



**Mwangi & another v Mbatia (Petition E004 of 2021)  
[2024] KEHC 11897 (KLR) (Family) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11897 (KLR)

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

**FAMILY  
PETITION E004 OF 2021**

**BM MUSYOKI, J**

**OCTOBER 3, 2024**

**BETWEEN**

**SUSAN WAIRIMU MWANGI ..... 1<sup>ST</sup> PETITIONER**

**PETER MBIYU MBATIA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ELIZA MBATIA ..... RESPONDENT**

**RULING**

1. This ruling relates to applications dated 2-10-2023 and 28-05-2024. The first one is a reference challenging ruling dated 20<sup>th</sup> September 2023 by Honourable Lesootia Saitabau which was taxation of costs. The applicants seek to set aside the said ruling on items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the respondent's bill of costs dated 4<sup>th</sup> May 2023. The second application sought stay of execution of this court's certificate of taxation dated 13<sup>th</sup> February 2024 pending the hearing and determination of the reference. The applications were disposed of by way of written submissions. The petitioners' submissions are dated 29-07-2024 while the respondent's submissions are dated 30-07-2024. However, the respondent's submissions do not address the application dated 2-10-2023.
2. I will start with the application for stay of execution. I do not think that I should spend time on this application because it will automatically be overtaken by events once I make determination on the application dated 2-10-2023. I however wish to observe that the application was filed eight months after the reference was filed which to me is an indication that the petitioners did not consider it urgent. I would also say that the same was filed with inordinate delay as we are now at the final stage of the disposal of the reference. The outcome of the application for stay of execution will not matter much once I am done with this ruling. I therefore decline to grant the application and the same is hereby dismissed with no orders as to costs.



3. The petitioners have stated that the honourable taxing officer erred in law by applying criteria for assessment of costs applicable to liquidated claims while assessing item 1 which was the instructions fees. According to the applicants, the taxing officer applied the wrong scale of the Advocates Remuneration Order. It is their position that the claim in this matter was unliquidated and the taxing officer should have applied the part of paragraph 1 of Schedule 6 under the head of 'other matters'. The applicants claim in their submissions that the taxing officer should have considered the circumstances of the matter especially the fact that it arose from a family dispute and as such consider the same as arising from a commercial transaction.
4. On her part, the respondent submits that the reference is incompetent because the petitioners have not attached the impugned ruling. In my view, failure to attach the ruling to the application is not fatal. What purpose would attaching the ruling serve? The reference is made in the same file in which the impugned taxation was done and I am able to read the ruling from the court file. The purpose of requirement of exhibiting the ruling would be to enable the judge to understand the reasoning behind the finding of the taxing officer. When a judge is able to read the ruling in the file he is handling, it is in my view, not necessary to have the ruling attached to the application. Even in the authority of *Elijah Ileri & Co Advocates vs County Government of Embu (2021) eKLR* which the respondent has relied on, the judge went on to go through a ruling in the file despite the same having not been attached to the application. The judge's issue with the ruling was that it did not contain the reason for taxation but not that it had not been attached to the reference.
5. The respondent has raised a preliminary objection dated 30-10-2023 in which she listed the following grounds;
  1. This court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of internal dispute resolution mechanisms.
  2. The plaintiff has not exhausted the internal dispute resolution mechanisms set out under Paragraph 11 of the Advocates Remuneration Order which provides that;

'Should any party object to the decision of the taxing officer, he may within 14 days of the decision give notice in writing to the taxing officer of the items of taxation to which he objects.'
  3. The plaintiff has not made any application to be exempted from such exhaustion of internal dispute resolution mechanisms to directly invoke this Court's jurisdiction.
  4. No objection has been filed in regard to the ruling on taxation delivered by Hon. Lesootia (DR) on 20<sup>th</sup> September 2023 to date.
  5. No request has been made to the taxing officer to give reasons regarding any of taxed items to enable the appellant invoke the jurisdiction of this court to consider any decision on any objected item(s).
  6. The taxing officer has rendered no communication containing his reasons for the impugned taxation as by law required to enable this Honourable Court to reconsider the same. Order 11(2) of the Advocates Remuneration Order only permits the instant application once the applicant/objector has received reasons from the taxing officer and is dissatisfied by the same.
  7. The application is misconceived and is otherwise an abuse of the process of the court.
  8. The Chamber Summons dated 2<sup>nd</sup> October 2023 be dismissed with costs.



6. Even with the obvious errors in the preliminary objection, I discern therefrom that the respondent is objecting to the application on grounds that the petitioners did not comply with Paragraph 11 (1) of the Advocates Remuneration Order. All the other contents of the preliminary objection are misapplied or misplaced. I do not see how the said provision of the law fits into internal dispute resolution mechanism doctrine. The Advocates Remuneration Order is not an institutionalised instrument from which a dispute resolution mechanism can be derived. It is not an instrument between specified parties or governing running or management of an institution or entity.
7. The ruling of the taxing officer was delivered on 20-09-2023. The application for reference was filed on 2-10-2023. It is true that Paragraph 11(1) of the Advocates Remuneration Order requires a party desiring to challenge the decision of a taxing officer to seek the reasons for the decision within fourteen days and thereafter file the reference within 14 days of receipt of the reasons. However, I hold the position that where the reasons for the taxing officer's decision are contained in the ruling, the aggrieved party does not have to seek the reasons through a letter or any other method. It will be enough and acceptable if the party files the reference without the procedural aspect of requesting for the reasons. The requests for the reasons will not serve any purpose as the taxing officer is not expected to depart from his ruling and give different reasons. In *Ahmednassir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1EA* Honourable Justice Ochieng held as follows;

‘Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because the unfortunate wording of subrule (2) of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already in the formal and considered ruling.’

