



**Mbogo v Nanda Ogange & Co Advocates (Miscellaneous Civil Application  
104 of 2022) [2023] KEHC 19074 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 104 OF 2022**

**HM NYAGA, J**

**JUNE 19, 2023**

**BETWEEN**

**ELIZABETH MBOGO ..... APPLICANT**

**AND**

**NANDA OGANGE & CO ADVOCATES ..... RESPONDENT**

**RULING**

1. Before this court is a chamber summons application brought under Paragraph 11(2) of the [Advocates \(Remuneration\) Order](#). The applicant seeks the following orders;
  - a. That this Honourable Court be pleased to set aside the decision of the taxing officer dated 8<sup>th</sup> December 2022 and direct that the bill dated 15<sup>th</sup> August, 2022 be taxed by another Taxing officer other than Hon. Nancy Makau.
  - b. That costs of this Application be provided for.
2. The application is based on the grounds set out therein and the annexed affidavit of Elizabeth Mbogo.
3. It is the applicant's case that in 2021 she instructed the Applicant to represent her in Nakuru CMCC No. E 332 of 2021 and that matter was determined and a judgement delivered partly in her favour.
4. She averred that her then advocate proceeded to draw a decree in the matter and the Applicant charged instructions fees based on the amount held in the bank and not on the nature of the work done and other factors that need to be considered while charging instructions fees.
5. She stated that the Applicant proceeded to draw an advocate client bill of costs dated 15<sup>th</sup> August, 2022 claiming Ksh. 410,596.50 which she disagreed with and proceeded for taxation.
6. She further deponed that the bill of costs was taxed at Kshs.417.088.50 vide a ruling delivered on 8<sup>th</sup> December, 2022 and that being aggrieved by that ruling, she filed a notice of objection to taxation on



- 16<sup>th</sup> December, 2022. That on 13<sup>th</sup> December, 2022 her advocate wrote a letter to Court requesting for a typed copy of the Ruling and reasons for taxation.
7. She stated that the applicant/respondent has filed an application for taxation notice issued by the taxing officer in the matter and when the applicant's application dated 25<sup>th</sup> January, 2023 came for hearing, the Honorable court notified her advocate that the ruling had been typed and it was ready for collection. It was her deposition that on 23<sup>rd</sup> February, 2023, her Advocate collected the certified copy of the impugned ruling.
  8. She contended that the taxed costs of Kshs.417, 088.50 is over and above the costs claimed in the bill of costs of kshs.410.596.50.
  9. She believes the taxing officer erred in law and principle in taxing the bill of costs as drawn and in holding that the instruction fees were drawn and taxed VAT at Kshs. 35,888.00 yet the amount claimed by the Advocate as instruction fees was excessive and unjustifiable.
  10. She also believes that the legal fees should not be taxed exorbitantly to an extent that a litigant cannot afford it and that given the nature of the pleadings herein and in order to avoid delaying, this Honourable Court should re-tax the bill on the disputed items, make a finding on the value of the subject matter, the instructions fees payable or remit the bill to be re-taxed by another taxing officer.
  11. Fred M. Ratemo, an advocate practicing with the Applicant swore a replying affidavit in opposition to this Application on 2<sup>nd</sup> March, 2023.
  12. He averred that the respondent exhibited the notice of objection to taxation dated 13<sup>th</sup> December,2022 without proof that she paid the filing fee of Ksh.100 in compliance with the Gazette Notice Number 6830.
  13. He averred that as per the e-filing portal the court assessed the filing fee for Notice of objection to taxation in the sum of Ksh.100/= but the invoice was never settled and thus in absence of proof of the payment of the prescribed filing fee there is no valid Notice of Objection to taxation lodged against the decision of the taxing officer.
  14. He also believes that based on the above, the reference herein being grounded on an invalid Notice of Objection to taxation is incompetent, null and void and it is for striking out.
  15. He deponed that the application does not state with precision the errors of law and fact that the taxing officer is alleged to have committed in taxing the bill of costs.
  16. He believes that the substantive prayer in the application herein does not avail the Applicant since she does not object to items 2,3,4,5,6 and 8 in the bill of costs and therefore the court's decisions should be confined only to items 1,7,9,10, VAT,1/2 Advocates-client costs and disbursements.
  17. Regarding the first item of the Bill of Costs, he averred that part B of Schedule 7 of the *Advocates(Remuneration)(Amendment) Order* 2014 stipulates the formula for taxing advocate and client costs and the Taxing officer has no discretion on the matter and that the taxing officer correctly appreciated the law and applied paragraph (a) of Part B of Schedule 7 of the *Advocates(Remuneration) (Amendment)Order,2014* and increased the costs assessed by the Lower Court under Part A of Schedule 7 of the *Advocates(Remuneration)(amendment) Order,2014* in the sum of Ksh.234,390 by 50% (Ksh.117,195)
  18. With regard to item no. 7 of the Bill of Costs, he asserted that paragraph 7(b) of Schedule 6 of the *Advocates (Remuneration) (amendment) Order, 2014* prescribes a charge of Ksh.500 for every attendance at offices of court or registrar on routine matters and believes that objection to item 7 is



