



**Nyiha Mukoma & Co. Advocates v Githu & 6 others (Miscellaneous Application E123 of 2021) [2024] KEHC 11949 (KLR) (Family) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E123 OF 2021  
SN RIECHI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**NYIHA MUKOMA & CO. ADVOCATES ..... APPLICANT**

**AND**

**NYONYO GITHU & 6 OTHERS ..... RESPONDENT**

**JUDGMENT**

1. The applicant filed this court a reference dated 12<sup>th</sup> July 2021 in respect of Bill of costs dated 17<sup>th</sup> June, 2021 under Order 11 of the [Advocates Remuneration Order](#) in which he seeks orders that;
  1. That the taxing officer's decision of allowing Kshs.2,100,373.72 in respect to the bill of costs dated 17<sup>th</sup> June 2021 in the ruling delivered on the 28<sup>th</sup> June, 2022 be varied and/or be set aside in its entirety.
  2. That the Honourable Court in the spirit of expeditious disposal and timeliness of the subject matter be at liberty to re-tax the said items:
    - a. Paragraph No. 4 of the ruling, as it pertains to Item No. 1 in the bill of costs,
    - b. Paragraph No. 9(I) of the ruling, as it pertains to Item No. 21 of the bill of costs and
    - c. Paragraph 10 of the ruling, as it pertains to Item No. 25, 28, 33, 43, 44 and 45 of the bills of costs.

with a view of taxing off and/or reducing the fees payable under the said items and or in the alternative, the matter be referred back for re-taxation with appropriate directions to the taxing officer as the Honourable Court may deem fit for reconsideration.



3. That from a perusal of the said ruling, it is respondents view that the taxing officer misdirected herself in both law and fact in arriving at an award of Kshs. 2,100,373.72.
  4. That the taxing officer failed to exercise her discretion judiciously by allowing a figure on Instruction fees of Kshs. 1,000,000/=. A 10,000% increase the basic instruction fee of Kshs. 10,000/=. The fee awarded is manifestly excessive as to justify an inference that was based on an error of principle.
  5. That the taxing officer also failed to exercise her discretion judiciously by allowing a figure on disbursement fees of Kshs. 170,310 "On account of making copies". The fee awarded is manifestly excessive as to justify an inference that is also based on an error of principle.
  6. That in Item No. 21 of the bill of costs, is of an unrelated matter altogether. The Court Attendance Fee is not in relation to Succession Cause No.E042 of 2020 or E1115 of 2020 and should not be a part of this case or the ruling of this case.
2. The application is premised on grounds on face that the taxing officer misdirected herself in both in law and fact to appreciate the fact that the nature of the dispute in parent files was simple succession matter and the applicants represented the respondents for only 5 months. The respondents stated that the taxing officer failed to consider that the 1<sup>st</sup> -7<sup>th</sup> respondents' further submissions in reply to Advocates/ Applicant's Bill of Costs dated 25<sup>th</sup> April 2022 and the 1<sup>st</sup> -7<sup>th</sup> respondents supplementary submissions dated 25<sup>th</sup> April 2022. The taxing officer failed to take into account the nature of dispute handled by the applicants in parent succession cause No. E042 OF 2020 and Succession cause No.E115 OF 2020.
  3. The application is further supported by an affidavit sworn by Nyonyo Githu on 4<sup>th</sup> April 2023. She briefly stated the taxing officer misdirected herself in both law and fact in failing to appreciate the fact that the nature of the dispute in the parent files was a simple succession matter, with the dispute being between the beneficiaries who were agreeable as to who should be appointed as administrators, and also agreeable on other matters in the cause. This was not a complex succession matter, and the Applicants represented the Respondents for only five (5) months, in the very early stages.
  4. The respondents stated the taxing officer in her ruling delivered on 29<sup>th</sup> June 2022, misdirected herself in both law and fact by failing to take into account the respondents further submissions in reply to Advocates Bill of Costs dated 25<sup>th</sup> April 2022 and respondents' supplementary affidavit dated 25<sup>th</sup> April 2022. That trial magistrate failed to take into consideration the nature of dispute handled by applicants in the parent file Succession Cause No. E042 of 2020 and Succession Cause No. E1115 of 2020.
  5. The respondents stated the amount allowed are manifestly excessive in the circumstances of the case and there is no justification for the same. The respondent stated the Deputy Registrar erred in principle by enhancing the instruction fees by 10,000% to Kshs. 1,000,000/=:, which amounts to wrongful exercise of discretion, given the factors taken into consideration and the total amount of work done by the Applicants. The Respondents stated they object to the amounts awarded to the Applicants in: Paragraph No. 4 of the ruling, as it pertains to Item No. 1 in the bill of costs, Paragraph No. 9 of the ruling, as it pertains to Item No. 21 of the bill of costs , Paragraph 10 of the ruling, as it pertains to Item No. 25, 28, 33, 43, 44 and 45 of the bill of costs dated 17<sup>th</sup> June 2021 by Nyiha Mukoma & Co. Advocates.
  6. The respondents stated that on Instruction fees - Paragraph 4 of the Ruling the taxing officer erred in principle in assessing the instruction fees in the sum of Kshs. 1,000,000/= whereas Schedule X Rule 1 (D) of the 2014 [Advocates Remuneration Oder](#) fixes the basic fee payable at 10,000.