8. I am in total agreement with the above holding and it is my finding therefore that the reference having been filed within 14 days after the ruling, the preliminary objection raised by the respondent has no merits and the same is overruled.
9. The position in law is that matters of quantum of costs on taxation are discretionary and should be left to the discretion of the taxing officer unless it is shown that the taxing officer used or applied wrong principles or made an error which would result to injustice. In *Del Mote Kenya Limited vs Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 Others (2021) eKLR* Honourable Justice L. Gacheru held that;

‘... it must be emphasised that matters of quantum on taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not lightly interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised resulting in injustice.’
11. The petitioners claim that the taxing officer applied the wrong scale in assessing instructions fees and consequently the getting up fees. I do agree that application of the inapplicable or wrong scale or schedule of the Advocates Remuneration Order is good reason for this court to interfere with the decision of the taxing officer. That would amount to application of the wrong principle of taxation.
12. I have read the ruling of the taxing officer dated 20-09-2023. Under the 1<sup>st</sup> and 2<sup>nd</sup> items, the officer observed that he was bound to consider factors such as the nature and importance of the case or parties, the complexities of the matter, whether novel issues were raised during the hearing and the scope of



the work done. In stating so, it is evident that the officer was alive to the matters he ought to consider in reaching his decision on the bill of costs before him. The taxing officer went on to consider that the petitioners were seeking to manage the subject's estate which was valued at Kshs 42.5 million. The subject matter of the proceedings is a core factor of consideration in taxation. The Court of Appeal in *Kamunyori & Co. Advocates vs Development Bank of Kenya* (2015) eKLR held as follows;

'Failure to ascertain the correct subject matter in a suit for purposes of taxation is an error in principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the taxing officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fees is arrived at on the wrong principles, it will be set aside.'

14. The applicants claim that the taxing officer applied a scale for liquidated claim under schedule 6 instead of the part under the heading of other matters. It is my view that the petitioners' argument is not tenable. The part the applicants are referring to will be applicable where the value of the subject matter is not ascertainable from the pleadings or judgement or settlement of the parties. What the taxing officer is required in law to do is to ascertain the value of the subject matter. The applicants seem to suggest that the only way to ascertain the value of the subject matter is where the value is stated in the parties' pleadings as liquidated claim. In my view, the fact that a value of the subject matter has been pleaded does not in itself mean that what is stated therein is the value. The court has mandate and duty to go through the pleadings and all documents filed by the parties to satisfy itself on the apparent value of the subject matter. In *Joreth Ltd vs Kigano & Associates* (2002) 1 E.A. 92 it was held that;

'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 ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, among other matters, the nature and importance of the cause or the matter, the interests of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.'

15. I have read the documents and pleadings filed in the petition and I find it indisputable that the issue in contention was management of the subject's estate. If the taxing officer was able to ascertain the value of the estate of the subject, it was right for him to use the said value as the basis for the taxation of the instructions and getting up fees. The petitioners in paragraph 12 of their supporting affidavit dated 2<sup>nd</sup> October 2023 stated;

'That it is apparent that the issues in dispute in the petition was the management of the property of the subject, now deceased, who was mentally infirm at the time and access of the deceased by the petitioners/respondents.'

16. With the above averment in mind, I find that the taxing officer was right and justified to use the subject's entitlement in *Nairobi High Court Succession Cause No. 587 of 1981* as the basis for assessing instructions fees in this matter. In the petitioners' own documents including annexures to their further affidavit dated 12<sup>th</sup> July 2021, it is clearly shown that the subject's estate was more than Kshs 42.5 million.
17. The fact that the petition involved family members is not a ground for me to interfere with the taxing officer's discretion. The officer had no jurisdiction on award of costs except to the extent of assessing



the same. Whether or not the respondent did not deserve award of costs, was in the ambit of the Judge who handled the petition and awarded costs. The Judge in her judgment gave her reasons for award of costs and the taxing officer could not reverse that neither can this court. Once a Judge awards costs, the taxing officer's hands are tied in that respect and cannot interrogate the position or relationship of the parties. In that regard, it is my finding that the taxing officer used the correct legal principle in reaching his decision and in the circumstances, I find no merit in the petitioners' argument on items 1 and 2 of the bill of costs.

16. All the other items being challenged are charges on attendances, drawings, services, perusals and making of copies. I do not see any basis for the objection to those items. The taxing officer was seized of the matter. The petitioners' submissions do not tell this court what was wrong in the method adopted in assessment of these items. There is no claim that the respondent was not entitled to those items neither has there been placed before me any material enough to justify my interference with the taxing officer's decision on the items.
19. In conclusion, I find no merit in the application dated 2-10-2023 and the same is also dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Kwamboka for the respondent and in absence of the counsel for the petitioners/applicants.