- unfounded since there is no dispute that the Notice of Taxation issued by the court on 6<sup>th</sup> September was collected by the Applicant from the Court's Registry and subsequently served.
19. With respect to items no. 9 and 10, he deposed that paragraph 7(a) of Schedule 6 of the *Advocates (Remuneration) (amendment) Order*, 2014 prescribes a charge of Ksh.1000/= on any necessary application to or formal attendance on the registrar or deputy registrar and there is no dispute that there was an attendance before the Deputy Registrar during the taxation and the delivery of the ruling on taxation and thus objection to these items is unfounded.
  20. Regarding ½ Advocate client costs, he stated that taxing officer having taxed item 1 as described at Paragraph 14 above, could not and did not award other ½ advocate client costs.
  21. With regard to disbursements, he stated that Gazette Notice Number 6830 prescribes Ksh.500/= as filing fees for a bill of costs yet they only claimed Ksh.350/= in the bill of costs and thus the objection to the same is unfounded.
  22. With respect to VAT, he stated that provisions of legal services is VAT ratable and that VAT is an allowable item in the in the Advocate/Client Bill of costs at 16% prescribed rate and that 16% of 357,260 is Ksh. 57,161.60 yet the Deputy Registrar awarded Ksh. 35,888/= only.
  23. He believes the amounts taxed by the Deputy Registrar are correct and the objection is unmeritorious.
  24. The Applicant swore a further affidavit on 8<sup>th</sup> March, 2023 in response to the aforesaid replying affidavit. She averred that her advocate on 15<sup>th</sup> December, 2022 paid the assessed fee of Kshs. 750/= to the notice of objection to taxation and was issued with a receipt which she annexed as EM 3.
  25. She asserted that the applicant is being mischievous by failing to point out that she paid Kshs. 750.00 and the receipts is in the court file and reflected in the judiciary portal.
  26. She therefore believes that the notice of objection to taxation and the reference was properly and validly filed.
  27. It was her deposition that notice of objection stated precisely the items she objected to and that the taxing officer erred in law and in principle by taxing the bill excessively than what was claimed.
  28. She stated that in determining instructions fees there are several factors to be considered including the amount of work done, pleadings filed and time taken in handling the matter.
  29. She averred that the taxing officer misdirected herself in finding that the lower court file was properly taxed hence premising her decision on that taxation yet no taxation had been done by the lower court.
  30. It was further deposition that Paragraph B of Schedule 7 of the *Advocates (Remuneration) (Amendment) Order* 24 provides that Advocate Client Bill of Costs need to be increased by one half only applies where party and party bill of costs has been duly assessed by the taxing officer and in this case, the party and party bill of costs was not assessed by a taxing officer.
  31. The Chamber summons was canvassed by way of written submissions. Only the Applicant's/ Respondent's submissions are on record.

