



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Wangendo (Miscellaneous Application E168 of 2023)
[2024] KEHC 15805 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS APPLICATION E168 OF 2023
GL NZIOKA, J
NOVEMBER 19, 2024**

BETWEEN

MARY NJERI KAMAU APPLICANT

AND

JOEL WARWIMBO WANGENDO RESPONDENT

RULING

1. By a chamber summons application dated 8th April 2024 brought under the provisions of paragraph 11 of the Advocates Remuneration Order (hereinafter “the Order”), the applicant seeks for the following orders: -
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to extend the period/time for filing a reference and hereby deem the instant reference as properly filed.
 - d. That upon grant of prayers 1, 2 and 3 above, this Honourable court be pleased to set aside and/or vacate the decision of the taxing officer delivered on 14th February 2024 and the resultant certificate of taxation dated 28th March 2024 in relation to items 1, 9, 12, 17 and 21 of the Party and Party Bill of Costs dated 28th November 2023.
 - e. That this Honourable court be pleased to remit and/or refer the Party and Party Bill of Costs dated 28th November 2023 before a different taxing officer for fresh taxation on disputed items with appropriate directions on how it should be done.
 - f. That in the alternative this Honourable court be pleased to proceed to tax by itself the Party and Party Costs dated 28th November 2023 on disputed terms.



- g. That the costs of this application be provided for.
2. The application is supported by the grounds thereto and the affidavit of the even date sworn by Kinyanjui Theuri, an advocate of the High Court of Kenya.
 3. He avers that, the respondent filed a party and party bill of costs (herein “the bill”) dated 28th November 2023, seeking costs of Kshs. 189,055 for defending the applicant’s application seeking to enlarge time to prefer an appeal from the decision of the subordinate court.
 4. That, the bill was served upon the applicant on 30th September 2024, together with a notice of taxation indicating that the bill of costs was to be heard on 14th December 2023. However, on the said date the taxing master was indisposed.
 5. That, the bill was considered by the taxing master on 8th February 2024 on which day Mr. Otieno appeared on behalf of the applicant and sought for seven (7) days within which to file written submissions and was granted the applicant seven (7) days to file his submissions. That the ruling was reserved for 22nd February 2024.
 6. Further in compliance with the directions of the taxing master, the applicant filed written submissions on 14th February 2024 opposing the bill.
 7. However, contrary to the directions given the taxing master proceeded and delivered the decision on 14th February 2024, which was one (1) day before the lapse of the seven (7) days granted to the applicant to file submissions.
 8. That, the applicant is aggrieved by the decision of the taxing master in allowing the bill as prayed while erroneously intimating that the same was unopposed.
 9. Further, in allowing the bill the taxing master acted on the wrong principles of law by disregarded pertinent factors and failing to apply the correct scale.
 10. That, the respondent used the decretal sum of Kshs. 897,983 to calculate the instruction fees yet the application was only seeking enlargement of time to prefer an appeal and not to dispose of the appeal.
 11. He averred that, the delay in filing the present reference was due to the applicant honest belief that the ruling was yet to be delivered and only became aware of the ruling after a certificate of taxation was served by the respondent.
 12. That, on 5th April 2024 the applicant wrote to the taxing master pointing out the items she was aggrieved with and requested for reasons behind the decision. Therefore, it is in the interest of justice the application be granted as prayed.
 13. However, the respondent opposed the application and filed a replying affidavit dated 9th April 2024 sworn by B. G Wainaina an Advocate of the High Court representing the respondent.
 14. He averred that, the bill was listed for hearing on 14th December 2023 but the court did not sit. That, the Deputy Registrar vide an email informed the parties that the matter was rescheduled for taxation 19th December 2023.
 15. That on 19th December 2023, the applicant’s Advocate failed to appear and the taxing master directed the taxation be disposed by way of filing submissions and fixed the matter for mention on 8th February 2024. That, on the 20th December 2023 he sent an email to the applicant’s Advocate of mention notice indicating the purpose of the mention was to confirm filing of submissions.



