



**Odiya & Associates Advocates v Mairura (Miscellaneous Application E182 of 2022) [2024] KEHC 4042 (KLR) (Family) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4042 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E182 OF 2022  
PM NYAUNDI, J  
APRIL 19, 2024**

**BETWEEN**

**ODIYA & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**CYNTHIA GESARE MAIRURA ..... RESPONDENT**

**RULING**

1. Before this court is the Chamber Summons presented under Section 1A,1B & 3A of the *Civil Procedure Act*, Order 51 rule 1 of the *Civil Procedure Rules*, 2010 and paragraph 11 of the *Advocates Remuneration Order* in which the Applicant seeks the following orders;
  1. That the decision of the Taxing Master Hon. C. Nganga, taxing the Bill of Costs dated 13<sup>th</sup> October 2022 at Kshs 96, 745 contained in the ruling dated 31<sup>st</sup> March 2023 be varied and/or set aside.
  2. This Honourable Court does Order that the Advocate Client Bill of Costs dated 13<sup>th</sup> October 2022 be placed before another taxing master for taxation.
  3. That this Honourable Court do make any additional orders as the demands of justice dictate
  4. That the Costs of this Application be provided for
  5. That the costs of this application be borne by the Respondents.
2. The Applicant challenged the impugned ruling inter alia on the ground that, the taxing master applied the wrong legal principles in taxing items 1 of the Respondent's Advocates/ Client Bill of Costs dated 13<sup>th</sup> October 2022 with respect to instruction fees. It is contended that the ruling is manifestly wrong both in law and in fact.



3. The Respondent opposes the Application and submits that the Taxing master correctly exercised her discretion.
4. The Court directed that the Application be canvassed by way of written submissions, both parties complied. The Applicants submissions are dated 17<sup>th</sup> August 2023, those of the Respondent are dated 11<sup>th</sup> December 2023.

### Summary

5. The Applicant contends that the impugned ruling should be reviewed on the basis that the Taxing master erred in principle and relies on the decision of the Court of Appeal in *Lucy Waitthera & 2 Others vs Edwin Njagi t/a E K Njagi & Company Advocates* [2017] eKLR.
6. The Applicant further relies on the decision in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No.3)* [1972] EA 162 on the duty of the Court to ensure that fees charged is not so exorbitant as confine access to justice to the wealthy.
7. The Applicant submits that the Taxing Master erred in allowing the Respondent to Bill twice on the same item and allowing an item for which there was no evidence.
8. It was the Applicant's submission that the Court erred in charging Value Added Tax on the total itemized bill as opposed to charging VAT on the instruction fees only. And relies on the decision in *Mwangi Keng'ara & Co. Advocates v Upward Scale Investment Co. Ltd & 2 others* [2019] eKLR.
9. The Respondent in opposition submits that the Taxing master properly exercised her jurisdiction and relies on the decision in *Kilonzo & Co. Advocates v Vipal Premchand Haria* [2013] eKLR to contend that this Court should not interfere with the discretion of the Court unless the decision is on an error of principle or the fee awarded is manifestly excessive.
10. The Respondent concludes by submitting that Advocates need to be justly compensated and references the decision in *Kibanya & Kamau Associates Advocates vs Dorcas Wanjiru Mwangi* [2018] eKLR.

### Analysis and Determination

11. I have considered the ruling delivered on 31<sup>st</sup> March 2023, alongside the pleadings herein, submissions filed, authorities cited and the relevant law and discern the following as the issues for determination.

#### a. Whether the taxing master erred in law and in principle in the assessment of Bill of Costs

12. 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.
13. 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.

14. 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).
15. 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;
  - 3) 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.”
16. The Applicant challenges the ruling of the Court on the basis that the Instruction fee as assessed is inordinately high.
17. At paragraph 1 the Taxing Master assessed this as Kshs 50000 having framed the issue for determination as What is the quantum of costs on the Advocate/ Client bill of costs dated 13<sup>th</sup> October 2022 for the services rendered by the Applicant?
18. It follows therefore that in assessing the Instruction fee the Court gauged that Kshs 50000 was commensurate to the services rendered by the Advocate. The principles upon which a court will interfere with the discretion of a taxing master were restated by Ouko SCJ in *Non- Governmental Organisations Coordination Board Vs Eric Gitari & 5 Others* SC Petition (Application) No.16 of 2019 as the following;
  - a. There is an error of principle committed by the taxing officer;
  - b. The fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy; (and if I may add conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
  - c. The Court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and if I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful the expenses to which he had been subjected by the other party) and



- d. The award proposed is so far as practicable, consistent with previous awards in similar cases.
19. Having regard to these principles I find no basis for me to interfere with the Taxing Master's discretion as relates to assessment of the instruction fee.
20. The Applicant also contends that the Taxing Master erred in subjecting the entire Bill of costs to VAT, this is not accurate. I have seen paragraph 5 of the ruling and the taxing master excluded disbursements from the VAT.
21. Finally, it is evident that the Taxing Master considered the deposit of Kshs 50000 paid by the Applicant.
22. In Conclusion the reference is dismissed in its entirety with costs to the respondent assessed at Kshs 25000

It is so ordered

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

**M. NYAUNDI**

**JUDGE**

In the Presence of

Sylvia Court Assistant

Ms. Onyinkwa h/b for Ms. Odiya for the Respondent

Ms. Okach h/b for Ms. Waliaula for the Applicant