### **The Applicant's/respondent's Submissions**

32. The respondent submitted that the further affidavit filed on 10<sup>th</sup> March 2023 is ripe for striking out as it was filed outside time and without leave of court



33. On whether the reference is grounded on an invalid notice of objection to taxation, the respondent submitted that in the instant case it has exhibited a printout of the e-filing portal evidencing assessment of filing fees of Ksh.100/= for a Notice of Taxation which was unpaid and that what the Applicant exhibited in her further Affidavit is a receipt of Kshs.750/= being filing fees for a response to an application. The respondent argued that besides not paying the filing fee the Applicant has also failed to remedy the situation and as such the reference herein is grounded on an incompetent notice of objection to taxation and should be struck out. To buttress this position reliance was placed on the case of *Mombasa Cement Limited vs Speaker, National Assembly & another* [2018] eKLR
34. In regards to whether the taxing master's decision was based on an error of principle, the Respondent reiterated its averments contained in the Replying Affidavit in regards to the objected Items.
35. The respondent also argued that the assessed party and party costs were judicially determined by a court of competent jurisdiction. To bolster this position, reliance was placed on the case of *Bernard Gichobi Njira vs Kanini Njira Katbendu & another* [2015] eKLR where the court inter alia held that it is indisputable that a Magistrate's court has jurisdiction to assess costs under paragraph 51 of the *Advocates Remuneration Order* of Schedule VII.
36. On VAT the Respondent argued that provision for legal services is VAT Ratable. To support this proposition reliance was placed on the cases of *Mereka & Co. Advocates vs New Kenya Co-operative Creameries Limited* [2018] eKLR & *Ngatia & Associates Advocates vs Interactive Gaming & Lotteries Limited* [2017] eKLR where both courts concurred that VAT is a statutory charge on legal services rendered to the client.
37. On costs of this Application, the Respondent prayed for the award of the same. In support of this position it referred this court to the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR where the court held inter alia that costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the case.

### **Respondent/Applicant's Submissions**

The applicant/respondent also filed her submissions. In a nutshell she states she has provided sufficient explanation surrounding the filing the notice of objection to taxation and therefore the said notice is valid. On the court's powers, I was referred to the decision in *KANU National Elections Board & 2 others vs Salah Yakub Farah* (2018) eKLR.

38. Upon perusing the application, the response to the same and the submissions on record, it is my view that the following issues arise for determination;
  - a. Whether the further Affidavit by the Applicant should be struck out.
  - b. Whether the reference herein is grounded on an invalid Notice of Objection to taxation.
  - c. If answer to (b) above is in the negative, whether the Applicant is entitled to the orders sought.

### **Whether the further Affidavit by the Applicant should be struck out**

39. Order 51 Rule 14 Sub-rule 3 provides that any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may, with the leave of the court, file a supplementary affidavit.
40. The Supreme Court in the case of *Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission and 3 Other* [2013] eKLR regarding failure to seek leave to file a further Affidavit held:



- i. “The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence”.
41. While it is true that the Applicant filed a further affidavit without leave of court, there is no evidence that it raises any new matters that were either not in her supporting affidavit. I have perused the affidavit. In my view it answers to direct matters raised in the affidavits in reply to the application. The Respondent herein has responded to the issues therein in its submissions and as such no prejudice has been occasioned to it. I therefore disregard the technicality issue and decline an invitation to strike out the further Affidavit.

### **Whether the reference herein is grounded on an invalid Notice of Objection to taxation**

42. Section 96 of the *Civil Procedure Act* provides for power to power to make up deficiency of court fees. It reads:-
- “Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”
43. Section 96 of the *Civil Procedure Act* therefore grants this Court power to exercise discretion to allow the person affected to pay the whole or part of the Court fees if not paid.
44. In *Mombasa Cement Limited vs Speaker, National Assembly & another* (supra) the court stated that;
- ‘The discretionary powers of this Court will ‘not be exercised where the applicant’s own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith. Examples include where
- (i) the failure to pay the Court fees or part thereof is willful or fraudulent aimed at denying the government revenue,
  - (ii) where no sufficient explanation is given for the failure,
  - (iii) or where it is evident that a party is not candid in the explanation given or there is willful concealment of material information,
  - (iv) where there is evidence of fraud or collusion in failing to pay the Court fees, obtaining the judgment
  - (v) where allowing the party to pay is prejudicial to the administration taking into account the time when the failure to pay was brought to the attention of the defaulting party and has failed to remedy the situation.’
45. The Applicant in this matter contends that on 13<sup>th</sup> December 2022 her advocate prepared a notice of objection to taxation and emailed it to court for assessment and on the same day the document was assessed at Kshs. 750/=, which amount was excessively high than the prescribed amount. That her



