



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Guantai v Mbogo (Miscellaneous Application 003B of 2021)
[2023] KEHC 1932 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 003B OF 2021
LM NJUGUNA, J
MARCH 15, 2023**

BETWEEN

SAMUEL KIRIMI GUANTAI APPLICANT

AND

NELLIUS NGAI MBOGO RESPONDENT

RULING

1. The matter for determination before the court is an application dated 18.01.2022 wherein the applicant sought for orders as enumerated on the face of the application.
2. The application is premised on the grounds on its face and it's supported by the affidavit of Samuel Kirimi Guantai, an advocate of the High Court of Kenya.
3. The matter herein relates to the Ruling of the Tax Master in relation to the applicant's Bill of Costs dated 06.09.2021. The applicant contested the ruling by the Tax Master in items 2,3,4,5,7,10 and 11 in relation to the fees due to him. He avers that the Tax Master erred in principle by failing to appreciate what the transaction involved and the level of correspondences required of which, the same is provided for under the ARO, 2014. He thus prayed that the application be allowed.
4. The respondent filed a replying affidavit albeit late in the day deposing that the Tax Master did not err in law or principle in taxing the Bill of Costs. That it was unprocedural to draw a demand letter for a transaction which did not exist and further, items 1, 2, 4 and 5 were undeserved for the same were fully paid for in the sum of Kes. 73,790.00 to the firm of Igeria and Ngugi Advocates vide receipt No 5061 on 07.12 2020. That the court exercised its discretion well, in reference to items 6, 7, 8,9,10 and 11 and therefore, the court ought not be faulted. It was her contention that the reference herein was filed out of the stipulated period and given that leave was never granted, the same should not stand. The respondent swore that if at all the applicant sued under power of attorney, then the alleged instruction fees is therefore underserved.



5. In the same breadth, the court notes that the respondent herein filed an application dated 20.01.2022 seeking for orders that the interlocutory judgment entered against the respondent together with all the consequential orders be set aside and leave be granted to defend the suit. It was her case that she was not served with the notice of taxation and the defendant's bill of costs. She therefore urged this court to set aside the ruling.
6. The applicant in response swore an affidavit dated 22.11.2022 wherein he stated that the application by the respondent is bad in law, devoid of merit and based on misapprehension of the law. That the prayers sought by the respondent are not tenable for the reason that there was neither an interlocutory judgment entered nor any formal proof hearing. It was deponed that the bill of costs together with the taxation notice was duly served upon the respondent but she failed to attend court. It was his case that the reference was not objected to, and as such, it was his prayer that the same be allowed.
7. The court notes that the respondent in her application seems to be challenging the bill of costs as filed by the applicant. This is so because she is challenging service of the notice of taxation and has stated that she previously paid an amount of Kes. 73,790.00 to the firm of Igeria and Ngugi Advocates vide receipt No 5061 on 07.12.2020 for the services allegedly rendered to her. In my considered view, this being a reference, the said averments ought to have been raised and thrashed before the taxing officer as this court lacks jurisdiction to entertain the same. Therefore, the orders sought by the applicant in that regard cannot issue.
8. The court directed that the application dated 18.01.2022 be canvassed by way of written submissions and only the respondent complied with the said directions.
9. The respondent submitted that she was introduced to the applicant herein by one Joseph Muturi Kiura and that she paid for the services rendered to the firm of Igeria and Ngugi Advocates an amount of Kes. 73,790.00 vide receipt No. 5061. That it is not therefore fair to pay double legal fees. Reliance was placed on the case of Zesta Engineering Ltd v Clouteir (2002) O.J. No. (C.A) (QL) where the court held that the fixing of costs is to be governed by an overarching principle of reasonableness. This court was therefore urged to dismiss the application herein.
10. I have considered the application, the response thereto and the respondent's submissions and it is my considered view that the main issue that this court needs to determine is whether the application has merits.
11. From the applicants Bill of Costs, the respondent herein had sought for services in a conveyancing involving property valued at Kes. 3,200,000.00. That the same included drawing, attestation of transfer forms, land control board forms, land board forms for charge, acknowledgement slip dated 18.07.2020; 01.10.2020 and 16.11.2020. The applicant annexed the said list of documents to support his cause for costs to be taxed by the Tax Master in his Bill of Costs dated 06.09.2021.
12. The respondent has contended inter alia that she was not served with notice of taxation and the bill of costs and as such, urged this court to set aside the ruling. Further, the respondent opposed the application herein citing reasons that the applicant did not demonstrate the manner in which the Tax Master erred in her decision.
13. From my perusal of the file, I note that an affidavit of service was filed on 08.11.2021 in which, one James Kamau Thuo explains how he effected service upon the respondent. The attached taxation notice reads High Court of Embu and not Kerugoya as alleged by the respondent. In that regard, I am not convinced that the respondent is truthful.



14. On whether, the reference herein was filed out of time and without the leave of the court, it is trite that the applicant ought to have filed the reference herein within 14 days of the ruling by the Tax Master. It has, however, not been shown that the applicant's failure to comply with the rules was deliberate and motivated by bad faith. Consequently, the applicant's failure to comply with the rules on time should not bar him from having his case heard and determined on merit. [See articles 48, 50 and 159 of *the Constitution*]. Further, I seek refuge in the case of *Abmednasir Abdikadir & Co. Advocates Vs. National Bank of Kenya Limited (2)* [2006] 1 EA 5 Ochieng, J, 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 of the unfortunate wording of subrule (2) of rule 11 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 contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same is dismissed.”
15. Similarly, Apaloo JA in the case of *Philip Keipto Chemwolo & Another Vs Augustine Kubende* Civil Appeal 103 of 1984 [1986] eKLR held;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
16. The applicant has faulted the finding of the Tax Master and has urged this court to adjust the figures and reassess the fees due to the applicant. That in the alternative, this Honourable Court refers the matter to be taxed afresh by a different Deputy Registrar.
17. It is now trite law that the court will only interfere with the decision of a taxing officer in cases where there is demonstration of an error of principle. In *Republic Vs Ministry Of Agriculture & 20 others Ex-parte Muchiri W' Njuguna* [2006] eKLR, Ojwang J (Retired) stated as follows: “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, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.”
18. In regards to item 2, the same ought to have been determined in reference to Schedule 5 of the *Advocates Remuneration Order*.
19. Items 3 and 7 ought to have been determined according to the scale prescribed by Schedule 5 paragraph 4 of the Advocates Remuneration Order.



20. On item 4, section 6 (1) of the VAT Act, 2015 provides as follows-

Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.

21. For Party and Party Bill of Costs, the winning party is merely compensated for the costs they incurred in prosecuting or defending a case while for Advocate-Client Bill of Costs, an advocate is compensated for the services rendered to the client. The court in the case of Pyramid Motors Limited Vs Langata Gardens Limited [2015] eKLR distinguished the two as follows-

...Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred.

22. Similarly, the applicant did not provide proof that he had paid for the same and I therefore agree with the Tax Master.

23. Item 5, the same ought to have been taxed under part II of Schedule 5 of the Advocates Remuneration Order.

24. Item 10, the same ought to have been taxed under part II of Schedule 5 of the Advocates Remuneration Order.

25. Item 11, is payable but should be 50% of the instructions fees awarded under item 1

26. In the end, the orders that are commendable to me are as follows:

- i. The bill of costs is hereby remitted back to be taxed by a different Taxing Officer.
- ii. Application dated January 20, 2022 is hereby struck out.

27. Each party to bear its own costs of their respective applications.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....Applicant

.....Respondent