7. The respondent deposed that the taxing officer did not consider the very relevant factor of filing and serving documents electronically. That the taxing officer did not consider another very relevant factor, the "conduct of the proceedings" where: a. the Applicants only filed seven(7) "straightforward" certificate of urgency applications seeking preservation of the estate and provision of school fees payments.
8. The respondents stated that the Applicants filed One Certificate of Urgency seven (7) times. They refiled the same Certificate of Urgency six more times requesting for an earlier date, praying that the court may hear the same two issues being a Certificate of Urgency application for the preservation of the estate (for Conservatory Orders) and A Certificate of Urgency application for Provision of school fees payments for dependents of the estate. The respondent referred to attached and marked "NG-1" copies of all sixty nine (69) pages of the seven Certificate of Urgency applications filed by the Applicants. The respondents stated that this is in essence all the work the Applicants did in the five (5) month period. The respondents averred the taxing officer erred in awarding the Applicants a massive Kshs. 1,000,000/= instruction fee. Ten Thousand percent (10,000%) of the basic instruction fee which amount is too high, and an injustice to the Respondents
9. The respondents averred further the "bulky documents" involved in the case and filed by the Applicants were not drafted by the Applicants. Three quarters of the documents presented to the court by the Applicants were filed by the opposition's counsel Titus Marenye & Co. Advocates as stated in Paragraph "D. Duplicated Documents presented by the Applicants" of the Supplementary Affidavit dated 25<sup>th</sup> April 2022, of the 511 pages presented to the court by the Applicants, they drafted only sixty nine (69) pages. The respondent stated that the Applicants resubmitted the same applications over and over again to make their filed annexures/documents look bulky.
10. The respondents stated the taxing officer failed to exercise her discretion judiciously by allowing a figure on Disbursements of Kshs. 170,310/=, that is manifestly too high, all relevant factors considered, specifically on making copies in paragraph No. 10 of the Ruling, where the Respondents object to items No. 25, 28, 33, 43, 44 and 45 on the bill of costs.
11. The respondents stated that the bill of costs was not accompanied by any documents) as outline under Order 21 Rule 9A of the Civil Procedure (Amendment) Rules, 2020. Disbursements are actual expenses incurred and the same are subject to proof by way of receipts otherwise they stand as taxed off. There is no basis or documentation in support of the award of Kshs. 170.310/= in paragraph 10 of the Ruling.
12. The respondents stated that based on the fact that no copies were printed and physically handed to them or the opposition during the Covid 19 period of electronic filing and email service, Item No. 25, 28, 33, 43, 44 and 45 of the bill of costs dated 17<sup>th</sup> June 2021 should be taxed off entirety to Zero Kenya Shillings. The respondents pray that the Honourable Court do order that the Bill of Cost dated 17<sup>th</sup> June 2021, be reviewed as for item No. I of the bill of costs, and taxed off as for items No. 25, 28, 33, 43, 44 and 45 or remitted with appropriate directions to a taxing officer for reconsideration.
13. The Advocate/applicant opposed the reference through a replying affidavit dated 9<sup>th</sup> May 2024 by Brenda Olemba. The applicants' case is that the instruction fees was calculated based on the value of the subject matter being the Deceased's Estate. The Estate was valued at Kshs. 166,253,604.15/= in an affidavit in support of Petition for Letters of Administration sworn by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as well as Robert Eric Wambiru and Christine Wahu Ragui on 16<sup>th</sup> October 2020.
14. The advocate stated that following the Applicant's representation of three of the beneficiaries of the Estate the value used to calculate the instruction fees was Kshs. 99,752,162.40/=. She referred to and



