



REPUBLIC OF KENYA



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**Mohammed v Akwala t/a Akwala & Co Advocates (Miscellaneous Civil Application
E071 of 2023) [2024] KEHC 12884 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E071 OF 2023
SC CHIRCHIR, J
OCTOBER 17, 2024**

BETWEEN

MWANAHAWA A MOHAMMED BUSOLO O MOHAMMED APPLICANT

AND

DANIEL AKWALA T/A AKWALA & CO ADVOCATES RESPONDENT

RULING

1. By way of a Notice of motion dated 23rd October 2023, the Applicants herein seek for the following orders:
 - a. That this honourable court be pleased to set aside the ruling of the taxing officer made on 11th 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 11th 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.



The Applicant's case

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Mwanahawa A. Mohammed.
3. The Applicants state that the award of ksh.40,000= as instruction fees was too exorbitant and had no legal basis; that the taxing master exercised her discretion wrongly as the fees was in respect taking out a limited Grant; that in any event there was a pre-existing Agreement that the fees for taking out the grant was ksh. 30,000 only which they had already paid in full. It is further stated that the taxed fees, if allowed, would amount to double payment of the Advocate's fees.
4. Consequently they seek that the fees be re-assessed and the certificate of costs be adjusted accordingly.

Respondent's case

5. The respondent filed their grounds of opposition to the application dated 2nd November 2023 . It is the respondent's case that the application is bad in law, misconceived and an abuse of the court process and did not disclose any reasonable ground; that this court is *functus officio* and that the application is merely meant to frustrate the respondent.

Applicants submissions

6. On whether this court is *functus officio*, the Applicants submit that the reference was in compliance with paragraphs 11(1) and (2) of the Advocate's Remuneration order and that in any event , pursuant to Article 159 (2) (d) of the *constitution* justice should be done without undue regard to procedural technicalities.
7. On the second issue of whether the Respondent was entitled to any further fees and costs, it is submitted that there was an existing agreement on fees which was corroborated by a receipt of ksh. 30,000 which was produced in evidence; that consequently the taxing master erred by re- opening the matter and re-Assessing fees. That the sum awarded was unreasonable, unnecessary and exaggerated and should be set aside.

Respondent's submissions

8. while setting out the procedure as laid down in paragraph 11 of the *Advocates Remuneration order*, the respondent faults the Applicants for challenging the taxation of costs through a miscellaneous Application instead of a Reference. In this regard the Applicant has relied on a number of decisions, to buttress his submissions, which I have read through.
9. On the award, it is submitted that taxation is an exercise in discretion and the Judge should not interfere unless there was an error in principle , or the discretion was improperly exercised resulting in an injustice. Again, a number of Authorities have been cited to buttress this point and I have perused them.
10. It is the respondent's final submission that this court has become *functus officio*. However, the respondent has not expounded on this submission.

Analysis and Determination

11. The following issues lend themselves for determination



- a) Whether the reference herein lacks merit for offending paragraph 11(2) of the *Advocates Remuneration Order*;
- b) Whether the Taxing Master erred in the assessment of the instruction fees.
- c). whether this court is funtus officio

Whether the reference offends paragraph 11(2) of the Advocates Remuneration Order;

12. The Respondent contends that taxation of costs by a taxing master can only be challenged before a Judge by way of a reference initiated by way of a chamber Summons as required by the provisions of paragraph 11(2) of the *Advocates Remuneration Order* and not by way of a miscellaneous application .
13. 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.
 - (3)
14. The procedure contemplated above , which has been summarised accurately by the respondent in his submissions is as follows:
 - a. The aggrieved party issues a notice within 14 days on the items objected
 - b. The Taxing Officer shall forthwith give reasons for his decision
 - c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection
 - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.
15. There is consensus between the parties on the procedure to be followed. Indeed, both parties have anchored their divergent arguments on paragraph 11 as aforesaid. The record further shows that the Applicant followed the above procedure, save for the fact that there is no indication as to whether the taxing master, responded to the letter of objection. The letter of objection is dated 18.10.2023 and filed on 23.10.2023. Therefore, the Respondent’s submission that there was no objection sent to the taxing master is therefore incorrect.
16. Nevertheless, I have noted that the chamber summons was filed the same day as the letter of objection. I don’t consider this an issue in these proceedings. It would have been an issue if the reference was filed past the 14th day after they had filed the letter of objection. They would then be said to have been time – barred.
17. The Respondent further argues that the Applicant ought to have filed a reference. It appears that the respondent is under a misconception as to what constitutes a reference. The chamber summons filed



is in itself a Reference, and can only be filed under the original Miscellaneous Application, in this case, being this miscellaneous Application. That is what paragraph 11(2) is all about. If one is dissatisfied with the outcome of the reference then the aggrieved party can then move to the court of Appeal.

