents or copies thereof, the preparation of which is charged for, shall be produced at taxation if required by the Taxing Officer.”

23. Items 53, 54 & 55 are provided for under Note 1 to Schedule 7 since they are related to “all necessary attendance” at Court or Chambers. In addition, the respondents did not dispute that the two Doctors and the Police Officer attended Court and produced receipts to confirm that they had been paid to attend Court from Makueni and Makindu Hospital to Voi as Expert witnesses. The Taxing Master did not give any reasons as to why he taxed off the party and party costs as he did, despite the fact that it is provided for under Schedule 7(1) of the *Advocates (Remuneration) (Amendment) Order*, 2014.

24. As stated hereinabove, the Taxing Master in his ruling delivered on 8th October, 2021 did not give any reasons for taxing off the applicant’s bill of costs dated 30th August, 2021, instead, he stated that he agreed with the respondents’ submissions. I find that not to be a proper way of determining the bill of costs, as it does not inspire confidence in the bench as no reasons were given for taxing off various items. Counsel for the respondents contended that the Taxing Master exercised his discretion judiciously thus the application herein ought to be dismissed. In *Republic v Minister for Agriculture & 2 others Ex-Parte Samuel Muchiri W’njuguna & 6 Others* [2006] eKLR the Court held as follows on taxation of a bill of costs-

“... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is



that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...”

25. The Taxing Master in consideration of the submissions filed by Counsel for parties also ought to have demonstrated how he exercised his discretion in taxing off the various items. Having failed to give reasons for so doing, this Court finds that there was an error in principle in the taxation of those items.
26. For this reason, I find that the application herein is merited and the same is allowed in the following terms-
- i. The Ruling By Hon. F. M. Nyakundi, Senior Resident Magistrate, Delivered On 8th October, 2021 Taxing-off The Plaintiff's Kshs. 95,539.75 From The Bill Of Costs Dated 30th August, 2021 Is Hereby Set Aside;
 - ii. The Bill Of Costs Dated 30th August, 2021 Is Hereby Referred To Another Taxing Master Save For Hon. F.m. Nyakundi, SRM, For Fresh Taxation According To The Provisions In Schedule 7 Of The *Advocates (remuneration) (amendment) Order*, 2014;
 - iii. Mention In The Chief Magistrate's Court At Voi On 30th May, 2024; And
 - iv. Costs Of The Instant Application Shall Be Borne By The Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

.....

JUDGE

In the presence of:

Mr. Muindi for the applicant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

