



**Akwala t/a Akwala & Co Advocates v Mohammed & another (Miscellaneous Civil Application E72 of 2023) [2024] KEHC 12989 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CIVIL APPLICATION E72 OF 2023  
SC CHIRCHIR, J  
OCTOBER 17, 2024**

**BETWEEN**

**DANIEL AKWALA T/A AKWALA & CO ADVOCATES ..... RESPONDENT**

**AND**

**MWANAHAWA A MOHAMMED ..... 1<sup>ST</sup> APPLICANT**

**BUSOLO O MOHAMMED ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. Through the Notice of Motion dated October 23, 2023, the Applicants seek for the following orders;
  - a. That this honourable court be pleased to set aside the ruling of the taxing officer made on 11<sup>th</sup> October 2023 in respect of item i.e. instruction fees and have the same re-assessed and/or adjusted.
  - b. That this honourable court be pleased to set aside the certificate of costs made on 11<sup>th</sup> October 2023 and have the same rectified in light of the outcome of prayer 1 above
  - c. That in the alternative but without prejudice to the foregoing , this Honourable court finds that the costs due to the advocate/ principle have already been paid by the defendant in the principal case and make a declaration that the advocate/ respondent is thus not entitled to any further payment.
  - d. That this honourable court be pleased to make such further orders in the interest of justice as it may deem just and fit.
  - e. That the costs of this reference be provided for.
2. The application is premised on the grounds appearing on the face of the Application and the supporting affidavit of Mwanahawa A. Mohammed.



3. The Applicants state that the award of Kshs. 500,000/= on instruction fees was too exorbitant when considered against ksh. 1, 564, 360 being the value of the subject matter; that the taxing officer did not consider the value of the subject matter when arriving at the award nor give reason for awarding the amount.
4. He further states that in any event, the Advocate had been paid costs by the defendants in the primary suit.
5. The respondent opposes the Application. He states that the application is bad in law, misconceived, an abuse of the court process and did not disclose any reasonable ground.
6. It is further stated that the court was already functus officio and that the application was merely meant to frustrate the respondent.
7. The application was canvassed by way of written submissions.

### **Applicant's submissions**

8. The Applicants have presented three issues for consideration, namely:-
  - a. Whether the court is functus officio
  - b. What is the appropriate fees payable
9. On the first claim of whether the court is functus officio, the Applicants submit that the procedure they have followed is in compliance with paragraph 11(2) and (2) of the Advocates remuneration order.
10. On the appropriate fees payable, it is submitted that the value of the subject matter is determinant of the instructions fees. In this regard the Applicants have relied on the case of Joreth Ltd vs Kigano & Associates (2002) e KLR to buttress their submissions. The Applicants consider ksh. 450,000 to have been an appropriate award.
11. The Applicants further submit that the rest of the charges as in the bill ought not to have been charged as the same had been paid under party and party costs as evidenced by the consent signed dated 14.11.2022 between the Advocate and the defendant's advocate in the primary suit.
12. It is finally submitted that the fee charged is exorbitant, exaggerated and urges the court to be guided by principles of reasonability and the provisions of the Advocates Remuneration order.

### **Respondent's submissions**

13. The respondent has faulted the Applicant for moving the court under a miscellaneous Application instead of a reference, and that consequently the Application offends the provisions of paragraph 11 of the Advocates Remuneration order. It is further contended that the laid down procedure under Rule 11 was not followed and that this court has become functus officio
14. It is further submitted that the Applicants failed to annex a letter to the taxing master seeking for reasons for the determination.
15. On the certificate of costs, it is argued that unless the same has been set aside or appealed against, it is final in regard to the costs stated therein.

### **Determination**

16. I have identified the following issues for determination:



- a. Whether the Application before court is competent.
- b. Whether the assessment of costs was erroneous.
- c. Whether the Applicant had paid part of the fees.

**Whether the Application is competent.**

17. The respondent argues that the procedure for challenging the decision of the taxing master is by way of a reference and not a miscellaneous Application. The Applicants on the other hand, insist that the procedure that they have adopted is correct.
18. In presenting their divergent views, both parties have cited the provisions of paragraph 11 of the Advocates Remuneration order
19. Paragraph 11 of the Advocates Remuneration Order provides as follows
  - “ 11(1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
  - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
20. Contrary to the respondent’s observation the Applicants have not filed a miscellaneous Application. They have, correctly, filed a chamber summons within the original Miscellaneous Application. It is apparent that the respondent is the one who has misapprehended the form that the reference is supposed to take. A party dissatisfied with the outcome of taxation by the taxing master has recourse to the judge by way of a reference. The chamber summons is the reference. Thus the Applicants have followed the correct procedure, and the Application is therefore competent.
21. On the letter seeking reasons for the basis of taxation, I have seen a “ Notice of objection” dated 18<sup>th</sup> October 2023 filed on 23/10/2023, on record. It is true that the same was not attached to the Application, but the record shows that such a request was made. This, in my view is a minor omission that does not go into the substance of the case nor cause any prejudice to the respondent.

**Whether this court is functus officio**

22. The respondent has further argued, without explanation, that this court is functus officio.
23. The principle of functus officio has been the subject of many past decisions of the court. In the case of *Raila Amolo Odinga & Another V Independent Electoral Boundaries Commission & 2 Others*, [2013] eKLR it was explained as follows:
  - “ ... Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:
    - “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.



