



Desai, Sarvia & Pallan Advocates v Aggarwal (Family Miscellaneous Civil Case E018 of 2022) [2024] KEHC 13988 (KLR) (Family) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY MISCELLANEOUS CIVIL CASE E018 OF 2022
MA ODERO, J
NOVEMBER 8, 2024**

BETWEEN

DESAI, SARVIA & PALLAN ADVOCATES ADVOCATE

AND

REKHA AGGARWAL CLIENT

JUDGMENT

1. Before this court for determination is the Chamber Summons dated 8th August, 2022 by which the Advocate/Applicant Desai, Sarvia & Pallan Advocates seek the following orders

- “ 1. The Hon. Deputy Registrar’s ruling and order on taxation dated and delivered on 5th August 2022 be reviewed and set aside in respect of the items number 1, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 110, 111, 112, 113, 114, 116, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 141 and 143 of the Advocate Applicant’s Bill of Costs dated 8th February 2022 9which items are hereinafter called “the Disputed Items’) AND the Disputed Items be allowed as claimed.
2. The costs of this objection application be awarded to the



Advocate/Applicant."

2. The client/Respondent Rekha Aggarwal opposed the summons through the Replying Affidavit dated 28th November 2023. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 7th March, 2023, whilst the Respondent relied upon their written submissions dated 17th April, 2023.
3. At the outset I wish to apologise to the parties for the delay in rendering this judgment. This was occasioned by my transfer from Nairobi Family Division to the Nyeri High Court, as well as by the inadvertent misplacement of this file away from the files which I had carried with me from Nairobi. The inconvenience to the parties is sincerely regretted.

Background

4. This reference emanates from the Advocate Client Bill of Costs dated 8th February, 2022 drawn by the Advocate in respect of Succession Cause No. HC 804 of 2016: In the Matter of the Estate of Ramesh Kumar Pyarelal Gupta (Deceased).
5. Vide a Ruling delivered on 5th August 2022, Hon. C. Ng'ang'a Deputy Registrar taxed the Bill in the amount of Kshs 4,107,877.79 Being dissatisfied by this Ruling the Advocate (Applicant) filed this Reference.
6. The Applicant contended that the Taxing Master erred in principle in her assessment of the instruction files. That the value given to the subject matter ought to have been Kshs. 1,791,000,000 and not Kshs. 895,350,000 as stated by the Taxing Master. Further that the Taxing Master erred in applying one quarter ($\frac{1}{4}$) of the total value of the estate to determine the instruction fees payable. That Applicant submitted that the correct value of the instruction fees ought to have been derived from the gross value of the estate being Kshs. 1,791,000,000 thus the clients share ($\frac{1}{4}$) would in the circumstances amount to Kshs. 273,837,500. Accordingly the taxed amount ought to have been Kshs. 4,556,750.
7. On her part the Respondent urged the Court to uphold the decision of the Taxing Master. That the Taxing Master correctly established the value of the subject estate to be Kshs. 895,350,000.
8. The Respondent averred that the Taxing Master did not err at all in finding that one quarter ($\frac{1}{4}$) represented the value of the Respondents share in the estate of the Deceased person.
9. The Respondent submitted that the Petition was never heard and that the value of the estate was determined by way of consent thus this was the value of the subject matter. Finally the Respondent urged that the Bill was properly taxed and asked that this reference be dismissed.

Analysis and Determination

10. I have carefully considered the reference filed in this court, the reply filed thereto as well as the written submissions filed by the parties.
11. It is not in any doubt that the Applicant was instructed to act for the Respondent who was one of the beneficiaries of the estate in question. The main area of dispute is whether the learned Taxing Master erred in her taxation of the Bill of Costs.
12. Taxation is deemed to be the exclusive preserve of Deputy Registrars and it is only very limited situations that the High Court will interfere with the exercise by the Taxing Master of this special discretion.



13. In *First American Bank of Kenya -vs- Shah & others* [2002] E.A, the Court set out the circumstances in which the High Court will interfere with the decision of a Taxing Master as follows;-
- (1) That the court cannot interfere with the taxing officers 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;
 - (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the 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;
 - (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer 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;
 - (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
 - (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
 - (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
 - (7) the mere fact that the defendant does research before filing a defence and then put a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.
14. Similarly in the case of *Ochieng, Onyango, Kibet & Ohaga* [*Advocates -vs- Adopt A Light Ltd Misc 729 of 2006*](#) the court stated that
- The taxing Master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken. It is of fundamental importance to consider the value of the subject.
- The law gives the taxing master some leeway but like all discretions, it must be exercised judiciously and in line with the material presented before the court.....” [own emphasis]
15. The general principle that has emerged is that the High Court should only interfere with the decision of the Taxing Officer where there has been an error of principle but should not interfere on questions of quantum only as that is an area where the Taxing Officer is deemed to be more experienced.
16. As a general rule the costs awarded should not be allowed to rise to such levels as to confine access to justice only to the wealthy, a successful litigant ought to be reimbursed for costs incurred, the general level of remuneration of Advocates should be such as to attract recruits to the profession and in so far



as possible there should be consistency in awards made. However every case must be determined on its own merits.

