



Badar Hardware Limited & another v Abubakar & 4 others (Civil Case E244 of 2023) [2024] KEHC 16930 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E244 OF 2023
F WANGARI, J
NOVEMBER 14, 2024**

BETWEEN

BADAR HARDWARE LIMITED 1ST APPLICANT

JIMMY KIMEI MUTHOKA 2ND APPLICANT

AND

TALIB ABUBAKAR 1ST RESPONDENT

MAGUNA ANDU WHOLESALERS (K) LTD 2ND RESPONDENT

MARY MWIHAKI WAWERU 3RD RESPONDENT

JIMMY KIMEI MUTHOKA 4TH RESPONDENT

**JOSEPH GATHITHU MWANGI (SUING AS THE LEGAL
REPRESENTATIVES OF THE ESTATE OF THE LATE PETER GATHITU
MWANGI) 5TH RESPONDENT**

RULING

1. This is a ruling in respect of the Chamber Summons Application dated 27th August, 2023 brought under Schedule 7 of the Advocate Remuneration Order and Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 21 Rules 9(A), (C) and (D) of the Civil Procedure Rules, 2010 Laws of Kenya. It sought as hereunder: -
 - a. That the Court be pleased to set aside the Assessment of Costs by Honourable M. Nabibya, SPM via ruling delivered on 8th June, 2023;
 - b. That the court be pleased to review downwards or assess afresh the Applicant's Statement of costs filed on 2nd February, 2023;
 - c. Costs of the application be provided for.



2. The grounds in support of the application were that the Applicant's Firm of Advocates raised a Party and Party Statement of costs filed on 2nd February, 2023 claiming a sum of Kshs. 623,220/=. The same was opposed and a ruling was then delivered on 8th June, 2023. It is stated that the Trial Court erred in law and fact by not applying Advocates Remuneration Order, 2006.
3. The Honourable Court is said to have erred in law and in fact by effecting assessment of costs without supporting evidence or annexures contrary to Order 21 Rule 9A of the Civil Procedure Rules. Several other allegations against the Trial Court were made among them that it erred in assessing instructions fees that was inordinately too high to inform an erroneous estimate of the instructions fees due.
4. The Trial Court was further said to have erred in law and in fact in assessing costs in contentious matters by failing to apply Schedule VII of the Advocate Remuneration Order. The award of items 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 15, 16, 18, 19 and 20 were said to be contrary to Schedule 7 paragraph 10. The costs of Kshs. 614,120/= for an award of Kshs. 2,857,600/= is said to be on the face of it inordinately high.
5. Further, the taxing officer is said to have failed to consider the guiding principles for taxation of matter as set out in the case of Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others (No. 3) [1972] 1 EA 162 (CAN) and more specifically in failing to note that costs should not be so high as to be a bar to access to justice.
6. They thus prayed that the court does set aside the ruling of the Trial Court delivered on 8th June, 2023 and review downwards or assess afresh the Statement of costs as filed on 2nd February, 2022. The application was supported by the affidavit sworn on even date by Mcmillan E. Jengo, the Applicants' Advocates. It restates the grounds in support of the application and I do not see any reason why I should rehash the same.
7. The application is opposed by way of grounds of opposition dated 3rd October, 2023. The Respondents contend that the Applicants have not demonstrated any sufficient grounds to impugn exercise of judicial discretion by the taxing master to warrant this court's interference. It is stated that the application is an afterthought meant to prevent the ends of justice since there is an inexcusable delay in filing the application which was said to have been filed three (3) months after the ruling on the bill of costs.
8. It is further stated that the Applicants did not seek for extension of time to file the said application hence the same is wrongly before court and should be struck out or dismissed with costs. Lastly, it is stated that the Applicants are not deserving of the orders sought hence the Applicants' reference ought to be dismissed with costs.
9. Directions were taken to have the application canvassed by way of written submissions. Both parties complied with the directions by filing respective submissions and citing various authorities in support of their rival positions. The Applicants' submissions are dated 1st February, 2024 while those of the Respondents' are dated 1st November, 2023. The court has given due consideration to the parties' submissions, various decided cases and the legal provisions cited.

