



REPUBLIC OF KENYA



**Okong'o v Mogaka (Miscellaneous Civil Case E005 of 2024)
[2024] KEHC 7432 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CIVIL CASE E005 OF 2024**

WA OKWANY, J

JUNE 13, 2024

BETWEEN

EDWIN NYAKUNDI OKONG'O APPLICANT

AND

STEPHEN M MOGAKA RESPONDENT

*(Being a Reference from the Tax Master 's Ruling dated 8th
February 2024 in Petition No. E003 of 2022 Nyamira Election)*

RULING

1. The Applicant herein filed the Chamber Summons dated 22nd February 2023 seeking the following orders; -
 1. SPENT
 2. That pending the hearing and determination of the Application and further Orders of the Court, the Honourable Court be pleased to order stay of execution of the Respondent's Bill of Costs dated 3rd April 2024 in Nyamira Election Petition No. E003 of 2022 arising from the Taxing Officer's Ruling delivered on 8th February 2024.
 3. That the decision of the Taxing Officer as evidenced by the Ruling delivered on 8th February 2024 with respect to items No. 1, 2, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 and 53 be set aside and taxed afresh by the Honourable Court.
 4. That in the alternative, the Honourable Court be pleased to order that the Respondents Bill of Costs with respect to Items No. 1, 2, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 and 53 be taxed afresh by another Taxing officer.
 5. That the costs of the Application be provided for.



2. The Application is premised on the following grounds: -
 1. That the Applicant disputes items No. No. 1, 2, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 and 53 on the basis that the Taxing Master gave awards for amounts pertaining to the items therein in the absence of evidential proof of the items and that he did not consider the Applicant's submissions regarding those items.
 2. That the award on the aforesaid amounts were not based on the Advocates (Remuneration) (Amendment) Order 2014.
 3. That the evidential documents in support of the items on transport costs and accommodation were unverifiable, unauthentic and doubtful.
 4. That the award of the cost on the aforesaid items amount to unjustly enriching the Respondent to the detriment of the Applicant.
 5. That the Election Petition did not proceed to full hearing.
 6. That unless a stay is granted, the Respondent is likely to execute the impugned taxed costs, something that will occasion the Applicant hardship.
 7. That the Respondent will not suffer prejudice if stay is granted.
 8. That it is in the interests of justice that stay is granted in the matter.
3. The Respondent opposed the Application through the Replying Affidavit dated 19th March 2024 wherein he states that the Taxing Master considered the strict timelines in election petitions, the complexity of the petitions and the provisions of the Advocates Remuneration Order when taxing the Bill of Costs. He averred that he spent money to hire the advocates who represented him in the petition and that he catered for their accommodation and transport expenses. He stated that Applicant has not made out a case for the granting of the orders sought in the Application. He urged the Court to order for the deposit the decretal sum of Kshs. 1,728,683/= in court or in a joint interest earning account as a condition for the stay.
4. In a rejoinder, the Applicant filed a further Affidavit in which he averred that the Taxing Master did not indicate that he relied on Schedule 5 Part 1 (2) of the Advocates Remuneration Order in awarding Kshs. 1 Million as instructions fees; and further, that the law does not permit the Taxing Master to use two schedules in taxing the bill of costs. He added that the Election Petition had not been confirmed for hearing as at the time the Respondent applied to have it struck out.
5. He further averred that the Respondent did not hire additional advocates and that the election court did not order for the payment of costs for more than one advocate. He averred that the documents submitted to support costs for accommodation and transport costs appeared to have been fabricated for purposes of filing the Bill of Costs.
6. The Application was canvassed by way of written submissions.

The Applicant's Submissions

7. The Applicant submitted that Schedule 6 (J) of the Remuneration Amendment Order 2014 provides for the minimum amount payable for presenting or opposing an Election Petition and noted that the Petition that led to the taxation was struck out at the preliminary stage for want of regular service pursuant to the Respondent's Application. It was submitted that the work involved in striking out the Petition was not so involving as to attract instructions fees of Kshs. 1,000,000.



8. The Applicant took issue with the award under the head 'getting up fees' and argued that Schedule 6 Paragraph 2 (ii) of the Advocates (Remuneration) (Amendment) Order, 2014 stipulates that such fees was only payable once the case was confirmed for hearing.
9. On items 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 44, relating to transport, it was submitted that the documents produced in support of the costs appeared to have been doctored because they were issued by one entity in Nairobi and that no basis was laid for awarding Kshs. 10,000/= on each of the items.
10. On items 47, 48, 49, 50, 51, 52 and 53 relating to accommodation, it was submitted that the documents presented to support the costs was a register from Borabu County Inn on various dates and do not include the particulars of the costs. It was submitted that the Taxing Master's decision to tax the same at Kshs. 6,000/= was arbitrary as the award was not merited.
11. It was submitted that the Taxing Master did not exercise his discretion judiciously when making the said awards.

The Respondent's Submissions

12. The Respondent submitted that the Taxing Master correctly exercised his discretion in awarding Kshs. 1,000,000/= as instructions fees. He cited the decision in *Joreth Ltd vs. Kigano & Associates (2002) eKLR* where the Court of Appeal held that if the value of a subject matter was not ascertainable, the taxing officer may use his discretion to assess the instructions fees. Reference was also made to the case of *Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Ltd (2014) eKLR* where it was held that in such scenarios the court should consider issues such as complexity of the matter, the nature and importance of the suit to the public and whether a novel issue had been raised.