16. However, on 8th February 2024, neither the applicant nor her Advocates were present and neither had they filed their submissions and/or a response to the taxation. That, the court took note that the applicant did not take the matter seriously and stated that they were estopped from alleging the bill was excessive and/or exaggerated.
17. That, the applicant's submissions were filed on 15th February 2024 being one (1) day after delivery of the ruling and therefore the applicant was aware at the time of filing the submission that the ruling had been delivered and has failed to explain to the court the delay in filing the current application. As such the delay is inordinate, unreasonable and lacks merit.
18. The respondent submitted that furthermore, the applicant's Advocate were served with a draft certificate of costs through an email dated 18th March 2024 and therefore became aware that the ruling had been delivered but the applicant has failed to explain to the court the delay of twenty (22) days in filing the current application.
19. Further that the disputed items being No. 1, 9, 12, 17 and 21 were unopposed and taxed to scale. That the ruling by the taxing master is sound as demonstrated in the respondent's submission and authorities relied on in support of the bill.
20. He argued that the applicant had failed to demonstrate that the decision of the taxing master was based on an error of principle or that the costs were manifestly excessive to justify interference of the same by this court,
21. That the court should not to assist the applicant who was seeking to delay and/or obstruct justice and therefore the application be dismissed with costs.
22. Upon hearing the arguments by the parties the court directed the application be disposed of by way of submissions.
23. The applicant filed submissions dated 17th May 2024 where she relied on the case of Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited & Another [1972] E.A 162 as cited in Charles Muchemi Karweru t/a Karweru & Co. Advocates vs Stephen Gachugi Muthoga & another [2018] eKLR where the Court of Appeal set out principles the court should consider during taxation being that; costs should not be allowed to rise to a level as to confine access to justice to the wealthy, a successful litigant ought to be fairly reimbursed for the cost he has had to incur. Further the general level of remuneration of Advocates must be such as to attract recruits to the profession, and there should be consistency in the award made. That 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.
24. The appellant argued that in considering item 1 of the bill the taxing master took into account the subject value of the intended appeal while the application was merely seeking extension of time to file the appeal and was not seeking any monetary sum.
25. She submitted that, in the circumstances the applicable schedule was Schedule 6 Paragraph C (viii) of the Advocates Remuneration Order 2014, which deals with appeals and provides for a fee of Kshs. 3,000 to present or oppose any other application not provided for, and a fee that is reasonable and not less than Kshs. 5,000 where such application is opposed. The applicant urged the court to tax item 1 at Kshs. 3,000.
26. On item 17 the applicant argued that Schedule 6 of the Advocates Remuneration Order does not provide for charging of getting up fees and the same should be taxed off.



27. On items 9, 12 and 21 of the bill of costs, the applicant argued that the same was based on kilometres however, service was done vide email and therefore there was no justification for the same and should be taxed off.
28. On the failure of the taxing master to consider the applicant's submissions, it was argued that, the applicant filed and served the submissions within the timelines given by the taxing master. That, the taxing master having scheduled ruling for 22nd February 2024, it was not clear how the same was rescheduled to 14th February 2024 as there was no notice to that effect.
29. That, in doing so, the taxing master delivered the ruling on the date reserved for filing submissions and consequently failed to consider the applicant's submission resulting in an error in principle.
30. Furthermore, on whether or not submissions had been filed, the taxing master is obliged to tax any bill of costs as per the scale and not on the basis that the same is unopposed. The applicant submitted that the application has merit and urged the court to allow it as prayed.
31. However, the respondent in his submissions dated 30th May 2024 argued that, the applicant filed the present application fifty-three (53) days after the date of the taxing master's decision despite being aware of the same. He cited the case of Supreme Court Application No 16 of 2014, Nick Kiptoo Arap Korir Salat V IEBC & 7 Others, where the Supreme Court outlined the principles to be considered in an application seeking extension of time as follows:
- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.”
32. The respondent further submitted that, the applicant did not satisfy the condition as set out and has failed to give a reasonable explanation for the delay thus the application lacks merit.
33. On whether the bill of costs was properly taxed, the respondent argued that the application before the court was a fresh matter commenced by way of a notice of motion as per section 2 of the *Civil Procedure Act* (cap 21) Laws of Kenya, and that the value of the subject matter could be ascertained from the pleadings. Reliance was placed on the case of; Kisumu Civil Appeal No 35 of 2007 George Arunga Sino T/A Jones Brook Consultants Limited vs. Patrick J.O & Geoffrey D.O Yogo T/A Atieno, Yogo & Co Advocates where the Court of Appeal considered the provisions of section 2 of the *Civil Procedure Act* and section of the Remuneration Order and held that matters commenced by a notice of motion is a law suit.
34. Further, that the application was disposed of by way of consent with an order that the entire decretal sum of Kshs. 897,983 be deposited in a joint interest earning account thereby ascertaining the value of the subject matter.
35. That in the circumstances, item 1 of the bill was properly taxed in accordance with Schedule 6(1) (a) & (b) of the Advocates Remuneration (amendment) Order 2014 which prescribes a minimum fee of Kshs. 120,000 where the value of the subject is between Kshs. 750,000 and Kshs, 1,000,000.