Analysis

10. This Court having carefully considered the application, the grounds of opposition, parties' rival submissions, the authorities cited and the law and the issues that fall for this Court's determination are as follows: -
 - a. Whether the application is properly before court;



- b. If the answer to (a) above is in the affirmative, whether the prayers sought are merited; and
- c. What is the order as to costs?
11. Before delving substantively on the application, this court notes that the Respondents only filed grounds of opposition. No replying affidavit was filed to rebut the Applicants' factual averments. The legal provision on ways of opposing an application is Order 51 rule 14 of the Civil Procedure Rules which provides as follows: -
- “Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
- a. A notice preliminary objection: and/or;
- b. Replying affidavit; and/or
- c. A statement of grounds of opposition.”
12. In *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, the Court of Appeal citing the decision in *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR observed as follows: -
- “...As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Grounds of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath...”
13. Further in the case of *Kennedy Otieno Odoyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR the court held as follows: -
- “...The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant...”
14. Based on the above binding decisions, I shall not seek to re-invent the wheel but simply apply the cited decisions and hold thus, the Applicants' factual averments and the grounds of opposition filed by the Respondents are deemed as general averments which do not counter or rebut the Applicants' averments.
15. Having stated as above, I proceed to consider the first issue vis some vis the Respondents' ground 4 in opposition to the application. According to the Respondents, the Applicants did not seek extension of time to file their application thus the same ought to be struck off or dismissed with costs. In their submissions, they place reliance on paragraph 11 (1) and (2) of the Advocate Remuneration Order and the decision in *Magdalena Alphonse Cheposowor v Cheposupko Lonyareng & 5 Others* [2021] eKLR.



16. In response, the Applicants contend that what is being challenged is not taxation but an assessment of costs. They place reliance on the 2020 introduction under Order 21 of the Civil Procedure Rules and in particular, the insertion of a new rule under Rule 9 of Order 21 appearing as rules 9A to 9D. This court is in agreement with the Applicants that the said provision does not provide the procedure to be adopted in the event a party is aggrieved with an assessment of costs before the Magistrates' Court.
17. Does this lacuna leave an aggrieved party without a remedy? I do not think so. I take judicial notice of this court's supervisory jurisdiction donated to it under Article 165 (6) and (7) of *the Constitution* and proceed to find that the current application is properly before this court.
18. I hold so since a magistrate assessing costs does not sit as a special court for that purpose as the Deputy Registrar taxing a bill of costs does. This is not taxation per se and therefore the decisions of Taxing Masters which have ended up before this court by way of reference are distinguishable. I therefore do not find paragraph 11 (1) and (2) of the Advocates Remuneration Order applicable herein.
19. I now proceed to consider the second issue. Did the Trial Court made any error in its assessment of costs to invite this court to interfere with the same? Under Order 21 Rule 9D, the court in assessing costs is bound to be guided by the Advocates (Remuneration) Order. Having perused the Trial Court's ruling, I note that the Trial Court only stated that other than items (i) 1, 2, 3 and (ii) 2, 3, the bill was drawn to scale. No reasons were assigned to the said findings.
20. Similarly, the Trial Court did not state what Remuneration Order it considered in order to conclude that the bill was drawn to scale. A party need to be satisfied that a court's holding contains reasons to convince it whether the court was right or wrong in its conclusion.
21. The persuasive decision in *Bwire v Wayo & Sailoki* cited by the Applicants suffices as a guide why reasons ought to be apportioned to every judicial decision as it gives effect to the Constitutional dictates underpinning the provisions of Article 47 (2) of *the Constitution*. On this reason alone, I am satisfied that this court ought to interfere with the award of costs as rendered by the Trial Court.
22. It is not in dispute that the suit was filed in 2012 and as such, the instruction fees would be based on the Advocates (Remuneration) Order, 2006. The judgement sum was Kshs. 2,857,600/=. Schedule VII (1) (iii) dictates that for figure in excess of Kshs. 500,000/= but less than Kshs. 500,000, a fee of Kshs. 500,000/= plus 2.5% in respect of the excess is applicable.
23. In the present case, for the first Kshs. 500,000/=: the fees payable is Kshs. 42,000/= on higher scale since the matter was defended is applicable. 2.5% is then applied to the excess of Kshs. 2,357,600/= thus giving a sum of Kshs. 58,940/=. The total instructions fee is thus fixed at Kshs. 100,250/=. A sum of Kshs. 149,750/= is taxed off.
24. On attendances for hearing, the first hearing took place on 6th August, 2014 and the last hearing was on 12th April, 2021. The Advocates (Remuneration) (Amendment) Order, 2014 came to effect on 9th May, 2014 through *Legal Notice No. 35 of 2014*. As such, all hearings took place under this regime.
25. Under paragraph 7 of Schedule 7, where a hearing lasts more than a day, the first hearing is billed at Kshs. 5,000/= and the subsequent hearings at Kshs. 2,100/=. Based on the foregoing, I enhance the first hearing to Kshs. 5,000/=. All the rest are properly drawn. I thus enhance the hearings by Kshs. 2,900/= to bring the total to Kshs. 30,200/=.
26. For mentions, the first mention took place on 16th January, 2014 thus under the 2006 Remuneration Order. All the other mentions were after the 2014 Remuneration Order. The first mention is billed at



