



**Njuguna v Karanja & another (Miscellaneous Civil Case E264 of 2019)
[2024] KEHC 13033 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL CASE E264 OF 2019
A MSHILA, J
OCTOBER 18, 2024**

BETWEEN

CHARLES MBUGUA NJUGUNA APPLICANT

AND

**JULIUS NGARACHU KARANJA & ANOTHER & ANOTHER & ANOTHER &
ANOTHER & ANOTHER & ANOTHER RESPONDENT**

RULING

Background

1. Before the Court is a Notice of Motion dated 9th March, 2020 which was brought under the provisions of Section 3A of the Civil Procedure Act, Order 10, 22, and 42 of the Civil Procedure Rules; the Applicant seek for orders that;
 - a. There be a stay of execution of the Warrants issued on 8/12/2022 pending the hearing and determination of this application inter-partes;
 - b. There be a stay of execution of the Warrants issued on 8/12/2022 pending the hearing and determination of this application;
 - c. The orders of the Deputy Registrar of 24/04/2020 and/or any subsequent orders be set aside.
 - d. The costs of this Application be provided for.
2. The Application was supported by the sworn Affidavit of Charles Mbugua Njuguna who stated that the orders of taxation of Bill of Costs were made without jurisdiction as the subject matter emanated from CMCC No 1281 of 1997 that involved the ownership of land parcel LR 29 Gatura and consequently the court with jurisdiction was either the Magistrates or the ELC Court at Thika or Nairobi. On 5/11/2029 the taxation was stood over pending the outcome of CA No ELC 3/2018 thereafter no further notice of taxation or Ruling was served on the Applicant or his advocates; The



orders for taxation of the Bill of Costs was made on 24/04/2020 without notifying the Applicant or his advocates; The Taxing Officer acted contrary to well-settled principles of law and also misdirected himself on the applicable principles of law. It is in the interest of justice and fairness that the Court grants the orders sought.

3. In response the Respondent The Application was supported by the sworn Affidavit of
4. It is therefore just and fair that the application be dismissed orders sought herein be granted.

Applicant's Case

5. It was the Applicant's case that the Award of Instruction Fees of Kshs 1, 300, 000/= and total of Kshs 5, 202, 260.53/= Awarded by The Taxing Officer on the Advocate's Bill of Costs is so manifestly high/excessive that it amounts to an injustice to the Client/Applicant
6. The Applicant submitted that the taxing officer considered the number of years the matter had been in Court in increasing the instruction fees. This amounted to a consideration of irrelevant factors which led to the taxing master awarding grossly excessive instruction fees.
7. Further, the learned taxing officer awarded instruction fees twice both on the original instructions and on the counterclaim, thereby running into or making an error of principle and awarding manifestly excessive fees on the Advocate's Bill of Costs. It is trite law that instruction fees are a static item and ought to be awarded or taxed only once.
8. On the issue of costs of the Client's application, the Applicant submitted that the Court ought to be guided by the legal principle under Section 27 of the *Civil Procedure Act* that costs follow an event, are granted to the successful party, and the Court has absolute discretion (to be exercised judicially) whether or not to award costs. It is thus the Applicant's submission that since the Client has demonstrated the merits of its application by showing that the taxing officer erred both in law and fact, the Client is entitled to the costs of this application as the successful party.
9. The Advocate sought judgment and decree in the sum of Kshs 5, 202, 260.53/= together with interest at the rate of 14% per annum from 17th February, 2021 until payment in full. The interest awardable to the Advocate ought to be at Court rates (14%) per annum from 30 days after the date of service of the Bill of Costs upon the Client and not from 17th February, 2021 as indicated by the Advocate. In support of this proposition, Rule 7 of the *Advocates Remuneration Order* provides that: -

“ An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full”

10. The Applicant submitted that should the court allow the Advocate's application, the interest on the decretal sum ought to be calculated from the date of the delivery of a ruling on the Client's reference.

Respondent's Case

11. It was the Respondent/Advocate's case that the Bill of Costs as drawn and filed reflects the value of the instructions, the subject matter, the complexity of the matter, the requisite professional skill, the volume of documents involved, the time and diligence expended and overall is fair in every aspect. Therefore, this fee ought to be increased, and was increased, having regard to the care and labour required, the number and length of the papers to be perused, the nature or 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.

12. In *Peter Muthoka and another v Ochieng Onyango Kibet and Obaga* [2010] eKLR, it was held that in suits where a party is seeking orders against a bank exercising its Statutory Power of Sale the value of the subject matter is the value of the suit property in question and not the value of the accrued debt.
13. Accordingly, had the Taxing Master actually based the value of the subject matter upon the true, disclosed and pleaded value of the suit property being Kshs 90,000,000 as verified and pleaded by the Client itself, and not the lesser sum of Kshs 39,400,000, as she did, the Taxing Master would have actually arrived at a much higher instruction fee which would have been the true and applicable instruction fee.
14. The Learned Taxing Officer correctly applied her mind by appreciating the value of subject matter, its complexity, industry put and time taken on the matter, so as to arrive at a fair remuneration that is commensurate to the work done by the Advocate, and that is why she exercised her discretion to increase the instruction fee by a small margin.
15. Further to the above, it is trite law that a Counter-Claim is a Separate and Independent suit from a claim by a claimant and is subject to a separate instruction fees. In the case of *Odera Obar & Co. Advocates v U Design & 2 others* [2016] eKLR, the court held that the instruction fees in respect to the counter-claim is independent of the instruction fees in relation to the plaint. Likewise, in the case of *Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited* [2015] eKLR, the court held that the Taxing Master proceeded on the correct principle that the Plaint and Counter-claim were separate claims and could stand independent of each other.
16. It was the Respondent's submission that the Applicant erroneously submitted that because the Advocates firm was not the first on record in the underlying suit, it is not entitled to full instruction fees. Quite to the contrary, the law is quite trite that an advocate is entitled to full instruction fees once instructed, and the outcome or stage of proceedings reached are irrelevant. The issue of there having been other Advocates on record for the client before Lubulellah & Associates does not in law disentitle Lubulellah & Associates to full fees in the Client's matter.
17. It was the Respondent's submission that the monies allegedly paid by the Client to the personal account of a former partner of the Advocate firm of Lubulellah & Associates Advocates, are not and cannot be legally recognized as money received by the firm in the ordinary course of business ("client's money"), as the same were never deposited into the firm's Client Account but rather were deposited into a former partner's Personal Account.
18. The Respondent argued that the consequence of an Advocate receiving a client's money into his personal account is that the said advocate will be personally liable to refund the said money to the client as was held in the case of *Henry Kipkorir Kimutai v Weda Ambrose Otieno & another* [2018] eKLR.
19. The issue of interest on an Advocates taxed costs is premised under Rule 7 of the Advocates Remuneration Order and it is settled that such interest be computed one month from the date of delivery of the fee note or bill.

