



Mbuthia Kinyanjui & Company Advocates v Dewji (Miscellaneous Application E063 of 2024) [2024] KEHC 13694 (KLR) (Family) (8 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E063 OF 2024
PM NYAUNDI, J
NOVEMBER 8, 2024**

BETWEEN

MBUTHIA KINYANJUI & COMPANY ADVOCATES APPLICANT

AND

HITESH AMRATLAL DEWJI RESPONDENT

RULING

1. Before this court is the Chamber Summons dated 8th April 2024 seeking the following orders;
 1. That the Honourable Court be pleased to review, revise and/or vary the decision of the Honourable Taxing Master rendered and /or delivered on the 29th February 2024 and in particular, the decision relating items 1,2,35,11,16 18 20 and 21(6 documents) drawings and item 21 on the attendances.
 2. The Honourable Court be pleased to issue an order that the untaxed items namely 6,7,8,9,10,12,13,14,15 and 21 (2 services, 2 copies and court fees thereof) be taxed.
 3. In the alternative, the Advocate/client bill of costs dated 4th July 2023 be remitted for taxation on all items mentioned in prayer 1&2 herein- above before a different Taxing Officer of this court.
 4. Costs of the Reference be borne by the Respondent.
 5. Such further and/or other orders be granted as the court may deem fit and expedient.
2. The Summons was premised upon Rule 11(2) of the *Advocates Remuneration Order*, Sections 1A,1B, 3 &3A of the *Civil Procedure Act* Cap 21 and Article 159 (2) of the *Constitution* 2010 and was supported by the Affidavit of even date sworn by Samson Mbuthia Kinyanjui.



3. The reference is not opposed.
4. It is the applicant's case that the taxing master erred in principle when he awarded the applicant a sum of Kshs. 10,000/= as instruction fees. That he did not exercise his discretion to increase the instruction fees and or allow the award of instruction fees sought as the advocate had diligently rendered the legal service to the conclusion of the matter. It is alleged that the taxing master erred in principle in omitting to tax some items in the bill of costs.
5. It is the applicant's submission that the taxing master relied on Schedule 10 of the *Advocates Remuneration Order* 2014 which provides the minimum cost of Kshs. 10,000/= which according to him was excessively low. It is submitted that the matter ended up in court annexed mediation therefore, the taxing master should have considered the nature of the cause, the value of the subject matter as well as the conduct of the proceedings and use his discretion to increase the instruction fees.
6. It is submitted that the taxing master erred in principle in finding that the Applicant failed to disclose the length and numbers drawn in items 5,11,16,18,20 and 21 hence generalizing items 5,16,18 and 20 as one item and awarding a general cost of Kshs. 1200. That items 1,2 3, 5, 16,18,20 and 21 are manifestively low
7. It is further submitted that items referenced to as items 6,7,8,9,10,12,13,14,15 and 21 were not taxed.
8. It is therefore submitted that on account of this, the bill should be re taxed. Reliance was placed on the decision in *Kipkorir, Too & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR.

Background

9. The Applicant's firm represented the Respondent in Milimani High Court Family Division Succession Cause No. 316 of 2018, the Estate of Nimesh Amratlal Dolatram Devji (deceased). The applicant thereafter filed an Advocate/Client Bill of Costs dated 4th July 2023. The Taxing master delivered his ruling on 29th February 2024 in which he taxed the Bill at Kshs.167,022.60. The applicant subsequently filed a Reference by way of this Chamber Summons seeking that the High Court vary the decision of the Taxing Officer and that the Bill of costs be remitted back to a different Taxing Officer for taxation.