Analysis and Determination

13. I have considered the Application and the parties' respective submissions. I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders sought in the Application.
14. Order 42 Rule 6 of the Civil Procedure Rules 2010 stipulates as follows: -
 6. (1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.
 - (2). No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.



- (3). Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4). For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
 - (5). An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6). Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
15. The principles governing the granting of orders for stay of execution were explained in the case of Elena Doudoladova Korir vs. Kenyatta University [2012] eKLR at paragraph 7 as follows: -
- “The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs. Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo vs. Straman FA Ltd [2013/eKLR in which it was held thus;
- ‘In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’”
16. In James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the court held as follows substantial loss: -
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
17. In the instant case, the Applicant did not demonstrate that the Respondent will not be able to refund the taxed amount should it be paid to him and the intended Appeal succeeds. The Applicant did not address the issue of security for costs which is a critical issue in an Application for stay of execution. In the premises, I find that the Applicant has not made out a case for the granting of orders for Stay of execution.
18. I will now turn to consider the prayer to set aside the Taxing Master's decision on the items highlighted in the Application. The issue for consideration is whether this court should interfere with the discretion of the Taxing Master and reassess the items contested by the Applicant.



19. In the case of Peter Muthoka & Anor vs. Ochieng & 3 Ors (2019) eKLR the Court of Appeal stated as follows;

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, then the decision though discretionary may properly be interfered with.”

20. In the oft-cited case of Joreth Limited vs. Kigano & Associates (supra) the Court of Appeal held that where the value of the subject matter could not be determined from the pleadings, judgement or settlement, a taxing officer was entitled to use his discretion in assessing the instructions fees and in doing so the factors to be taken into account included the nature and importance of the case, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.

21. In Republic vs. Minister for Agriculture & 2 Ors Ex Parte Samuel Muchiri W'njuguna (2006) eKLR Ojwang, J (as he then was) expressed himself as follows: -

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other. 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.”

22. In Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited [2018] eKLR the court discussed the principles governing whether a court should interfere with the exercise of discretion thus:-

“.....whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR. The Court ought not to interfere with the exercise of such unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”

23. The Applicant’s case was that the Taxing Master applied the wrong principles by taxing the instruction fees at Kshs. 1,000,000 as the petition did not proceed to full hearing since it was struck out for want of service. The Respondent, on the other hand, argued that the amount was justified owing to the strict statutory timelines and the complexity of Election Petitions.

24. Schedule 6 of the Advocates (Remuneration) Order provides as follows: -



- i. Election petitions
To present or oppose an election petition; such sum as may be reasonable but not less than 500,000/=.
25. My finding is that the Taxing Master applied the wrong principles in awarding Kshs. 1,000,000 as instruction fees considering that the petition did not proceed to full hearing. It is my view that, in the circumstances of this case, an award of Kshs. 500,000/= will be reasonable for instruction fees.
26. The Applicant also took issue with the assessment of the award for getting up fees. Schedule 6 of the Advocates (Remuneration) Order thus:-
 2. Fees for getting up or preparing for trial
In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:
Provided that —
 - i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
 - ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
 - iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.
27. I note that the Taxing Master awarded the Respondent Kshs. 333,333/= as getting up fees. As I have already stated in this ruling, the petition was struck out at a preliminary stage for want of service. This means that parties did not reach the stage of joining issues for hearing or preparing for hearing for that matter. I am therefore not persuaded that getting up fees was applicable or payable in this case.
28. On items 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 in respect to transport costs, the Respondent claimed Kshs. 57,000/= for the 14 times that the two vehicles were allegedly used for transportation to and from Nyamira. The Taxing Master awarded Kshs. 10,000/= on each item. I am not persuaded that there were 14 court attendances before the petition was struck out. The Taxing Master did not explain the basis for the award of the of Kshs. 10,000 per item. I find that the correct position should have been to make award for court attendances as provided under the Advocates Remuneration Order.
29. The Applicant submitted that the receipts presented to support the transport costs were fabricated as they all originated from Nairobi even for trips that started from Nyamira to Nairobi. They also questioned how one advocate could use two vehicles every time he attended court. The Applicant also noted that the registration details of the said vehicles were not given.
30. I am of the view that the Taxing Master should have interrogated the weighty issue raised regarding the credibility and/or authenticity of the receipts presented by the Respondent to support the claim for transportation costs and juxtaposed them with the number of court attendances by the Respondent. It is regrettable that the said receipts were not presented in this Reference for my consideration and



I am therefore unable to say more about them. I therefore find no reason to sustain the award under items 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44, in respect to the alleged transport costs.

31. I have considered the items 47, 48, 49, 50, 51, 52 and 53 relating to accommodation. The Taxing Master awarded Kshs. 6,000/= under this item. I however find that there was no basis for this award because the accommodation costs were not proved to the required standard.
32. For the above reasons, I find that the Applicant herein has made out a case for the granting of prayers no. 3 and 4 of the Chamber Summons dated 22nd February 2023. Consequently, I direct that the Respondent's Bill of costs be taxed afresh taking into account the observations that I have made in this ruling.
33. I make no orders as to costs.
34. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE 2024.

W. A. OKWANY

JUDGE

