



**Wamahu v Gitonga & another (Succession Cause 523 of 2006)  
[2023] KEHC 3914 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 523 OF 2006**

**FN MUCHEMI, J**

**MAY 4, 2023**

**BETWEEN**

**PAUL GITONGA WAMAHIU ..... APPLICANT**

**AND**

**WACHIRA GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**PAUL NYARE GITONGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This application dated October 14, 2021 seeks for orders to set aside and review the Taxing Master's ruling dated September 9, 2021 on the 2<sup>nd</sup> respondent's Bill of Costs dated April 7, 2021.
2. The 2<sup>nd</sup> respondent opposed the application and filed a relying affidavit dated September 29, 2022 and further affidavit dated March 6, 2023.

**The Applicant's case**

3. The applicant states that the bill of costs dated April 7, 2021 was taxed on September 9, 2021. The applicant contends that the taxing master erred in finding that the 2<sup>nd</sup> respondent's bill of costs had not been opposed. He deposes that he opposed the bill of costs through grounds of opposition filed on August 19, 2021. The applicant further states that the court on September 1, 2021 confirmed that he filed his grounds of opposition before the court scheduled a ruling date.

As such, the applicant states that there is an error apparent in the taxing master's ruling as his submissions were not considered in the taxation.

**The 2<sup>nd</sup> Respondent's Case**



4. The 2<sup>nd</sup> respondent states that costs were awarded in his favour and thus he leaves it to the court to render its ruling pursuant to the law.
5. The 2<sup>nd</sup> respondent filed submissions herein while the applicant elected not to file any submissions.

#### The Law

Whether the applicant has made out a case for the review or setting aside of the taxing master's assessment.

6. The law is settled that a court will only interfere with the taxing master's decision where there is an error of principle. In *Republic vs Ministry of Agriculture & 2 Others ex parte Muchiri W'njuguna & 6 Others [2006] eKLR* it was held:-

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 that 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 interference that it was based on an error of principle.

7. In the case of *Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd [2014] eKLR*, Odunga J laid out the principles as follows:-

- a. That 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 manifested excessive as to justify an inference that it was based on an error of principle;
- b. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;
- c. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion. “

8. The Bill of Costs dated April 7, 2021 and was drawn at Kshs 225,135/-. The taxing master taxed the said bill at Kshs 225,135/- for it was not opposed. The taxing master noted that the bill was drawn to scale. The applicant argues that he opposed the bill of costs by filing grounds of opposition on August 19, 2021. The court record confirms that the said grounds of opposition were filed on the said date. On September 1, 2021, the court confirmed that the applicant had filed his grounds of opposition and scheduled a ruling date for September 6, 2021. The taxing officer ruling in her said that the applicant did not file any objection to the said bill of costs. She proceeded to tax the bill as drawn because it was not opposed and was drawn to scale. It is therefore evident that the taxing master overlooked the applicant's objection to the bill of costs.
9. Article 50(2) of the *Constitution* guarantees every person the right to be heard in any suit. The court in taxing the bill of costs did not accord that right to the applicant since the grounds of opposition were not considered in the ruling. It may have been an oversight by the taxing master in preparing the ruling



since the court had already acknowledged while giving the date of delivery of the ruling on September 1, 2021 that the applicant had filed his grounds of opposition.

10. The oversight by the taxing master resulted in the applicant being denied his constitutional right to be heard. As such the said ruling delivered on September 9, 2021 taxing the bill as drawn was an error in principle which allows this court to interfere with the decision of the taxing master.
11. Consequently, the ruling delivered on September 9, 2021 is hereby set aside and the original file be and is hereby remitted to another taxing master for taxation of the Bill of costs to be concluded within 60 days.
12. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through videolink this 4<sup>th</sup> day of May, 2023**

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