



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPLICATION NO. E084 OF 2021**

**DUKE O. OMWENGA T/A**

**OMWENGA AND COMPANY ADVOCATES.....APPLICANT**

**-VERSUS-**

**THE MONARCH INSURANCE COMPANY LTD.....RESPONDENT**

**RULING ON REFERENCE**

The reference before me arises from the Ruling of the Taxing Officer dated 12<sup>th</sup> August 2021.

1. The Applicant has raised the following 3 matters for consideration;

*“1. Whether the taxing master erred in principle in assessing service fees under items 18 to 22 at Kshs 1,000/=.*

*2. Whether the taxing master erred in principle in disallowing the travelling expenses under items 40 to 50 of the Advocate/Client Bill of Costs dated 13.05.2021.*

*3. Whether the taxing master erred in taxing off the Court Attendance fees for filing purposes under items 23 and 24 of the Advocate/Client Bill of Costs dated 13.05.2021.”*

2. When canvassing the reference, the Applicant submitted that the amount of money he charged in relation to service of the specified documents was drawn to scale, in accordance with **Schedule 7A (8)** of the **Advocates (Remuneration) (Amendment) Order, 2006**.

3. The Applicant pointed out that the specified documents were served upon the Law Firm of Geoffrey Okoth & Company Advocates in Kisumu, which is approximately 122 Kilometres from Eldoret town where the Applicant’s offices are located.

4. In respect to the service effected in Kisumu, the Applicant asked for Kshs 2,000/=, each time.

5. Meanwhile, in respect of service effected upon Mathew Rakame Waswa, in Bungoma town, the Applicant asked for Kshs 3,000/=.

6. Considering that the Applicant says that the distance between Bungoma and Eldoret is 79 Kilometres, I find it odd that it would cost more to serve process in Bungoma, as compared to Kisumu which was 122 Kilometres from Eldoret.

7. Secondly, the Bill of Costs did not indicate the distance between Eldoret and the other 2 towns. In the circumstances, the Applicant failed to provide relevant information which could have guided the Taxing Officer in assessing the appropriate amounts to be awarded for service of process.

8. It would not be right to find fault with the Taxing Officer when it was the Applicant who had not provided the requisite information which could have provided appropriate guidance to the said Taxing Officer.

**Travelling Expenses**

9. The Applicant submitted that the travelling expenses which he claimed in the Bill of Costs were reasonable and justified.

10. Based upon the authority of **KANU NATIONAL ELECTIONS BOARD & 2 OTHERS Vs SALAH YAKUB FARAH (2018)eKLR**;

***“The discretion vested in the Taxing Master is to allow costs, charges and expenses as appear to him to have been necessary or proper; not those which may objectively attain such qualities, and that such opinion must relate to all costs reasonably incurred by the litigant, which also imports a value judgement as to what is reasonable.***

***The discretion to decide what costs have been necessary or properly incurred is given to the Taxing Master; and not to the Court.”***

11. It therefore follows that unless the Taxing Master is shown to have exercised her discretion in a manner that was not judicious, the Court cannot interfere with the decision arrived at.

12. In my understanding of the case cited above, (which was relied upon by the Applicant), it is not sufficient for the Applicant to show that the expenses claimed were objectively reasonable.

13. As the learned Judge held, the opinion of the Taxing Master must relate to all costs reasonably incurred by the litigant.

14. Therefore, I find that the Taxing Officer was right when she held as follows;

***“7. Travelling expenses are actual costs incurred, which ought to be proven by way of production of receipts.***

***In the absence of this receipts, items 40 – 52 are each taxed-off.”***

15. I hasten to add that in respect of expenses, the Applicant would need to make available receipts to prove the same; but he would also need to demonstrate that such expense was necessary or proper.

16. If there was no evidence to prove the alleged expense, it would not matter even if, objectively, the expense appeared necessary or proper.

#### **Court Attendances**

17. The Taxing Officer taxed off the sums claimed in respect of attendances at the Registry, for purposes of filing the Memorandum of Appeal, and the Statement of Defence, respectively.

18. Although the Applicant submitted that he was entitled to claim costs for his attendance at the Registry when he was filing the respective documents, the correct position is that under **Schedule 7** there is no provision for such attendances.

19. The attendances provided for under **Schedule 7** are those either in Court or in Chambers.

20. I do not know whether or not that omission was deliberate; but it is clearly different from the provision under **Schedule 6**.

21. Accordingly, the learned Taxing Officer did not err when she taxed-off the items **23** and **24**.

#### **Costs on the Reference**

22. The reference is unsuccessful. Therefore, ordinarily the Court would have awarded costs to the Respondent. But the Respondent did not take part in the application, and I find it would not be in the interest of justice to award the Respondent.

23. I order that each party will meet his or her own costs of the reference.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF FEBRUARY 2022**

**FRED A. OCHIENG**

**JUDGE**