



Catholic Medical Mission Board v Mombasa Maize Millers Kisumu Limited (Civil Appeal 104 of 2018) [2023] KEHC 23525 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 104 OF 2018
RE ABURILI, J
OCTOBER 13, 2023**

BETWEEN

CATHOLIC MEDICAL MISSION BOARD APPELLANT

AND

MOMBASA MAIZE MILLERS KISUMU LIMITED RESPONDENT

RULING

Introduction

1. By a chamber summons dated November 26, 2021, the appellant seeks the following orders:
 - a. That the Court be pleased to review, set aside and/or vary the decision of the Taxing Officer made on December 22, 2020 in respect of Item 1 of the Party – Party Bill of costs dated May 26, 2020
 - b. The costs of this application be provided for.
2. The application was supported by the grounds therein as well as the supporting affidavit deposed by Peter M. Karanja Advocate.
3. The appellant averred that the taxing officer misapprehended the subject matter of the suit and ignored the judgement sum as awarded by the judge.
4. The appellant further averred that the taxing officer proceeded as if the subject matter of the suit was not determined by the judgement of the court.
5. It was the appellant’s case that the taxation of the item was unjust, capricious and not based on sound basis or principle.



6. In opposition, the respondent filed a replying affidavit dated December 15, 2021 sworn by Dancan Otieno Njoga advocate in which he stated that the taxation of the applicant's Bill of Costs ruling delivered on 26th May 2020 was done properly and soundly.
7. It was further deposed that being an appeal, taxation of instruction fees was based on schedule 6 of the Advocates Remuneration Order [Amendment] Order 2014 and the Advocates [Remuneration] No. 2 Order, 2014 [legal Notice No. 45] and that under the appeals section of Schedule 6, the instructions fees is pegged at Kshs. 25,200 as was correctly stated by the Taxing Officer.
8. The respondent further contended that the matter from which the bill of costs arose was not a matter freshly filed in the High Court as the trial court hence schedule 6 paragraph 1 (b) of the Advocates Remuneration Order 2014 could not apply.
9. The parties canvassed the application by way of written submissions.

Appellant's Submissions

10. It was submitted that the taxing master did not give any reason for the figure given in assessing the instructions fees at Kshs. 25,200 and that the applicable schedule for taxation of instruction fees on appeal was schedule 6 paragraph 1 (b) of the Advocates Remuneration Order.
11. The appellant submitted that the judgement sum being Kshs. 766,984, the instruction fee under paragraph 1 (b) would have been Kshs. 120,000 as claimed in the Bill and thus in awarding Kshs. 25,200, the Taxing Officer made an error of principle and thus this Court is entitled to interfere.

Respondent's Submission

12. The respondent submitted that under the appeals section of schedule 6 of the Advocates Remuneration Order, 2014, the instruction fees was pegged at Kshs. 25,200 as correctly stated by the Taxing Officer.
13. It was submitted that the matter from which the bill of costs arose was not a matter freshly filed in the High Court as the trial court hence schedule 6 paragraph 1 (b) of the Advocates Remuneration Order 2014 cannot apply.
14. The respondent urged the court to consider the principles of taxation on instructions fees as stated in the case of *KANU National Elections Board & 2 Others v Salab Yakub Farah* [2018] eKLR.

Analysis and Determination

15. I have carefully considered the application, the opposition thereto and the submissions filed by both parties in this matter as well as the relevant law.
16. The only issue for determination is whether this court ought to interfere with the taxing master's holding under Item 1 of the Appellant's Bill of Costs dated May 26, 2020.
17. The principles of taxation were outlined in the case of *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & Others* (No. 3) (1972) EA 162, where the then Court of Appeal stated thus -
 - (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.
 - (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.



- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
 - (d) so far as practicable there should be consistency in the award made and
 - (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”
18. It is trite that the court will not interfere with the exercise of the taxing master’s discretion unless it appears that such has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle.
19. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue. The court must be of the view that the taxing master was clearly wrong i.e. its conviction on a review that he or she was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal. See the case of KANU National Elections Board (*supra*).
20. The particulars of Item 1 of the aforementioned Bill of Costs which item is disputed were as follows:
- Instruction fee to file HCCA No. 104 of 2018 against a judgement sum of Kshs. 766,894, taking into account the amount, complexity and importance to the appellant.
21. In essence, the instructions cited above were to file an appeal.
22. Schedule 6 paragraph 1 of the Advocates (Remuneration) (Amendment) Order, 2014 provides for instruction fees as hereunder:
- “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 but does not exceed
- Kshs. Kshs. 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%.
- Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.” (emphasis added).



23. It is evident from the foregoing paragraph that instruction fees is determined by the value of the subject matter which can be determined from the pleadings, judgment or settlement, in the event that the value of the subject matter cannot be determined.
24. The respondent's Counsel relied on Schedule 6(a) of the Advocates (Remuneration) (Amendment) Order, 2014, under the sub-heading of appeals, which provides as hereunder-

“To present or oppose an appeal in any case not provided for above such sum as may be reasonable but not less than Kshs 25,200.”
25. The question this court is faced with is whether the value of the subject matter was ascertainable by the taxing master. In the instant case, both parties are agreeable that the judgement sum was for Kshs. 766,894.
26. Schedule 6(a) of the Advocates (Remuneration) (Amendment) Order, 2014 is clear that it only comes into play in cases that have not been addressed by the preceding paragraphs in Schedule 6 paragraph 1.
27. This Court finds that the value of the subject matter in this appeal was ascertainable as the judgement sum was determined to be Kshs. 766,894.
28. Accordingly, the Taxing Master erred in holding that the instruction fees was Kshs. 25,200 as provided under Schedule 6(a) of the Advocates (Remuneration) (Amendment) Order, 2014, under the sub-heading of appeals.
29. It is my finding that the Taxing Master ought to have applied the provisions of Schedule 6(1)(b) of the Advocates (Remuneration) (Amendment) Order, 2014 in taxing the bill of costs dated May 26, 2020.
30. For the above reason, the application dated November 26, 2021 is found to be meritorious and the same is hereby allowed. The order of the taxing master taxing item 1 of the applicant's bill of costs at Kshs 25, 200 is hereby set aside and substituted with the figure of Kshs 120,000.
31. I make no orders as to costs. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF OCTOBER, 2023

R.E. ABURILI

JUDGE