Kshs. 1,000/= as per paragraph 5 of Schedule VII. Kshs. 400/= is taxed off. The other mentions are drawn to scale. Equally, the attendance for judgement are drawn to scale.

27. On items 1, 2, 3, 4, 6, 9, 10, 11 and 12 on services, though the paragraph 10 (ii), the charge should be the actual expense incurred, I take judicial notice that the sums of Kshs. 70/= and Kshs. 170/= are modest and thus within range of such service. I do not see any reason to disturb the same. They total to Kshs. 770/=.
28. On items 5 and 8, I am in agreement with the Applicants that the service said to have been effected does not indicate upon which party. I thus tax off the 40,000/=.
29. On items 15, 16, 18, 19 and 20, the services effected were after the 2014 Remuneration Order came to force. The parties being served are within 3km of the Court's Registry. These ought to be taxed at Kshs. 1,400/= each bringing the total to Kshs. 7,000/=. A sum of Kshs. 18,600/= for each is taxed off.
30. On items 13, 14, 17 and 20, where the parties being served are outside the 3km of the Court's Registry, you charge the actual sum incurred. Without prove of the said expense, I find that an award of Kshs. 6,000/= is reasonable thus totaling to Kshs. 24,000/=. The other sums do not seem to be contested and I thus see no reason to interfere with the same.
31. In totality, the instructions fees are taxed at Kshs. 100,250/=: attendances for hearings taxed at Kshs. 30,200/=: attendances on mentions and judgement taxed at Kshs. 13,600/=: on services at Kshs. 91,770/= and disbursements at Kshs. 9,125/=

Taxed Amount = Kshs. (100,250 + 30,200 + 13,600 + 91,770 + 9,125)

Total = Kshs. 244,945/=

A sum of Kshs. 369,175/= is taxed off.

32. I have said enough to demonstrate that the application dated 27th August, 2023 merited.
33. On costs, the same follows the event. The Trial Court's error cannot be attributed to any party and it would be onerous to punish any of the parties herein with costs. I direct each party to bear own costs.
34. The upshot of the foregoing is that the court renders itself as hereunder: -
 - a. The Chamber Summons Application dated 27th August, 2023 has merits and the same is allowed in the following terms;
 - i. The Trial Court's ruling delivered on 8th June, 2023 assessing costs at Kshs. 614,120/= is hereby set aside;
 - ii. Consequently, the assessment of costs is assessed afresh and reviewed downwards to Kshs. 244,945/=:
 - iii. A sum of Kshs. 369,175/= is hereby taxed off.
 - b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF NOVEMBER, 2024.

.....

F. WANGARI

JUDGE



In the presence of;

N/A by the Applicants;

M/S Muresia Advocate for the Respondents;

Brian, Court Assistant