According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter....The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”( Emphasis added)

24. It suffices to state that the taxation was being done by the taxing master, and pursuant to paragraph 11 of the remuneration Order as aforesaid a party aggrieved files a reference before the judge. The judge is yet to make any determination on the finding of the taxing master. Further filing a reference is one of the procedural steps provided under paragraph 11 of the Remuneration order. These procedural steps are well captured in the case of *In Machira & Co. Advocates v Magugu* [2002]2 E.A, Ringera J (as he then was), cited by the respondent held as follows:

“ As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

25. To the extent that this matter had not passed through a high court judge, then the argument that this court has become *functus officio* is therefore misplaced.

#### **Whether the assessment of costs was erroneous**

26. The principles of setting aside the decision of taxing officer are well - settled. The discretion of a taxing master can only be interfered with if there is an error of principle or the fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy and that as far as practicable there should be consistency in the award. ( see *First American Bank of Kenya Vs Shah and Others* [2002] E.A.L.R 64 AT 69)
27. The Respondent elected schedule 5 of the Advocates Remuneration order to base his billing. There is no dispute to this extent. There is also no contest on the value of the subject matter, which is given as ksh. 1,564,360. The only issue is whether the award of ksh. 500,0000 was too excessive.
28. It is the Applicant’s submission that the dispute between the parties was not a complex one ; that there was no novel issue of law or fact raised, and as such the time spent, research done and the skill employed by the advocates were that which are ordinarily undertaken by advocates within their normal call of duty.
29. In his ruling, the taxing officer without assigning any reasons, calculated the instruction fee on the alternative prayer of Kshs. 500,000.The question is whether the taxing officer properly exercised his discretion in allowing the sum Kshs. 500,000/= as instruction fees.
30. Paragraph 1 of part II of schedule 5 provides as follows in regard to instructions fee: “ Instructions fee: such fee as having regard to the care and labour required , the number and length of papers to be perused, the nature and importance of the matter, the amount or value of the subject matter involved , the interest of the parties, complexity of the matter and all other circumstances of the case , may be fair and reasonable , but so that due allowance shall be given in the instructions fee for other charges raised in the schedule.”



31. The cause of Action was based on the tort of negligence. It was a claim for compensation for the Estate and dependants of the then deceased who died following a road accident. The issues in such cases are fairly straight forward and not novel at all.
32. The taxing master indicated that she found ksh. 500,000 reasonable. However , she did not indicate what factors she considered terming the award “ reasonable”. Pursuant to 1 part II of schedule 5, the taxing master ought to have stated the factors she considered before arriving at the figure of ksh. 500,000. I consider this a failure in principle and therefore this court has a reason to interfere.
33. The claim was based on negligence as aforesaid . Past decisions are replete with several decisions in this area and thus the issues were not novel. I have perused the judgment in the primary suit and noted that the issues addressed were anchored on the *Law reform Act* and *Fatal accidents Act*. I have further noted that there was a consent entered on liability. Thus the trial proceeded on the aspect of quantum of damages only, and in respect of which only one witness testified on the part of the plaintiff. There was no evidence offered on the part of the defence. The hearing began and concluded the same day.
34. Thus for a matter that entirely rested on very familiar areas of law, whose hearing touched only one aspect in the case ; where one witness testified ,and the hearing taking place within a day, the award of ksh. 500, 000 on instructions fee cannot be said to have been reasonable . it was too excessive.
35. In an attempt to further establish what is reasonable, I have made a comparison with the fee provided under schedule 7. I hasten to add that this is not to ignore the election of schedule 5 by the respondent, but am of the considered view that schedule 7 can be a compass on what is reasonable.
36. Under schedule 7 , instruction fee for a subject matter of ksh. 1,564,360 , under Advocate – client bill of costs in ksh. 153, 376 , exclusive of VAT. The advocate will then proceed to earn on other items like attendances to court. However it should be remembered that under schedule 5,the Advocates equally earn attendance fee as separate items. Therefore this huge variance between the instruction fee under schedule 7 and 5 is too big for the award of ksh. 500,000 to be considered reasonable under schedule 5. There is no justification for it.
37. In view of the foregoing and for reasons stated thereon I hereby set aside the instructions fee of ksh. 500,000 and substitute with ksh. 250,000.

#### **Whether some costs had been paid by the Applicants.**

38. It is the Applicants’ case that the respondent had been paid some costs by the Defendant in the primary suit, arising from party and party costs. This was not disputed by the respondent.
39. It suffices to state that party and party costs belong to the client and the moment an Advocate pays himself costs from the proceeds of party and party costs then he / she can only recover the balance of his fees from the client. Consequently the respondent in this case is entitled to his full fees as shall be assessed hereafter, less the ksh.137, 085 that was paid to him as party and party costs
40. The Applicants have raised other issues in the submissions , but their Application was challenging instructions fee only. As it has been often stated , submissions are not evidence.

#### **Final orders:**

41. In conclusion I hereby make the following orders:
  - a). The award of ksh. 500,000 is hereby set aside and substituted with ksh. 250,000
  - b). The certificate of costs dated 11<sup>th</sup> October 2023 is hereby set aside.



- c). The final award works out as follows:
- (i) Instructions fee –.....ksh. 250,000
  - (ii) Add:VAT( 16%)..... Ksh. 40,000
  - (iii) Sub -total.....Ksh.290,000
  - (iv) Add: Uncontested items ... ksh. 213,000
  - (v) Grand- total.....ksh.503,000
  - (vi) Less paid .....(ksh. 137,085)
  - (vii) Balance.....ksh. 365,915
- d) The costs will attract interest at 14 % from the date of taxation by the taxing master
- e) Each party to meet their own costs in this reference.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. CHIRCHIR**

**JUDGE**

In the presence :

Godwin- Court Assistant

Mr. Lucheli for the Applicants

Mr. Abok for the respondent.