advocate wrote an email to court to reassess the notice of objection to taxation but the email was not responded to. She averred that on that day her advocate sent a representative to the registry to inquire about the assessment and he was informed by the registry that the document was correctly assessed and that that was the requisite figure for the notice of objection to taxation. She annexed an email excerpt marked as EM1 evidencing that her advocate did send the document in question to court for assessment and a receipt of Ksh. 750/= marked as EM2 for payment of Response to application by way of grounds of opposition or objection.

46. The respondent on its part stated that filing fees for Notice of objection to taxation as per the Gazette Notice Number 6830 is Kshs.100/= and that it visited the e-filing portal and ascertained that the said document was assessed at Ksh.100/= which amount has not been paid by the Applicant. He annexed copy of Gazette Notice Number 6830 showing that the filing fee of Notice of Objection to taxation is Kshs.100/= and screenshots of the e-filing portal showing that an invoice of Kshs.100/= was generated and sent to the Applicant on 14<sup>th</sup> December, 2022.
47. The amount payable for a notice of objection to taxation is Kshs.100/=. It is clear that a notice of objection to taxation was sent to the court and that an invoice of the said amount was generated and sent to the Applicant. Whereas the Applicant has not exhibited any receipt as proof of payment thereof, the question that begs an answer was what the Kshs. 750/- paid was for. It refers to an application but at the material time no application was filed. The only document filed on 15<sup>th</sup> December 2022, was the notice of objection to taxation, and the accompanying receipt is said to be for an application.
48. The averments by the Applicant in regards to this issue do present a reasonable explanation. She averred that the document was excessively assessed and stated that her advocate did write an email to court for reassessment of the same.
49. It is common knowledge that when a party wishes to file a document in a court not using e-filing portal, it is the court that assesses the document and generates an invoice. In this case the court generated an invoice for Kshs. 750/- for a non existent application. Despite her reservations, the applicant paid the same.
50. If the court was to find that the notice of objection was not paid for it would also find that the court wrongly assessed the document as an application. It would have to refund the applicant the excess amount of Ksh. 650/-.
51. I thus find that the error by the assessment officer cannot visit upon the applicant who duly submitted the correct document for assessment.
52. In *Mombasa Cement Limited vs Speaker, National Assembly & another* (*supra*) the court stated as follows in regards to failure to pay court fees:-

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.”



53. It is clear that the circumstances of that case were very different from the present one. This is a case of an apparent error by the assessment officer. The applicant has not been asked to remedy the situation and if that is done, she is entitled to demand for the excess fee paid to court.
54. Based on the reasoning above, I cannot hold that the reference herein is grounded on an invalid Notice of Objection to Taxation. I therefore allow the said Notice to stand.
55. Having said that, I will now deal with the reference itself. The only items objected to are Items 1, 7, 9,10, the application of VAT and the increase of ½ as advocate client costs.
56. The law is well settled on the powers of the court in respect to a reference from a taxation.
57. In *First American Bank of Kenya Limited vs Shah and Others* [2002] I EA 64. Justice Ringera J (as he then was) stated as follows;

“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error in principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”

58. Further in *Republic vs Ministry of Agriculture and 20 Others Ex Parte Muchiri W. Njuguna* (2006) eKLR, it was held that;

“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.”