- marked BO-6 a copy of the said Affidavit. The applicants stated further that the instruction fees was awarded in line with the stipulations of the Advocates Remuneration Order 2014.
15. The advocate stated the Deputy Registrar also took the following factors into consideration in paragraph 4 of the Ruling when awarding the instruction fees: a. The bulky documents involved in the cause; b. The conduct of the parties; c. The numerous applications that had to be filed by the Applicant; d. The meetings held between the Applicant and the Respondent in the course of engagement (referred paragraph 4 of the Ruling).
  16. The advocates stated in response to paragraphs 26 - 32 of the Reference which oppose the printing of hard copies of pleadings the Applicants stated that it is set in legal practice that documents are only to be filed once signed and appended with the advocates' stamp and to comply, advocates first print out documents, sign. The applicants stated that the Deputy Registrar was justified in awarding a total of Kshs. 12,115/= for the items listed under drawings in the bill of costs as follows: She averred that this position correctly reflects the recommended amounts under Schedule 10 rule 2 [Advocates Remuneration Order](#) of 2014. She stated that over the course of being retained by the clients they engaged in correspondence listed as items 14, 15 and 16 in the Bill of Costs on behalf of the client. The advocate stated that all these items were all allowed as correspondence for an amount of Kshs. 1,100/= in total. It is the advocate's case that this award is justified and in line with the amounts allowed for these items as charged under Schedule 10 rule 6 of the [Advocates Remuneration Order](#) of 2014.
  17. The applicants stated that in opposition to amounts awarded for court attendance that while acting for the Respondents/clients in the matter they attended court on their behalf as follows: i. On 16<sup>th</sup> December 2020 before lady Justice Maureen Odera for a hearing; ii. On 3<sup>rd</sup> February 2021 before Lady Justice Thande for a hearing; iii. On 22<sup>nd</sup> of February 2021 before Lady Justice Thande for a hearing; iv. On 8<sup>th</sup> March 2021 before Lady Justice Thande for a hearing.
  18. The advocate stated that the Deputy Registrar taxed off each of the above court attendances at a total of Kshs. 7,900/= in line with the stipulations under schedule 10 rule 6 of the Advocates Remuneration Order 2014.
  19. The advocate stated that in response to paragraphs 24 - 42 of the Reference which dispute amounts awarded under disbursements the Respondent does not have any reasonable ground on which to oppose the amount of Kshs. 170,310/= awarded to the Applicant for copies under the bill of costs. That Schedule 10 rule 3 (a) of the [Advocates Remuneration Order](#) 2014 provides for Kshs. 235 per folio for making copies. She averred that Deputy Registrar noted the Respondents do not dispute the number of folios but rather the amount charged under making copies. she stated it is clear in law that filing fees are proved by way of receipts. The advocate averred that she endeavored to file the said receipts leading to the Deputy Registrar's decision to allow the costs listed for items 26, 29, 32, 37, 38, 39, 40, 41 and 42 for a total amount of Kshs. 2830/= .
  20. The applicant deponed that the Deputy Registrar correctly awarded Kshs. 60 per folio and Kshs. 42/- for perusal of the following: i. A 1 folio of Notice of Appointment listed as item 18 at Kshs. 60/=; ii, A 6-folio Replying Affidavit listed as item 19 at Kshs. 360/= (60 \*6); Iii. A 223-folio Petition for Letters of Administration and supporting documents at Kshs. 13,380 / = (223\*60). 30. That Kshs. 13,800/= as the total amount awarded for perusal is therefore justified as it corresponds with Schedule 10 rule 4 of the [Advocates Remuneration Order](#) of 2014. 31. She deponed the cost awarded by the Honourable Deputy Registrar is right in law and principle and the Respondents are only seeking to waste precious judicial time by opposing the same.



21. The applicants state the Respondents herein have not shown that the Deputy Registrar committed an error in principle to justify setting aside of the ruling by the Deputy Registrar.
22. The reference was canvassed by way of written submissions. The applicants filed written submissions dated 9<sup>th</sup> May 2024 whilst the respondent from the court record did not file submissions. I have carefully analyzed and considered the submissions and case law. The parties in their respective submissions reiterated averments in their affidavits and do not need to reproduce the same.
23. From the pleadings the main issues arising for determination is whether or not this court should vary/ or set aside the taxing officer's decision contained in ruling dated 28<sup>th</sup> June 2021.
24. The respondents' case is that a ruling was delivered on the 28<sup>th</sup> June 2021 the advocate's 'bill of costs was taxed at Kshs. 2,100,373.72/= which respondents find to be too high. The respondent have disputed the following items;
  - i. Paragraph No. 4 of the ruling, as it pertains to Item No. 1 in the bill of costs, ii. Paragraph No. 9 of the ruling, as it pertains to Item No. 21 of the bill of costs iii. Paragraph 10 of the ruling, as it pertains to Item No. 25, 28, 33, 43, 44 and 45 of the bill of costs
25. On the other hand, the respondents submitted that bill was taxed to scale. The respondent submitted that the instruction was taxed based on the value of subject matter.
26. The principles for reference in taxation are well settled. The principles as set out in *First American Bank of Kenya v Shah & Others* [2002] 1 EA 64, were that;

