



Ochieng' Ogutu & Co Advocates v Mararo (Miscellaneous Civil Application E178 of 2021) [2023] KEHC 2472 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E178 OF 2021**

G MUTAI, J

MARCH 24, 2023

BETWEEN

OCHIENG' OGUTU & CO ADVOCATES APPLICANT

AND

LILIAN WAMUYU MARARO RESPONDENT

(Being a reference from the ruling on taxation of the applicant's advocate-client bill of costs by the honourable EM Analo dated and delivered on 2nd December, 2021)

JUDGMENT

1. The Deputy Registrar of this court assessed the advocate-client bill of costs dated September 14, 2021, on December 2, 2021 at KES 240,650.00. The applicant was aggrieved by the said decision, in particular, by the award of KES 200,000.00 as instruction fees, instead of KES 400,000.00 that had been sought, and thus filed this reference.
2. The Deputy Registrar, in his role as the court's taxing master, arrived at the said decision having looked at the following cases *Joreth Ltd v Kigano & Associates*; Civil Appeal No 66 of 1999 ([2002] 1 EA 92 [2002] eKLR, *Republic v the Ministry of Agriculture and 2 others Ex parte Samuel Muchiri W Njuguna and Others* [2006] eKLR, *Jeremiah Muku v the Methodist Church in Kenya Trustees Registered and Another* [2015] eKLR and *Premchand Raichand Limited & Another v Quality Services of East Africa Ltd and Another (N0.3)* [1972] EA 162. Having done so he distilled the factors that he had to consider when taxing an advocate-client bill of costs as being: -
 - a. The nature and importance of the cause or matter;
 - b. The amount or value of the subject matter involved;
 - c. The interest of the parties;
 - d. The complexity of the matter; and



- e. Serious preparations involved in the general conduct of the proceedings.
3. It was his opinion that the applicant had not justified why it sought instruction fees in the sum it did. Consequently, in exercise of what he said was his discretion he allowed the sum of KES 200,000.00 as instruction fees. Thereafter a certificate of taxation dated December 2, 2021 was issued on December 9, 2021.
4. The applicant being aggrieved filed this reference on December 17, 2021 seeking 3 orders to wit that:-
 - a. The ruling and decision delivered herein on December 2, 2021 by the honourable taxing master, EM Analo, taxing the applicant's advocate-client bill of costs dated September 14, 2021 at KES 240,650.00 be set aside and or vacated;
 - b. The Bill of Costs aforesaid be remitted back or taxation by a different taxing officer; and
 - c. The costs of this application be provided.
5. The Chamber Summons application herein is expressed to be brought under rule 11(2) of the Advocates (Remuneration) Order and Section 3A of the Civil Procedure Act, "and all other enabling provisions of the law".
6. It would appear to me that the applicant's sole objection is in regard to the assessment of the instruction fees. In the applicant's reckoning the learned taxing master "erred in law and in fact in taxing the advocates instruction fees in the sum of KES 200,000.00 under item 1 being an amount way below what is allowed under schedule 10 paragraph 1 (a) of the Advocates Remuneration Order, 2014 for an estate worth over KES 34,000,000.00".
7. Paragraph 4 of the Advocates (Remuneration) (Amendment) order, 2014 states that "an advocate shall not agree or accept his remuneration at less than (that) provided by this Order." There doesn't seem to be a bar to a higher amount. It would appear to me that an advocate and his client may, if they so wish, agree on payment of a higher amount. The advocate may also ask for a higher amount of fees than that provided by the Rules. In case of a dispute in the latter event it is up to the taxing master to determine if the higher amount sought by the advocate is merited based on the justification provided.
8. The advocate acted for the Respondent in succession proceeding in respect of the estate of Cleophas Biryomumaisho Mubangizi (deceased). I have seen the Petition for Letters of Administration intestate as well as the Affidavit in Support of the Petition for the Letter of Administration Intestate. In the latter of these documents the value of the assets of the deceased (and thus the gross value of the estate) is given as being KES 34,000,000.00. In my view the said value should have guided the taxing master.
9. Schedule 10 (1) (a) of the Advocates (Remuneration) Order gives a table of fees payable in such proceedings. It states "to apply for grant of probate of written will, or proof of oral will, of letter of administration with or without will annexed, the proceeding not being contested where the gross capital value of property comprised in the grant ... 5% of the value on the first KES 1,000,000.00 thereof and 1% over KES 1,000,000.00.
10. The schedule if in my opinion clear enough. The principles applicable in assessment of costs are also well settled. An advocate may not charge less than what the relevant schedule provides. Conversely he may charge more than what is prescribed but the taxing master may only allow such an amount of fees in excess of the scale as may be reasonable, bearing in mind the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the complexity of the matter and whether or not serious preparation was involved in the conduct of the proceedings.



11. In my opinion the matter before the trial court was an ordinary succession cause. That being the case the instruction fees ought to have been assessed in conformity with schedule 10, unless reasons for allowing higher amount was provided to the satisfaction of the taxing master. No such reason was provided in this case.
12. As the gross value of the estate was given as being KES 34,000,000.00 it is my opinion that the taxing master was bound to base his ruling in respect of instruction fees on the said value. I however note that the advocate, in the advocate-client bill of costs, did not set out the basis for seeking KES 400,000.00. That said the taxing master did not justify his award of KES 200,000.00 or how he arrived at it.
13. The ruling of the taxing master refer so this “discretion” in allowing the applicant KES 200,000.00 as instruction fees. I am afraid his discretion is limited by the relevant schedule. He may only allow as instructions fees, an amount equal or greater than the minimum fees provided in the *Advocate (Remuneration) Order, 2014* and the schedule thereto. Where he allows an amount less than that provided for by the Rules this court has the power to set it aside and give appropriate directions.
14. What then is the appropriate instruction fees in this matter? Since the gross value of the estate is KES 34,000,000.00 the instruction fees should therefore have been at least KES 380,000.00, and not KES 200,000.00 as allowed by the learned taxing master.
15. I find and hold that the learned taxing master erred. I therefore set the same aside. As prayed in prayer No 2. of the Chamber Summons application dated December 10, 2021 I remit the Bill of Costs dated September 14, 2021 back for taxation by a different taxing officer.
16. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH, 2023

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GREGORY MUTAI

JUDGE

In the presence of:

Winnie Migot – Court Assistant

No appearance for the Applicant

No appearance for the Respondent

