



Ndungu v Masinde (Suing as administrattix and on behalf of the Estate of the Late John Gitau Gichuru) & 3 others (Miscellaneous Application E201 of 2023) [2024] KEHC 7430 (KLR) (Civ) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E201 OF 2023

JN MULWA, J

JUNE 20, 2024

BETWEEN

JOAN NJOKI NDUNGI APPLICANT

AND

PERSIAH MUTHONI MASINDE (SUING AS ADMINISTRATITIX AND ON BEHALF OF THE ESTATE OF THE LATE JOHN GITAU GICHURU) 1ST RESPONDENT

RICHARD GATIMU GITAU 2ND RESPONDENT

DAUDI NDATHA GITAU 3RD RESPONDENT

JOE WAWERU GITAU 4TH RESPONDENT

RULING

1. By a Chamber Surmons Application dated 13/04/2023 the Applicant Joan Njoki Ndungi sought orders to set aside the certificate of costs dated 30/11/ 2022 in respect of item no. 1 on instructions fees and be taxed afresh by this court or in the alternative the same be remitted to another Taxing Officer.
2. The impugned taxation was in respect of the party and Party Bill of Costs in respect of HCC No. 138 of 2018 wherein the Taxing Master awarded to the applicant Kshs. 2,039,378/= which the Applicant deems to be low, based on the value of the subject matter, a property known as LR167/9 Limuru Road, Kiambu County valued at Kshs. 4.3 billion as at 2/09/2019 together with LR number 214/277 Muthaiga, LR No. 214/ 751 Muthaiga and LR167/9 and 168/9 Gimalu, LR. 209/ 2412 and LR No. 4955/ 19.



3. On the main property LR. 167/ 9 Limuru Road, a valuation report as at 2/09/2019 is annexed to the application stating the value as Kshs. 4.3 billion. Upon consideration of the material facts and authorities placed before the Taxing officer and the proposed award of 82,650,000/= the Taxing officer in its discretion awarded Kshs. 2,000,000/= on the item.
 4. Reasons advanced by the Applicant for the reference are stated in the Supporting Affidavit of Laurence Muriithi Mbaru Advocate for the Applicant that: -
 - i. It is inordinately low and indicates an error of principle
 - ii. The Taxing Officer failed to take into account the scale fees under schedule 6 of the *Advocates (Remuneration) Order* 2014.
 - iii. That the Taxing Officer failed to consider the value of the subject property stated as Kshs. 4.3 billion.
 - iv. The taxation was irregular and ought to be taxed afresh.
 5. The bill of costs emanated from the ruling of the court (Sergon J) dated 28/02/2020 when the plaintiff's suit was struck out with cost to the 1st and 2nd Defendants against the Plaintiff's amended plaint dated 16/08/2018.
 6. Despite being served with the Chamber Summons the Respondent has not filed any response nor submissions. The Applicant too has not filed any submissions. The court will therefore be bound to interrogate the applicant's concerns upon the affidavit in support and documents placed before it.
 7. At the time the bill of cost was being taxed parties had filed their submissions as well as affidavits for and in support thereof. The Taxing Officer Hon. L. Mbacho- DR had in the court file documents together with the above. Upon consideration of the relevant *Remuneration Order* Schedule 6 of 2014 and their pleadings it is the learned Taxing Officer's finding that there was no judgment on record as the matter was disposed of by way of application at preliminary stage as spelt out at paragraph 2 of the ruling. and the case
 8. In the case, *Joresb Limited v Kigano & Associates* [2002] IEA the court rendered that: -

“.....the value of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment, or settlementif not ascertained, the Taxing Officer is entitled to use his discretion to assess such instructions fees as he considers just...”
 9. In addition the Taxing Officer made a finding that what was on record was a ruling which had no value of the subject matter as the plaintiff's suit was struck out and as such it was not possible to deduce the value of the subject matter from the ruling and therefore had to result to the pleadings for guidance of the value.
 10. I have looked at the amended plaint dated 16/08/2018. The cause of action is a succession dispute of the estate of the late John Gitau, Gichuru. The plaint does not place a monetary value on the estate as at 16/08/2018 just as the taxing Officer found. The prayers sought by the plaintiff were non-monetary but orders of injunction and Orders for Account to be taken of rental income from the estate properties or assets determination of the plaintiffs share thereof.
- Upon the above the Taxing Officer determined that it was not possible to determine the value from the pleadings clearly as stated in the *Joresb Limited case (supra)*.



