



Nyaga (Suing as the Legal representative of the Estate of Harrison Nyaga (Deceased) v Nyaga (Miscellaneous Civil Application E052 of 2022) [2023] KEHC 2040 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2040 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E052 OF 2022
LM NJUGUNA, J
MARCH 8, 2023
IN THE MATTER OF PURITY NKIROTE NYAGA (SUING AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF HARRISON
NYAGA (DECEASED)
AND
IN THE MATTER OF HIGH COURT OF KENYA AT EMBU IN
CIVIL APPEAL NO. E015 OF 2021
AND
IN THE MATTER OF RULE 11 ADVOCATES REMUNERATION
ORDER
BETWEEN
PURITY NKIROTE NYAGA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF HARRISON NYAGA (DECEASED) APPLICANT
AND
EUDICAS FUNDI NYAGA RESPONDENT

RULING

1. The applicant herein filed the instant application dated November 7, 2022 and wherein he seeks for orders that;
 - i. This Honourable court be pleased to set aside and /or vary the costs as taxed by the Deputy Registrar Hon T Kwambai on October 12, 2022 in respect to item 1.



- ii. The costs of this application be provided for.
2. The application is premised on the grounds on its face and further supported by the affidavit by Joe Kathungu wherein among other issues, faulted the taxing officer for having failed to exercise his discretion judiciously by holding that Kshs 50,000/= was reasonable instruction fees. That the appeal by the respondent was dismissed in favour of the applicant and further, the Bill of Costs stated that the value of the subject of the appeal was Kes 4,064,770.00. That under the ARO 2014, Legal Notice No 35, schedule 6 para (b) clearly states that where the value of the subject matter is Kes 4,064,770.00 the instruction fees ought to be Kes 181,295 but the applicant in her Bill of Cost had prayed for Kes 180,000.00. It was therefore prayed that the application herein be allowed with costs.
3. The application is opposed vide a replying affidavit sworn on January 17, 2023 and wherein the respondent deposed that the application herein is incompetent, misconceived, and an abuse of the court process and therefore, ought to be dismissed. That the applicant did not file an objection to the Taxing Master on the items on the Bill of Costs that she was dissatisfied with, and seek for reasons for determination pertaining to the taxation before lodging the reference herein. It was deposed that the period for filing a reference is specific and no evidence has been shown that there was an extension of time to file the present application thereby rendering the application incompetent and time barred. Further that, from the supporting affidavit by Joe Kathungu Advocate, it was not demonstrated that there was an error in principle in the ruling by the Taxing Master.
4. Directions were taken that the application be canvassed by way of written submissions which I proceed to summarize as follows:
5. The applicant filed his written submissions and wherein he reiterated that the grounds upon which a court can interfere with the decision of the Taxing Master are settled. Reliance was thus placed on the case of *Andrew Kipkoech Bon & 2 Others v Elizabeth Korir* [2022] eKLR. It was submitted that the Taxing Officer did not give his reasons for reducing the amount in item 1 from Kes 180,000.00 to Kes 50,000.00. That in the dismissed appeal, the value of the subject matter could be ascertained as the same was Kes 4,064,770 as awarded by the trial magistrate in Runyenjes SPMCC No 39 of 2018. It was contended that in the premises, the amount awardable to the applicant in her Bill of Costs ought to have been Kes 180,000.00 as was prayed. It was submitted that the amount of Kes 50,000.00 which was awarded on item 1 is extremely low in the circumstances as it is less than the prescribed minimum fees by a colossal sum of Kes 130,000.00. That the said amount of Kes 130,000.00 also exceeds the total costs awarded to the applicant in her Bill of Costs which was taxed at a paltry Kes 63,700. The applicant stated that the Taxing Master awarded costs that were extremely low, unfair, unreasonable in the circumstances and not commensurate to the work done. This court was therefore urged to interfere with the decision of the Taxing Master as it was alleged that the same did not take into account the value of the subject matter.
6. The respondents submitted that he relies entirely on the replying affidavit sworn on January 17, 2023 and further gave a synopsis of the same to wit that, the applicant filed the civil suit for recovery of damages following a road accident in which one Harrison Nyaga sustained fatal injuries before the trial court at Runyenjes PMCC No 39 of 2018 and obtained ex parte judgment. That on July 20, 2020, he filed an interlocutory application seeking to set aside the ex parte judgment and be granted leave to defend the suit which application was dismissed. It was stated that being aggrieved by the trial court's decision, he appealed the same via Appeal No E015/2021 at Embu High Court and the same was equally dismissed with costs. That the appeal was an interlocutory appeal whose value was not disclosed given that the prayers sought in the memorandum of appeal did not touch on the value of the subject matter. Reliance was placed on the case of *Premchand Raichand Limited & Another v Quarmy*



Services of East Africa Limited & Another [1972] E.A 162. That the award in reference to item 1 was more than reasonable.

7. The Taxing Master thus was faulted for exercising his discretion in assessing the instruction fees on the appeal herein.
8. I have considered the application, the response thereto and the respondent's submissions and it is my considered view that the main issue for determination is whether the application is merited.
9. Paragraph 11 Rules (1) and (2) of the *Advocates Remuneration Order* and which I believe are relevant in this case provides that: -

“(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 this objection.

10. What the above provision means is that before a person can object to the decision of the taxing officer, he ought to give notice in writing to the taxing officer, of the items of taxation which he objects. The taxing officer is then required to forthwith record and forward to the objector the reasons for his decision. The objector has discretion to file his reference within 14 days.
11. This court is alive to the decisions of superior courts to the effect that lack of the taxing officer's reasons will not make the reference incompetent more so where the reasons appear on the face of the decision of the taxing master. Odunga J, in *Evans Thiga Gaturu Advocate v Kenya Commercial Bank Limited* [2012] eKLR, held that:

“It is therefore clear that the interpretation by the court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing officer was exercised on sound legal principles.

However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference”.

(See also *Kinyua Muyaa & Co Advocates v Kenya Ports Authority Oensin Scheme & 8 others* [2017] eKLR and *In Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* (2) (2006) 1 EA 5.

12. The respondent herein has challenged the exercise of the Taxing Master's discretion in reference to item one of the Bill of costs. Of importance to note is the fact that as already mentioned above that this court will only interfere with the decision of a taxing officer in cases where there has been shown



to be an error of principle. In Republic v 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 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.”

13. Having considered arguments by both counsel and having in mind that the appeal before this court was mainly an interlocutory appeal in that the appellant sought before this court an order to set aside the ex-parte judgment previously entered by the trial court and not the decree of the said judgment, it is my considered view, therefore, that the value of the subject matter had nothing to do with the appeal.
14. In that regard, and guided by the provisions of the ARO, the most appropriate section that the Taxing Master ought to have used is Schedule 6 (A) under Other Matters – Appeals (a) which provides as follows:

To present or oppose an appeal in any case not provided for above; such as may be reasonable but not less than Kes 25,200.00.
15. As already noted above, the instructions were to defend an interlocutory appeal to set aside the ex-parte judgment previously entered by the trial court and not against the decree of the said judgment.
16. In the case herein, the value of the subject matter as already found had nothing to do with the appeal and its outright that the Taxing Master by exercising his discretion opted to award the applicant herein Kes 50,000.00 instead of 25, 200.00 as provided for by the ARO.
17. It is my view, therefore, that the taxation on item 1 was sound and the Taxing Master exercised his discretion properly.
18. In the premises, the application is hereby dismissed with no orders as to costs.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....Applicant

.....Respondents