18. It also follows that this court cannot be said to be *functus officio* as the Judge was not doing the taxation. I view the procedure of filing a reference as some sort of supervisory role, that is a judge of the high court supervising the work of a taxing master.
19. In short the reference was properly placed before this court and this court is not *functus officio*.

Whether there was an error in assessing fees?

20. In *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162 cited by the respondent the grounds of interfering with the discretion of the taxing master include :
 1. an error of principle
 2. That the fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 3. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 4. That so far as practicable there should be consistency in the award.
21. Further in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, again cited by the respondent, the Court of Appeal stated as follows: -

“It is not lost to us ... that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the 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, to borrow the holding in *Mbogo -vs- Shah* (Supra), then the decision though discretionary, may properly be interfered with. See also *Attorney General of Kenya -vs- Prof. Anyang’ Nyong’o & 10 Others, EACJ App. No. 1 OF 2009.*”
22. Thus, like any other judicial discretion, the discretion of the taxing master cannot be exercised capriciously, but judiciously.
23. The Bill of costs arose from the services rendered by the Advocate in respect of Applying for Grant of letters of Administration ad litem. It is one of the items where the fees is not specifically provided for. The taxing master correctly applied paragraph 1 (f) of schedule 10 of the 2014 [Advocates Remuneration Order](#) on taxing the bill.
24. Paragraph 1(f) of schedule 10 provides as follows: “To lodge an objection to grant, or a citation or other application or proceedings under the law not otherwise provided for in this Schedule; such As the taxing officer shall consider reasonable, but not less than Kshs 10,000.” I therefore see no error in principle.
25. The next question then is whether a fee of ksh. 40,000 as instructions fee was reasonable.



26. In an attempt to ascertain what is reasonable I have made comparison with the fees chargeable for taking out a full grant provided for under Paragraph 10(a). where the value of the estate for instance is ksh. 1,000,000, the fees is ksh. 50,000. I have also considered the fact that the work involved in taking out a grant ad litem is far much less than that of taking out a full grant and equally take so less a time than the full grant. The costs incurred is also much less than in a full grant as there is no gazette fees for instance.
27. Comparing the work involved in the two different assignments, the disbursements attendant to it and time involved are of the considered opinion that ksh. 40,000 as instruction fee was too excessive and cannot be said to be reasonable in the circumstances. On the other hand, ksh. 30,000 which had been allegedly agreed upon was in my view reasonable.
28. The Applicant has submitted that there was an agreement on fees but no such agreement has been produced.
29. Consequently, I hereby set aside the award of ksh. 40,000 on instructions fee and substitute it with ksh. 30,000.
30. The final orders are as follows:
- a). The award of ksh. 40,000 on instructions fee, by the taxing master is hereby set aside and the certificate of costs emanating therefrom is also set aside.
 - b). The fee is assessed as follows:
 - Instructions fee.....ksh. 30,000
 - Other fees.....ksh. 620
 - Sub- total..... Ksh. 30,620
 - Add: 50% thereofksh. 15,310
 - Sub- total...ksh.45,390
 - Add: VAT (16%)ksh. 7,262.40
 - Add: Court fees.....ksh. 950
 - Grand total----- ksh. 53,602.40
 - Less paid.....(ksh. 30,000)
 - Balance.....ksh. 23,602.40
 - c). The costs will attract interest at 14 % from the date of Ruling by the taxing master
 - d). Each party to meet their own costs in this reference

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OCTOBER 2024.

S. CHIRCHIR.

JUDGE

In the presence of:

Godwin- Court Assistant

Mr. Lucheli for the Applicant.

