



Ogoti & another v Omoro & another (Suing as the legal representative of the Estate of Brian Otieno Ouma) (Miscellaneous Civil Application E027 of 2024) [2024] KEHC 4681 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E027 OF 2024
RE ABURILI, J
APRIL 16, 2024**

BETWEEN

CHARLES OGOTI & TANSLINE CLASSIC APPLICANT

AND

HENRY OUMA OMORO AND DONA ANYANGO OUMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BRIAN OTIENO OUMA) RESPONDENT

RULING

1. This Ruling determines the Applicant's Notice of Motion dated 21st February 2024 challenging the taxed costs between party and party on the ground that the taxing master failed to subject the same to 20% contribution in line with the Judgment of the court where the Defendant/Applicant herein bore 80% liability whereas the Plaintiff /Respondent bore 20% the contributory negligence.
2. The Plaintiff/Respondent did not oppose the application and despite the Applicant serving the Respondent's counsel with the application and hearing notice, there was no appearance hence this court allowed the Applicant to proceed *ex parte*.
3. The application is brought under the provisions of Section 89 of the *Civil Procedure Act*, Schedule 7 of the *Advocates Remuneration Order* and Section 11 of the *Advocate Remuneration Order*.
4. From the judgment in the original Kisumu Chief Magistrate Civil Case No. E251 of 2022, the Respondent was awarded damages in the sum of Kshs. 1,650,000 general damages, less 20% contributory negligence plus costs and interest.
5. A party and party bill of costs was filed and the same was taxed vide Ruling of 24th November 2023 at Kshs.158,480. However, the same is silent on whether the costs as taxed are subject to 20% contribution.



6. The Applicant asserts that the Respondent has declined to have the issue resolved amicably hence this application for determination of the question of whether the taxed costs should be subjected to the 20% contributory negligence as per the judgment delivered on 24th November 2023 and pursuant to Schedule 7 of the *Advocates Remuneration Order*.
7. The Applicant therefore prays for the setting aside of the order of taxation which is alleged to have been arrived at erroneously. Those are the facts deposed by Ms. Christine Musando Advocate in her supporting affidavit sworn on 5th March 2024, annexing copies of the impugned Ruling, Bill of Costs which was taxed, submissions in opposition to the Bill of Costs dated 7th December 2023 and authorities relied on in the said submissions.

Determination

8. I have considered the application, the grounds and the supporting affidavit together with the arguments for the prayers sought. The issue for determination is whether the Bill of Costs as taxed vide Ruling of 28th February 2024 ought to have been subjected to 20% contributory negligence.
9. In *First American Bank vs Shah & Others* [2002] EA 64 at P. 69, the court held that the court ought to 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 so manifestly excessive as to justify an inference that it was based on an error of principle. Thus, the duty of the Judge in a reference is not to tax bill of costs, that being the preserve of the taxing master, exercising special jurisdiction of the High Court.
10. In the submission in response to the filed bill of costs, the Applicant herein did submit on the issue of apportionment of liability, applying this court's recent Ruling in Kisumu HC Misc. Application No. E177 of 2023 between David Kamau Chege & Khusa Owili and Dennis Gichana Nyangwansa wherein a similar issue arose and this court held that costs as taxed were subject to 30% contributory negligence as per the judgment of the court which found the Defendant/Applicant 70% liable and the Plaintiff/Respondent was to bear 30% contributory negligence.
11. In this case, despite the above authority being submitted to the taxing master in the lower court in the Party & Party Bill of Costs, the taxing master ignored the authority and remained silent on the submission for apportionment of contributory negligence to the costs.
12. The question is whether the complaint by the Applicant is founded in law.
13. Schedule 7 of the *Advocates Remuneration Order* under Party and Party costs, Note 3 provides that:
 - “3. 3. Where success in a suit is divided, the scale may be distributed having regard to partial success on either side.”
14. The above provision is as crystal clear as white colour and it needs no interpretation. In the instant case, there was partial success of the Respondent/Plaintiff in Kisumu CMCC No. E251 of 2022 where the court apportioned liability against the Defendant at 80% and 20% against the Plaintiff/Respondent herein.
15. It follows that applying the Schedule 7 Note 3 of the *Advocates Remuneration Order* on the taxed costs, the taxing master had the obligation to subject those taxed costs to 20% contribution. What that means is that the Kshs.158,480 should have been subjected to 20% contribution which is Kshs.31,696 leaving a balance of 126,784.



16. Therefore, failure to do so by the taxing master amounted to an error in principle and that in itself calls for interference by this court.
17. In the end, and for the above reasons, I find and hold that the taxed costs of Kshs.158,480 are liable to and subject to 20% contribution leaving a balance of Kshs.126,784.
18. Accordingly, the Notice of Motion/Reference dated 21st February 2024 is found to be meritorious.
19. The Ruling of 28th February 2024 taxing the Party and Party Bill of Costs at Kshs.158,480 in Kisumu CMCC No. E251 of 2022 is hereby set aside and substituted with an order that the Kshs.158,480 taxed costs is subjected to 20% liability thereby leaving a balance of Kshs.126,784.
20. As the Respondent has not challenged this Reference and as the trial court taxing master ought to have considered the submissions by the Applicant herein on the important point of law discussed herein, which he did not, for reasons known to himself, I order that each party do bear their own costs of this Reference.
21. This file is closed and the lower court file Kisumu CMCC No. E251 of 2022 be returned to the lower court, with copy of this Ruling to be personally served upon Hon. K. Cheruiyot, SPM for noting and for future guidance.
22. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF APRIL, 2024

R. E. ABURILI

JUDGE

