



**Ombonyo v Kengere (Miscellaneous Civil Case E016 of 2023)  
[2024] KEHC 3902 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CIVIL CASE E016 OF 2023**

**WA OKWANY, J**

**APRIL 18, 2024**

**IN THE MATTER OF THE ADVOCATES ACT AND PARTY AND PARTY BILL OF COSTS**

**AND**

**IN THE MATTER OF A REFERENCE FROM THE RULING OF THE  
TAXING OFFICER OF THE HIGH COURT OF KENYA AT NYAMIRA  
IN MISCELLANEOUS SUCCESSION CAUSE NO. E001 OF 2023**

**BETWEEN**

**STEPHEN NYANDIGISI OMBONYO ..... APPLICANT**

**AND**

**LYDIA MORAA KENGERE ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the reference dated September 14, 2023 in which the Applicant seeks the following orders: -
  1. That the Honourable Court be pleased to set aside and tax afresh the decision of the Taxing Master as evidenced in the Ruling delivered on August 17, 2023 with respect to the items No. 1-29 in the Bill of Costs dated June 30, 2023.
  2. That this Reference do operate as stay of execution for the taxed costs pending the hearing and determination of the Reference herein.
  3. That costs of this Application be provided for.
2. The Application is supported by the affidavit of Omwenga Kwamboka and is brought on the grounds that the Taxation Ruling of August 17, 2023 was based on clear errors of principle and the sum awarded exorbitant. The Applicant contends that the Taxing Master considered irrelevant factors and disregarded the rules governing taxation of Bill of Costs as provided under the Advocates'



- Remuneration Order (ARO). It was the Applicant's case that the Taxing Master applied the wrong scale in taxing the Bill of Costs. It was also contended that the Taxing Master flouted the rules of natural justice by disallowing the Applicant's plea to be allowed to file a response to the Bill of Costs.
3. The Respondent opposed the Application through her replying affidavit sworn on October 18, 2023 wherein she states that the Application is bereft of merit, is vexatious and merely intended to embarrass and frustrate the court's process. She avers that the Application is tainted with false statements and is meant to deny her the fruits of the Ruling delivered on June 29, 2023.
  4. It was the Respondent's case that the Application to file objection and taxation reference is premature as the Applicant did not give a written notice, to the Taxing Officer, regarding the items that he objects to. The Respondent further contended that the Application is time-barred as no extension of time was obtained in line with Rule 11 of the ARO which is couched in mandatory terms.
  5. The reference was canvassed by written submission which I have considered.
  6. The Applicant faulted the Taxing Master for committing an error in principle during the taxation. He cited the decisions in Joreth Ltd vs. Kigano & Associates, Civil Appeal No. 66 of 1999(2002) 1 EA 92, (2002) eKLR, First American Bank of Kenya vs. Shah and Others (2002) EA 64 at pg. 69 and Green Hills Investments Ltd. vs. China National Complete Plant Export Corporation where the courts outlined the circumstances under which a court can interfere with the decision on taxation.
  7. It was submitted that the Taxing Master grossly misdirected himself as he was expected to tax each item and give reasons for the said taxation notwithstanding the fact that the Bill of Costs was not opposed. For this argument, the Applicant cited the decisions in Peter Kamau Ikigu vs. Barclays Bank of Kenya Ltd & Another (2020) eKLR, Republic vs. Medical Practitioners and Dentists Board and 2 Others, ex parte Mary A. Omamo Nyamogo (2017) eKLR and Opa Pharmacy Ltd vs. Howse & McGeorge Ltd, Kampala HCMA No. 13 of 1970 (HCU) (1972) EA 233.
  8. The Applicant argued that the Taxing Master did not comply with the principles governing taxation as were outlined in the case of Premchand Raichand Ltd and Anor. vs. Quarry Services East Africa Ltd and Others, No. 3 (1972) EA. 162.
  9. The Respondent, on the other hand, submitted that the ruling on taxation was well-founded in law because the Bill of Costs was not opposed and that there was no law barring a Taxing Master from allowing a Bill of Costs as drawn. She argued that the Applicant ought to have filed a response or submissions listing the items that she was objecting to. She added that the decision of the Taxing Master is final and binding unless it is based on an erroneous principle.
  10. I have carefully considered the reference and the rival arguments made by the parties herein. I find that the main issue for my determination is whether the reference is merited.
  11. The circumstances under which the decision of a Taxing Master can be altered were stated in First American Bank of Kenya vs Shah & Others (2002) 1 EA 64, as follows:-
    - a) 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 manifestly excessive as to justify an inference that it was based on an error of principle;
    - b) It would be an error of principle to take into account irrelevant factors or 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 the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;



- c) 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, the amount awarded was high;
  - d) It is within the discretion of the taxing officer to increase or reduce the instructions fees and the amount of the increase or reduction is discretionary;
  - e) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;
  - f) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
  - g) The mere fact that the Defendant does research is not necessarily indicative of the complexity of the matter as it may well be indicative of the Advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.
12. Paragraph 1 of Part II of schedule V of the *Advocates Remuneration Order* outlines the factors to be considered by a Tax Master in assessing fees as follows:-
- a) Care and labour required by the advocate;
  - b) the number and length of the papers to be perused;
  - c) The nature and importance of the matter;
  - d) The value (where ascertainable) of the subject matter;
  - e) Interest of the parties;
  - f) Complexity of the matter, and
  - g) Novelty of the matter
13. In the instant case, I note that the Taxing Master adopted the Bill of Costs as filed without considering the individual items on the Bill of Costs or providing reasons for allowing the said items as he did. The Taxing Master stated as follows in his Ruling: -
- “On July 24, 2023, this court directed the Applicant to file a response to the said bill within 7 days. The Applicant was present in court. However, to date, no response had been filed. The Respondent’s bill is thus unopposed and the same is taxed as drawn.”
14. In *Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’Njuguna & 6 Others* (2006) eKLR) Prof. J.B. Ojwang J. (as he then was) observed thus: -
- “The correct perception of a 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...
- From the foregoing analysis it is clear that I am not of the opinion that the taxing officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on advocate’s instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by



principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs. 20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.” (Emphasis added).

15. Guided by the above decision, I find that the Taxing Master was under an obligation to consider each item on the said Bill of Costs when Taxing Bill. I find that it was not prudent for the Taxing Master to perfunctorily tax the Bill of Costs by adopting it ‘wholesale,’ as drawn, without considering whether the individual items on costs were justified or not. To my mind, this amounted to an error of principle. I further find that the duty of the Taxing Master was not diminished merely because the Applicant was indolent or inadvertently failed to oppose or file submissions contesting the Bill of Costs. The Taxing Master was still expected to consider each item on costs and exercise his discretion judiciously while paying homage to the [\*Advocates Remuneration Order\*](#) and the legal principles governing taxation of Bill of Costs.
16. For the above reasons, I find that the Application dated September 14, 2023 is merited and I hereby allow it. Consequently, I direct that the said Bill of Costs be remitted back for taxation by another Deputy Registrar other than Hon. Waswa for fresh taxation. I find guidance in [\*Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board\*](#) [2005] eKLR it was held as follows:-

“ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see– *D’Sonza v Ferrao* [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see [\*Devshi Dhanji Naran Patel\*](#) (No. 2) [1978] KLR 243).”
17. Each party shall bear its own costs in this Application.
18. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 18<sup>TH</sup> DAY OF APRIL 2024.**



**W. A. OKWANY**  
**JUDGE**

