



REPUBLIC OF KENYA



KENYA LAW
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**Wamatu v Bakaye (Civil Appeal 375 of 2017)
[2023] KEHC 21169 (KLR) (Civ) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 375 OF 2017

JN NJAGI, J

JULY 21, 2023

BETWEEN

NJORE JAMES WAMATU APPELLANT

AND

LIBAN RARE BAKAYE RESPONDENT

RULING

1. The Respondent/Applicant has filed a chamber summons dated 14th July 2022 seeking for orders:
 - a. That the Honourable Court do determine whether an appeal is subject to the provisions of Schedule 6 A (1) (b) of the Advocates Remuneration (Amendment) Order 2014 as applied by the Deputy Registrar.
 - b. That the taxation of the respondent/applicant's amended bill of costs dated 7/4/2022, taxing off Ksh.83,887.20 of items No.1 on instruction fees, be set aside.
 - c. That this honourable court be pleased to tax the said disputed item 1 as per scale drawn and/or remit the same for taxation before the Deputy Registrar
 - d. Costs be provided for.
2. The application is premised on grounds on the face of the application and is supported by the affidavit of Rose Obaga. The Applicant contends that the taxing officer erred in law and fact in her calculation of the basic instruction fees and applied a figure of Ksh.138,168.90/= instead of Ksh.158,168.90/= . Further that the taxing officer proceeded on wrong principles in the calculation of the basic instruction fee by not holding in accordance with the provisions of Schedule 6A 1(b) of the Advocates Remuneration (Amendment) Order 2014.



3. The application was opposed by the Appellant/Respondent vide a replying affidavit sworn on 8/9/2022 wherein the deponent deposed that the bill of costs was correctly and properly taxed. Therefore, that the application has no merit and the same ought to be dismissed with costs.
4. The value of the subject matter in the bill of costs that was placed before the taxing officer for taxation was Ksh.1,908,445.90/=. The appeal did not proceed to full hearing but was withdrawn by consent of the parties. The taxing master thereupon taxed the chargeable fee on instruction fees as follows:

First 1,000,000.00 fees chargeable..... Ksh.120,000.00/=

2% x 908,445.00/=.....Ksh. 18,168.90/=

TotalKshs.138,168.90/=

Reduced by 25%Ksh. 34,542.00/=

BalanceKsh. 103,626.90/=
5. There is no dispute on the chargeable fee of Ksh.120,000/ =. The dispute is on the additional charge of 2% on the sum above the Ksh.1,000,000/=. The applicant argues that the 2% additional charge was applicable on the figure of 1,908445.90 which brings the additional sum to Ksh.38,169 thus bringing the chargeable instruction fees to Ksh.158,168.90/=. The taxing officer to the contrary charged the 2% additional charge on the figure above the 1,000,000, i.e. 908445.90 which brought the additional sum to Ksh18,168.90, thus totalling to Ksh.138,168.90. The trial court subjected this final figure to 25% deduction since the appeal did not go to full trial. The applicant argued that the taxing master was wrong in her taxation on the instruction fees while the respondent argued that the taxing master was correct.
6. Directions were taken that the application be canvassed by way of written submissions. The Applicant in his submissions argued that the Deputy Registrar erred in law and fact in her calculation of the basic instruction fee for a subject value of Kshs.1,908,445.90/= under Schedule 6A 1 (b) of the Advocates Remuneration (Amendment) Order 2014 by applying 2% on the excess of Kshs.1,000,000/=:, i.e. 908,445.90/=:, instead of the full amount of Kshs.1,908,445.90/= thereby arriving at an erroneous decision on the instruction fee under item 1 of the amended bill of costs.
7. He further submitted that the taxing officer erred in law and fact in taxing off 25% in respect of the instruction fees of an appeal. He strongly submitted that an appeal is not a suit under the provisions of Schedule 6A 1 (b) of the Advocates Remuneration (Amendment) Order 2014 and is thus not subject to any deductions.
8. The Respondent on the other hand reiterated in his submissions that the learned taxing master was correct in awarding the chargeable amount as per scale of Ksh.138,168.90/=. That the taxing officer was correct to subject the applicable chargeable fees to 25% reduction since the matter did not proceed to full trial.
9. I have considered the application herein, the response thereto and the submissions by the parties. The issues for determination are:
 - (1) whether the taxing officer should have charged the additional 2% on the figure of 1,908,445.90 or on the sum above the 1,000,000, i.e. 908,445.90.
 - (2) Whether the instruction fees was liable to be subjected to 25% deduction.
10. The circumstances under which this Court can interfere with the Taxing Master's exercise of discretion were stated in the cases of *Premchand Raichand Limited & Another vs Quarry Services of East Africa*