Issues For Determination

20. After reading the supporting affidavit filed herein this court finds only one issue for determination which is whether the taxing master applied the wrong principles during the taxation of the Bill of Costs; and whether there are sufficient grounds to warrant interference with its decision.



Analysis

21. The undisputed facts are that the Applicant had engaged the services of the respondents in CMCC No 335 of 2016 Jimtec Services Ltd v The Department of Health Services, County Government of Nyeri & The County Government of Nyeri; it is also not in dispute that the Bill of Costs dated 17/11/2020 emanated from proceedings in that case; the question then arises as to whether the Deputy Registrar had the jurisdiction to tax a Bill of Costs relating to a matter determined in the Chief Magistrates Court;
22. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where the Court of Appeal held;

‘I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’
23. The legal position is that costs in the subordinate courts matters are assessed not taxed; the assessment is provided for under Schedule VII of the *Advocates Remuneration Order* which is specifically titled ‘costs of proceedings in subordinate courts’; this position is fortified by Paragraph 51 of the *Advocates Remuneration Order* which reads as follows;

‘Subject to paragraph 22 the scale of costs applicable to proceedings in subordinate courts (other than Kadhi Courts) is set out in Schedule VII.’
24. This position was upheld in the case of *Angelo Gitonga v Angelo Gitonga & another* [2010] eKLR where the court held;

‘...there is no provision in the Advocates Remuneration Order for taxation in subordinate courts. A practice is however arising where parties in the subordinate court file laborious and detailed bill of costs and then engage the magistrate in taxation. That in my view is uncalled for and should be discouraged, subordinate courts party and party costs should be assessed following the provisions of Schedule VII of the Order...’
25. After considering both Applications and the written submission, the issues framed for determination are;
 - a. Whether proper service of the Notice was effected;
 - b. Whether the Taxing master had jurisdiction; whether the decision/Ruling of the Taxing Officer delivered on 24/04/2020 should be set aside
 - c. Costs.

Analysis

Whether the decision/Ruling of the Taxing Officer delivered on 24/04/2020

26. It was the Applicant’s argument is that the the matter related to Thika CMCC No 1281 of 1997 and the Respondent proceeded to file a miscellaneous application in the Kiambu High Court and had it taxed thereat instead of in Thika ELC Thika; the taxing master had no jurisdiction therefore the Bill of Costs as filed was incompetent ab-initio;



27. The Applicant also argued that the Respondent failed to effect service of the Notification of Taxation.
28. The jurisdiction of this court to intervene in the decision of Taxing Officer, is limited. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal explained that,
- “On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
29. This court can only interfere in the decision of the taxing master if its shown that:
- a) The taxing master has misdirected himself;
 - b) Applied wrong principles; and
 - c) The amount taxed is extremely excessive or extremely low.
30. The above basic principles for taxation matters are set out in the *Premchand Raichand Ltd & another v Quarry Services East Africa Ltd* (1972) EA 162. In the words of Spry, VP;
- “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, and particularly where he is an officer of great experience merely because it thinks the award somewhat to high or too low: it will only interfere it thinks that the award is too high or too low as to amount to an injustice to one party or the other”
31. While determining the instruction fee, the Taxing Officer appreciated the law regarding the assessment of the instruction fee as was held by the Court of Appeal in *Joreth Ltd v Kigano & Associates* [2002] eKLR that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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.
32. In light of this holding, this court is satisfied that the Taxing Officer correctly determined the value of the subject matter from the pleadings but applied the wrong principles of law in computing the instruction fee and therefore arrived at an amount that was excessive in the circumstances.
33. This court, for the above reasons is satisfied that the Learned Taxing Officer correctly applied her mind by appreciating the value of subject matter, its complexity, industry put and time taken on the matter, but did not arrive at a fair remuneration when determining the instruction fee.
34. From the material placed before the court is satisfied the Applicant has established that the Taxing Officer committed an error in principle in proceeding to taxation of the costs and finds good reason in setting aside the Ruling. The Respondent is at liberty to have its costs assessed by a subordinate court.

Findings And Determination

35. In the light of the foregoing this court makes the following findings and determinations;
- i. The application is found to have merit and it is hereby allowed; the taxing master is found to have applied the wrong principles in taxing the Bill of Costs;



- ii. The decision of the taxing master made on 24/04/2020 is hereby set aside;
- iii. There shall be no order as to costs on this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 18TH DAY OF OCTOBER, 2024.

HON. A. MSHILA

JUDGE

In the presence of:

Mourice – Court Assistant