“The Court cannot interfere with the 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 and that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. 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. Thirdly, if the Court considers that the decision 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. Fourthly, it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
27. Every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions.
28. The above stated principles were re-affirmed by the Court of Appeal in *Joreth Limited v Kigano and Associates* [2002] 1 EA 92 where the Court stated:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assets such instruction fee as he considers just, taking



into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances. That is what C K Njai Esq. did when he said: ‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’”

29. The Applicant is seeking an order that the ruling delivered on 28<sup>th</sup> June 2022 25<sup>th</sup> January 2021, be varied and/ or set aside. The principles of setting aside the decisions of Taxing Master were well established in the cases of *Premch and Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA
92. These includes
- 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.
30. With these principles in mind, the issues for determination are whether, the Taxing Officer herein rightly exercised her discretion in determining and taxing off instruction fees in the Party to Party Bill of costs dated 17<sup>th</sup> June 2021.
31. The disputed item 1 of bill of cost is on instruction fees was taxed off at Kshs.1,000,000/=.
32. The client has disputed this amount on ground that the amount allowed are manifestly excessive in the circumstances of the case and there is no justification for the same. The clients submitted that the Deputy Registrar erred in principle by enhancing the instruction fees to Kshs. 1,000,000/=, which amounts to wrongful exercise of discretion, given the factors taken into consideration and the total amount of work done by the Applicants. The clients submitted that taxing officer erred in principle by assessing the instruction fees in the sum of Kshs. 1,000,000/= whereas Schedule X Rule 1 (D) of the 2014 Advocates Remuneration Oder fixes the basic fee payable at 10,000. The clients consider this amount to be too high.
33. In the case of *Joreth Ltd v Kigano & Associates* [2002] 1 E.A. 92, this Court addressed the issue thus;
- “We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”
34. In taxing an Advocate’s Bill of Costs, the value of the subject matter must be ascertained a priori. Where the value of the subject matter of a suit is known or can be determined from the pleadings, judgment or settlement, the Taxing Officer has no discretion in assessing instruction. However, where the value of



the subject matter is unknown or cannot be ascertained, then the Taxing Officer is expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider to assess instruction fees.

35. The Applicant has an issue with the instruction fees. It is trite that instruction fees are charged from the value of the subject matter, but there are suits where the value cannot be drawn from pleadings or judgment.
36. I perused the pleadings to establish the work done by the advocates and I note that the Advocates on record did not draw the petition. In fact, Taxing Master in her ruling noted that the advocates did not draw the petition and cannot be held to be the one that initiated the claim. She noted further that schedule X rule 1 applies to the one who applies for grant.
37. I also note that the work done by advocates from the record which is conceded is that the advocate filed application for preservation of estate, provision of school payments for dependants of the estate. I agree this are straightforward applications. I also note applicant has to file numerous application as evidenced by bulk documents filed in court by advocates and also the advocates attended court on numerous occasion.
38. Considering the above analysis, the Court finds that the instruction fees taxed at Ksh.1,000,000/= was not excessive in the circumstance and this court will not interfere with the same.
39. s land which is the subject matter of this application is manifestly large and that the instruction fees of Kshs. 75 000/= awarded by the Taxing Master is extremely low, compared to the subject matter of the land and the complex issues raised in Muranga'a ELC 86 of 2018.
40. On whether items 21 was properly taxed, I note that item 20 was taxed under paragraph 9 of the ruling. Item 21 relates to court attendance on court attendance before justice Maureen Odero for mention which was taxed at Kshs.2800.
41. The client submitted that the court attendance was on unrelated matter and not in relation to this succession cause. However the client has not produced any evidence to support the claim. The respondent also urged this court to tax the same at Kshs. 2800/= which is the amount the taxing officer awarded. I therefore find no reason to interfere with item 21.
42. On issues raised in respect to paragraph 10 of the ruling in relation items 25,28,33,43,44 and 45 of the bill of costs. The disputed items are on making of copies of the documents. The trial magistrate awarded Kshs.170,310 for making of the copies. The clients have not dispute the number of folio made but the amount spend on the copies.
43. Schedule X RULE 3(a) provides for Kshs.235 per folio and the taxing officer taxed the items at Kshs.235 per folio. I therefore find the items were taxed to scale.
44. In the end, the Court finds that the application dated 12<sup>th</sup> July 2021 lacks merit and the same is dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>th</sup> DAY OF SEPTEMBER, 2024**

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**S.N.RIECHI**

**JUDGE**