36. The respondent relied on the case of; Kisumu Misc Application No 25 of 2008 Nation Media Group Limited Vs Kephah Osiago Magare where the High Court held that the application was a fresh matter commenced by way of a notice of motion and not a continuation of the lower court matter and therefore fell under schedule vi 1 (a) & (b) and not schedule vi 1 (c) of the Advocates Remuneration Order of 2006.
37. Further, reliance was placed on the case of Kajiado ELC Misc No 15 Of 2020 Geoffrey Karanu Rwenji vs Rosemary Wambui Makokha where the Court stated that instruction fees can be charged in a suit commenced by a notice of motion.
38. Furthermore, in George Arunga Sino T/A Jones Brook Consultants Limited vs. Patrick J.O & Geoffrey D.O Yogo T/A Atieno, Yogo & Co Advocates the Court of Appeal noted that if the Advocate was required to go to court to argue the notice of motion application he would be entitled to getting up charges.
39. On items 9, 12, and 21 of the bill, the respondent submitted that, its Advocate's office is located in Nairobi which is a distance of 103 kilometres from the court registry and therefore the same was taxed to scale in accordance with Schedule 6 (9) (a) & (b). Further, the advocates remuneration Order does not make provision for service by email.
40. Lastly, the respondent submitted that, the applicant's allegation that she was given seven (7) days to file submissions was misleading as the court records indicate that, the applicant never attended court on 8th February 2024 or any other day for the taxation.
41. That additionally, the submissions were filed one (1) day after delivery of the ruling and it was therefore not possible for the taxing master to consider them. The respondent urged the court to dismiss the application with costs as it lacks merit.
42. I have considered the pleadings and the material placed before the court and note that the main issue to determine is the date when the taxing master delivered the impugned ruling and whether the applicant had notice thereof.
43. A perusal of the trial court files reveals that on 19th December 2023 when the matter was before the court, the respondent's counsel was in court but there was no appearance by the applicant and the matter was stood over to 8th February 2024.
44. On 8th February 2024, the learned counsel Mr. Wainaina for the respondent addressed the court saying that he had not been served with any submissions by the other party and asked for a date for ruling. The court gave the ruling date as 22nd February 2024.
45. Notably the applicant was absent when the date for the ruling was given but an order was issued for the date ruling to be served upon the applicant.
46. Be that as it were, a perusal of the file reveals that the ruling was delivered on 14th February 2024, earlier than the scheduled date of 22nd February 2024.
47. The question that arise is; when the court delivered the decision on a date earlier than the scheduled date, was the applicant notified of the change of date for the ruling. There is no evidence of the same on the trial court's record. In fact, during the intervening period the applicant filed their submissions.
48. Pursuant to the aforesaid, it does appear that the applicant's submissions were not considered because the ruling was delivered before the due date.



49. In that case, it is not in the interest of justice to shut the applicant in this matter from being heard, and is on that basis that I allow the application in this matter.
50. In cognisance of the fact that, the mandate of taxing of the bill belongs to the taxing master. It is not in the interest of justice and proper procedure for this court to tax the bill, so I remit it back and order that it be taxed before a different taxing master.
51. There will be no costs awarded in this matter because the circumstances that have given rise to this matter did not arise due to any of the parties in this matter. Further, I directed that this matter be mentioned before the Honourable Deputy Registrar within seven (7) days of the date of this order.
52. Those are the orders of the court.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF NOVEMBER 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Otieno for applicant

Mr B. G Wainaina for the respondent

Ms. Doreen court assistant