In *KANU National Elections Board & 2 others vs Salah Yakub Farah* (*supra*) cited by the applicant, the court held that;

‘It is clear from the authorities cited above that this Court has the power to correct the Taxing Master’s ruling not only if he/she has acted mala fide or from ulterior and improper motives, if he/she has not applied his/her mind to the matter or exercised his discretion at all, but also when he/she has disregarded the express provisions of a statute.[26]

It is also my conclusion that the amount taxed was manifestly excessive; and that the taxing officer followed a wrong principle in reaching her decision. Further, it is also my finding the Taxing Master did not properly exercise her discretion judicially, and or acted on a wrong principle.’

59. I don’t think that I need to expound on the above principles. With the same in mind, I will now proceed to look at the main contested item; Item 1. The rest of the items will be subject to the finding on this.
60. The main point of contention is the determination of what the subject matter is. As was stated in *Joreth Limited vs Kigane and Associates* (2002) 1 EA 92, the subject matter ought to be determined from the pleadings, judgment or settlement.
61. The client’s case is that the subject matter was a “simple” order of lifting freezing orders that had been illegally placed in her bank account. To her, the costs awarded were excessive.



62. The advocate's position is that the lower court costs were correctly taxed and therefore the increase of  $\frac{1}{2}$  was proper.
63. Having looked at the matter, there is no dispute as what the client/respondent sought in the lower court. It is to be remembered that costs in the lower court are in most cases assessed by the court, rather than taxed, as happens in the superior courts. During the said assessment, there is hardly any input from the parties. Therefore, the question is, were the assessed costs excessive in the first place.
64. I am of the view given the nature of the matter, the said costs were erroneously assessed. The suit included a prayer to seek a return of the Kshs. 5,700,000/= transferred from the client/respondents account. That figure was taken to be the subject matter by the lower court. I see a big problem with that.
65. If one looks at the fees paid on filing suit, they tell a different tale. The advocate was able to couch the plaint in a manner that the court only assessed the filing fees at Kshs. 5,285/= Inclusive of fees paid for the application. If the claim was for Kshs. 5,700,000/= as alluded to, the then fees payable ought to have been at least Kshs. 70,000/= going by the current fee guidelines. It is thus dishonest for the advocate to have opted to draft the plaint in a manner that avoided payment fees for a claim of Kshs. 5,700,000/= and at the time of seeking costs rely on the same amount as the focal point of the value of the subject matter. The plaint must be looked at as drawn and not in any other way.
66. Having found that the subject matter was not Kshs. 5,700,000/= as alleged, then it follows that the costs taxed or assessed by the lower court were erroneous. The costs ought to have been assessed under paragraph 2 of Schedule 7, which provides as follows;
- “In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs. 50,000.”
67. The above costs can be increased if the taxing officer finds that the matter can fall under the notes to schedule 7 which provides that;
- “Costs exceeding the scales in this Schedule may be charged on special grounds arising out of the nature, importance, difficulty or urgency of the case.”
68. The next issue to be determined is whether the taxing officer erred in her taxation decision. Faced with assessed party and party costs in the lower court, the taxing officer then proceeded to increase the same by  $\frac{1}{2}$ .
69. The taxing officer has no power to question the same and correctly increased the same. However, the taxing officer took the entire costs including the disbursements and increased them by  $\frac{1}{2}$ . That was wrong. The disbursement ought to have been excluded in assessing the advocate/client costs. These were;
- a. Court fees on filing Plaint and application – Kshs. 5,285/=
  - b. Other disbursements Kshs. 4,305/=
  - c. Court fees as issuance of decree – Kshs. 500/=
70. Having made the above findings, the next issue is what steps the court, ought to take.



71. I think that the first step is to correct the initial errors in the lower court which applied paragraph 1 of Schedule 7 of the order. Thereafter the advocates/clients costs can be assessed on the basis of the correct amount of party and party costs. I therefore make the following orders;
- a. The decision of the taxing officer is hereby set aside.
  - b. The lower court party and party costs to be correctly assessed as set out above, or taxed.
  - c. Thereafter the advocate/client costs to be taxed in accordance with (b) above.
  - d. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF JUNE, 2023.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Ms Kurere for Applicant

Mr. Konosi for Respondent