Analysis and Determination

10. I have considered the ruling on the bill of costs delivered on 29th February 2024, the application, the supporting affidavit, the applicant's submissions before me and the authorities cited by the applicant.
11. The principles to guide a Court in considering an application to set aside the decision of Taxing Master were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92. These include;
 - a. That there was an error of principle.
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy.
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred.
 - d. That so far as practicable there should be consistency in the award.
12. The court will not normally interfere with the taxing master's ruling simply because it thinks it would have awarded a different figure had it been the one taking the bill. The court can interfere if it is proved



that the amount taxed was manifestly excessive or low; and The court can interfere if there is proof that the taxing officer followed a wrong principle in reaching his decision.

13. There is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low as to lead to an injustice. In *James v Nyeri Electricity* [1961] 492, it was stated at pages 492 – 293 as follows: -

“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of *Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim* (4) 1956, 23 EACA 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles.” [own emphasis]

14. In the case of *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, Odunga J emphasized that the circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise discretion are now well known. These principles are: -

1. That 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 manifested 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 Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests 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.

15. The Applicant takes issue with the instruction fees awarded by the Taxing Master. He states that the Taxing Officer did not apply his discretion judiciously. In *Joreth Limited v Kigano & Associates* [2002] EA, the court stated as follows: -

We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assets such instruction fee as he considers just, taking in to account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances. That is what CK Njai Esq did when he said:

“As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the Taxing Officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel. [own emphasis]



16. In the Ruling dated 29th February 2024, the Hon. Taxing Master justified the sum awarded as Instruction Fees as follows: -

..... the provision cited above confirms that unlike instruction fees for applying for grant of probate, the instruction fees for lodging an objection to a grant or a citation, instruction fees for filing an application for revocation of grant is not calculated based on the gross capital value of the estate, or the interest of the beneficiary, but has been left to the discretion of the taxing officer with a minimum figure set at Kshs. 10,000.00.....further, no reasons were advanced by the Applicant to persuade the court to enhance the minimum sum of Kshs. 10,000 as provided under the schedule. As such it is my finding that instruction fees of Kshs. 650,000 charged by the applicant is not merited and I hold as such

17. The Court of Appeal in *Ratemo Oira & Co. Advocates v Magereza Sacco Society Ltd* [2019] eKLR stated-

The business of taxation of costs must ensure a delicate balance between the guiding principles aptly pronounced by the Premchand case which include: the “Court owes a duty to the general public to see that costs are not allowed to rise to such a level as to deprive of access to Courts but the worthy” and “the general level of the remuneration must be such as to attract worthy recruits to the profession.

18. The Applicant relies on the decision of *Mayers v Hamilton* (1975) EA 13 for the submission that the minimum instruction fee will increase as the matter progresses. In *Kipkorir Titoo & Kiara Advocate v Reliance Bank Limited (In Liquidation)* [2005] eKLR whilst reversing the decision of the taxing master to increment the instruction fee the Court stated as follows-

In my considered opinion, the fact that the suit was settled on the advice of the advocate does not justify an increment(*sic*). A prudent advocate is expected to give due consideration to his client’s case and the applicable law; and to then advice the client appropriately. By doing so, the advocate cannot be said to have done something extraordinary. Therefore, in my considered opinion there is no basis in law, or fact for the award, by the Taxing Officer, of the increment(*sic*). To that extent, I hold that the Taxing Officer erred, in principle, in increasing the prescribed instruction fee

19. From the foregoing I find that the increment to the basic instruction fees is not automatic and a party is obligated to lay the basis upon which the taxing master would do so. I find Taxing Master justified and explained his award for instruction fees at paragraph 6 of his ruling. I do not find any error of principle by the Taxing Master in awarding the sums awarded.
20. As regards items 6,7,8,9,10,12,13,14,15 and 21 of the Bill of costs it is clear that apart from Item 21, the Court upheld them while Item 21 was reviewed for reasons that I agree with. In the circumstances that limb of the Application will also fail.
21. In conclusion, in light of the foregoing I will dismiss the application and uphold the ruling of the taxing master dated 29th February 2024. As the Respondent did not participate there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

P M NYAUNDI



JUDGE

In the presence of:-

Fardosa Court Assistant