17. On the question of Instruction fees the court ought to take into account the amount of work done by the Advocate and where relevant the subject matter of the suit as well as the prevailing economic conditions.
18. In *Joreth Ltd -vs- Kigano & Associates* [2002] E.A 99, the Court of Appeal gave the following guidelines in assessing instruction fees.
 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production section;
 2. the taxation of advocate's instruction fees is to seek no more and no less than reasonable compensation for professional work done;
 3. the taxation of advocate's instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
 4. so far as apposite comparability should be applied in the assessment of advocate's instruction fees;
 5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
 6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
 7. where responsibility borne by advocates is taken into account, its nature is to be specified;
 8. where novelty is taken into account, its nature is to be clarified;
 9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.
19. In the Ruling delivered on 5th August, 2022, the learned Taxing Master noted that in contested matters, the Advocates costs are based on Schedule X clause 1(a) Part A of the Advocates Remuneration Order 2014 in respect of party and party costs. The said schedule provides as follows:-

“Schedule X

Probate and Administration

A-Party and Party Costs

1. Instruction Fees
 - a. To apply for grant of probate of written Will, or proof of oral Will, or letters of administration with or without Will annexed, the proceedings not being contested; where the gross capital value of property comprised in the grant –
Exceeds but does not exceed
Kshs Kshs.
10,000
10,000 50,000



50,000 200,000

200,000 1,000,000

1,000,000 5 percent of the value on the

first Kshs. 1,000,000

20. In the case of Paul Smogerere & Olum vs. Attorney General – Civil Application No. 5 of 2001 [unreported] the Court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance of the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer’s opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.” [Own emphasis]

21. Based on the above provision of law the Taxing Officer proceeded to assess the instruction fee based on the value of the estate as per the confirmed Grant which was Kshs. 895,350,000. Further since the estate had four (4) beneficiaries, the learned Taxing Officer determined that the Respondents share of the estate was one quarter ($\frac{1}{4}$) which came to Kshs. 223,837,500.
22. The Applicant submits that the Taxing Officer erred in determining the instruction fees as she did based on an uncontested matter yet this was a matter which was contested.
23. In Makula International -vs- Cardinal Nsubuga & Another [1982] HCB the Court of Appeal of Uganda observed as follows:-

“The taxing officer should in taxing a bill first find the appropriate scale fee in schedule VI and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards fee by a multiplication factor but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction file either by awarding the back file or by increasing or decreasing it.”

24. In this case I note that the Taxing Officer applied instruction fees based on uncontested matters under schedule 1 of the Advocates Remuneration Order. However the record indicates that the proceedings in Succession Cause No. 804 of 2016 were in fact contested as there was an objection dated 27th October, 2016 lodged to the Grant of Representation made to the Petitioners and a challenge to the written will as well as a Summons dated 7th November 2016 by which the Objector (Respondent) sought orders of full entry and access to the Deceased’s main House located on LR No. 209/64/16 Mogotio Road Nairobi as well as orders to have the police enforce the orders and maintain security in the execution thereof



25. In the circumstances therefore the instruction fees ought to have been multiplied by two as provided by Schedule X Paragraph 1(d) of the Remuneration Order 2014 which would amount to Kshs. 4,556,750/=.
26. I find that the Taxing Officer erred in principle in the manner in which she calculated the instruction fees and to this extent I will interfere with her finding on instruction fees.
27. The Applicant also challenged the value given by the Taxing Officer to the subject matter being Kshs. 895,350,000. The value of the subject matter can only flow from the amount as stated in the summons for confirmation of Grant dated 16th October 2019 which is indicated to be Kshs. 895,350,000. The figure of Kshs. 1,791,000,000 submitted by the Applicant is therefore not supported by the Annexures on record.
28. The Applicant also took issue with the decision of the Taxing Master to dismiss items 10, 16, 24, 26, 27, 29, 31, 32, 35, 37, 42, 44, 45, 47, 50, 52, 58, 61, 63, 66, 72, 75, 78, 79, 81, 86, 88, 100, 103-105, 108, 111, 114, 117, 120-124, 126, 127, 129, 131, 132, 134-141 of the Bill of costs. Having perused the Bill I do agree with the Taxing Master that the above items were not proved.

In Republic -vs- Minister for Agriculture & 2 others Ex Parte Samuel Muchiri Winjuguna & 6 others [2006] EKR Hon. Justice Owang (retired) stated as follows:-

“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. Of court it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer disclosed errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... a taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large



volumes of documentation and to be classified, ascertained and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

29. Based on the foregoing this reference succeeds only with respect to the issue of Instruction Fees. Consequently this court makes the following orders:-

- (1) The Ruling of the Taxing Master dated 5th August 2023 in respect of instruction fee is hereby set aside.
- (2) The Instruction Fees payable is hereby assessed at Kshs. 4,556, 750/=
- (3) The Ruling of the Taxing Master on all other aspects of the Bill of Costs dated 8th February 2022 is upheld.
- (4) Each party shall meet their own costs.

DATED IN NYERI THIS 8TH DAY OF NOVEMBER, 2024.

MAUREEN A. ODERO

JUDGE