Limited and Another [1972] E.A 162 and *Arthur vs Nyeri Electricity Undertaking* [1961] E.A 492, which principles were re-affirmed by the Court of Appeal in *Joreth Limited vs Kigano and Associates* [2002] 1 E.A 92. These are that:

- i. That the Court cannot interfere with the Taxing Master's discretion 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;
 - ii. 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 the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
 - iii. If the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master 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, the amount awarded was high;
 - iv. It is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”
11. In the premises, the Court will only interfere with the decision of the Taxing Master where there is a clear error of principle or the sum awarded is manifestly high or low so as to lead to an injustice.
12. The Bill of Costs before the taxing master related to an appeal to the High Court. Schedule 6A (1)(b) of the Advocates Remuneration (Amendment) Order 2014 provides as follows:-
- “ The fees for instructions shall be as follows...”
- (a) ...
 - (b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).
13. Item 1(b) provides that:
- To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—
- That value exceeds Kshs but does not exceed Kshs.
- 500,000 75,000
- 500,000 750,000 90,000
- 750,000 1,000,000 120,000
- 1,000,000 20,000,000 fees as for Kshs.1,000,000 plus an additional 2%
14. In the instant matter, the appeal did not proceed to full trial. It was withdrawn by consent of the parties.



15. I have considered the arguments raised by the Applicant and the Respondent. It is my view that the taxing master was correct in charging the additional 2% on the figure of 908,445.90 and not on the whole figure of 1,908,45.90. To have charged the additional 2% on the figure of 1,908,445.90 would have amounted to double charge on the figure 1,000,000. I find that the taxing master was guided by Schedule 6A (1) (b) of the Advocates Remuneration (Amendment) Order 2014 when she awarded instruction fees of Ksh.18,168.90/= on the additional charge of 2%. The contention by the Applicant that the same should have been assessed at Ksh.38,169.90/= is not correct.
16. The Applicant argued that an appeal is not a suit and should therefore not be subjected to 25% deduction. The provision on instruction fees in 1(b) provides that:
To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).
17. The *Civil Procedure Act* in Section 2 defines a “suit” as follows;
“suit” means all civil proceedings commenced in any manner prescribed.
In view of this definition, I hold that an appeal is a suit as defined in the *Civil Procedure Act*.
18. The instruction fees for appeals is provided for under the stated item 1 (b). In my reading of the provision, I am of the considered view that all the items stated in 1(b) are subject to the 25% deduction where they are concluded in a summary manner without going to full trial. Appeals are included under that item and are thus subject to 25% deduction where they do not go for full trial. The Taxing Master was therefore correct in subjecting the instruction fees to 25% deduction since the appeal did not go to full trial.
19. In the end, I am satisfied that the learned Taxing Master properly and correctly exercised her discretion and applied the correct legal principles in determining the instruction fees awarded under Item No. 1. I therefore find no merit to the objection raised by the Respondent/Applicant to the taxation on instruction fees. Accordingly, the reference herein lacks merit and is dismissed with costs to the Appellant/Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 21ST JULY 2023

J N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant/Respondent

Miss Obaga for Respondent/Applicant

Court Assistant – Amina

30 days R/A.