11. I have considered provisions of Schedule 6, paragraph 9 on matters that are not specifically provided for under the [Remuneration Order](#) and the parameters a Taxing Officer ought to consider, thus;
 - a. being the nature and importance of the subject of matter,
 - b. the amount or value of the subject matter.
 - c. The interest of the parties.
 - d. The general conduct of the parties.
 - e. The complexity of the issues raised.
 - f. Skills expended in the brief.
12. Volume of documents involved. Indeed the Taxing Officer was guided by the above principles as humbly seen in the ruling on taxation, as well as consideration of several authorities stated therein.
13. On the value of the property LR No. 167/9 Limuru road Kiambu County. I note that the valuation of Kshs. 4.3 billion is dated 2/09/2019. The question that then seeks an answer is whether the said valuation report could be taken at face value as the value of the subject, noting that it was not tested for its genuinity and probability during a hearing inter-partes. The case having been struck out at interlocutory stage, all documents therein including the valuation report remained as such, documents for the plaintiff.
14. On item no. 1, the instructions fees, several properties and their estimated values were stated. I have perused the 2nd Defendant's Affidavit in Support of Bill of Costs dated 19/07/2021 wherein the valuation report is annexed as "A" stating the valuation as Kshs. 4.3 billion. The Taxing Officer did not rely on the said valuation report. The party who commissioned the valuation of the report was the applicant. It is not stated that all the interested parties in the suit were involved in any way concerning the valuation of the property. It does not seem to have been one of the documents that the Plaintiffs had filed with the plaint.
15. The Taxing Officer is granted considerable discretion in taxing matters. That exercise must be exercised cogently and with conviction upon consideration of the parameters stated above. See also [Republic v Minister for Agriculture & 2 others v Ex-parte Samuel Muchiri Wanjuguna & 6 others](#) [2006] eKLR. [Premchand Raichand Ltd & another v. Quarry Services of EA Ltd and others](#) [1972] EA 162.
16. The Taxing Officer in her ruling went ahead to specify factors that she considered to determine instruction fees being the importance of the matter, general conduct of the case and time taken for its dispatch and impact of the case on the parties as stated in [Kyalo Mbabu t/a Kyalo and Associates Advocates. v Jacob Juma](#) [2015] eKLR.
17. There is no doubt in my mind that the Hon. Mbacho DR considered the authorities she cited in her impugned ruling as well as the underpinning legal provisions. Considering that the plaintiff's suit was struck out at a preliminary stage and that no getting up or any efforts to prepare for the hearing by either party was expended, and more particularly that the value of the subject matter could not be determined from the pleadings which are plain and clear, nor from the ruling striking out the suit, I am of the view that the valuation report of the Limuru property two years after the suit was filed could not have been considered to determine the value of the property for purposes of determining instructions fees on the 2nd Defendant Party and Party Bill of Cost dated 11/08/2020.



18. The court in *Kipkorir Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR rendered that a judge on reference will not ordinarily interfere with the exercise of discretion of the Taxing Officer unless the officer has erred in principle in assessing of the costs.
19. The principles for setting aside a Taxing Officer's decision were stated in the cases *Premch & Richard Limited and another v Query Services of East Africa & Another* [1972] EA *First American Bank of Kenya v Shah and others* [2002] EA 64 among others. These include: -
- i. That there must be an error of principle.
 - ii. The fee awarded was manifestly excessive or is so high as to confirm access to the court wealthy.
 - iii. That the successful litigant ought to be fairly reimbursed for the cost incurred.
 - iv. That as far as practicable there should be consistency in the award.
20. I am persuaded that the Taxing Officer in this matter considered the above principles in arriving at the impugned decision. I find no merit in any of them as enumerated at the grounds of the Chamber Summons or at the Supporting Affidavit.
21. I therefore find the sum of Kshs. 2,000,000/= awarded as instruction fees, on item no.1 to have been reasonable.

In the circumstances, I find no reason to interfere with the taxing officer's discretion. It is upheld with the Chamber Sermons dated 13/4/2023 being dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE, 2024

JANET MULWA

JUDGE

