Akida v Mukoya (Civil Appeal E081 of 2022)
[2024] KEHC 15859 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15859 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E081 OF 2022

AC BETT, J

DECEMBER 6, 2024

BETWEEN

RAJAB AKIDA .... APPELLANT

AND

RASHID HAJI MUKOYA .... RESPONDENT

(Being an Appeal from the Judgement and Order of Hon. G. Ollimo (SRM) in Butere Senior Principal Magistrate's Court Civil Suit No. 92 of 2019 delivered on 22nd September, 2022)

RULING

1. Before me is a Chamber Summons dated 13th September 2024, brought pursuant to Rule 11 of the Advocates (Remuneration) Order and Section 1A, 1B, 3, 3A of the *Civil Procedure Act* where the Applicant herein sought for the following orders:-

    a. Spent

    b. Spent

    c. Spent

    d. That the ruling of the Taxing Master, Honourable Deputy Registrar J.J Masiga on 30th August 2024 in respect of the Advocate Client Bill of Costs dated 17th February 2024 be set aside and/or vacated.

    e. That the Honourable court be pleased to direct the Respondent's Bill of Costs dated 17th February 2024 be taxed afresh before a different taxing master.

    f. That costs of this Application be in the cause.

2. The Application is based on the grounds set out on the face of the Application dated 13th September 2024 and the Affidavit in Support sworn by the Applicant's advocate, Ashioya Biko, on the same date.

3. The Appellant's advocate in the Supporting Affidavit averred that the Taxing Master, Hon. J.J Masiga, Deputy Registrar, delivered a Ruling on the Respondent's Bill of Costs dated 17th February 2024, allowing the bill as drawn. He stated that the Appellant, being dissatisfied with the Ruling and the reasons of the Taxing Master, gave the requisite Notice of Objection to the Taxing Master and has opted to file the reference herein seeking to have the Ruling delivered 30th August 2024 and the Orders emanating therefrom vacated and/or set aside.

4. He stated that the Appellant had filed his written submissions dated 17th July 2024 in opposition to the said Bill of Costs through the Court Tracking System. He averred that the Taxing Master entirely failed to consider the Appellant's written submissions in taxing the Respondent's bill of costs. The Appellant's advocate argued that the decision by the Taxing Master to allow the bill as drawn is in contravention of clear and explicit provisions of the law. He further posited that the Ruling by the Taxing Master did not address itself to the counter arguments and/or submissions in opposition of the Bill of Costs raised by the Appellant and that it also did not address itself on the fact that the bill as drawn offended the clear provisions of the Advocates (Remuneration) (Amendment) Order, 2014.

5. The Appellant's advocate advanced that the Taxing Mater erred in principle in the following respects:-

    a. Taxing the Respondent's bill of costa as drawn which amounts were manifestly high, unreasonable, unjustified and unlawful.

    b. Failing to consider the submissions dated 17th July 2024 raised by the Appellant in opposition to the Bill of Costs dated 17th February 2024.

    c. Wrongly exercising his authority in a manner that was drastic, harsh, unjustified, oppressive and prejudicial by taxing the bill without considering any documentation filed by the Appellant thus failing to determine the matter on merit.

    d. Failing to notice that there was no certification by the judge certifying the Appeal as a proper one for consideration of a getting up fees, as mandated by the provisions of Schedule 6 (2) of the Advocates (Remuneration) (Amendment) Order, 2014 and as such there was no legal basis for the award of getting up fees by the Taxing Master.

    e. Awarding sums under items 4 to 10 and items 12 to 14 being attendances as they were attendances for mention which would not have taken longer than thirty minutes.

    f. Failing to hold that there was no evidence adduced in support of the claim by the Respondent to having drawn a Mention Notice dated 29th September 2023, a Mention Notice dated 22nd July 2023 and a Hearing Notice dated 24th March 2024 to support an award by the taxing master.

    g. Awarding sums taxed for drawings of a Mention Notice, Hearing Notice, Submissions, Bill of Costs and a Taxation Notice under Schedule 6(4) of the Advocate (Remuneration) (Amendment) Order, 2014 yet the same are not pleadings.

    h. Awarding sums taxed for service in Nairobi under item Number 22 to 29 of the bill of costs despite there being no evidence of physical service of the said documents being effected upon the Appellant.

i. Awarding sums for disbursements in the absence of production of any receipts by the Respondent in support thereof.

6. The Appellant's advocate stated that the Application was brought at the earliest opportune time and filed without inordinate delay. He averred that from the perusal of the said Ruling, there is nowhere in the contents of the Ruling that the Taxing Master considered any of the documents filed on behalf of the Appellant. He further posited that in the Ruling, the Taxing Master claims that the Bill of Costs is unopposed but there are written submissions on record for the Appellant dated 17th July 2024 and filed through the Court Tracking System. He stated that the Appellant's written submissions impugning the Respondent's Bill of Costs was properly filed and before the court records. He advanced that the said Ruling is a miscarriage of justice and a travesty of justice as it denies the Appellant his constitutional right to a fair hearing. The Appellant's advocated stated that the Ruling delivered on 30th August 2024 should be set aside / vacated and the bill of costs dated 17th January 2024 should be taxed afresh before a different taxing master.

7. In opposing the Application herein, the Respondent relied on a Replying Affidavit dated 24th September 2024 and sworn by the Respondent's advocate, Okwaro Winnie Anono. In the Replying Affidavit, the Respondent's advocate stated that the Application is destitute of merit, inappropriate and brought in bad faith with the aim of delaying justice. She averred that the Appellant was duly served with the Bill of Costs dated 17th February 2024 on 2nd March 2024 and a return of service placed on record. She reiterated that by the time the Deputy Registrar retired to write the ruling, the submissions purportedly filed had not been placed on record as reflected in part of the said Ruling. She argued that it was the Appellant's obligation to ensure that their documents are placed on record upon filing. She contended that the Respondent ought not to be punished for the Appellant's failure to follow up with the registry and have their documents placed on record. She advanced that the Respondent continues to suffer great prejudice if the orders sought herein are granted as he continues to be denied the fruits of his litigation 2 years down the line. She averred that the Bill of Costs dated 17th January 2024 was drawn to scale under the provisions of the Advocate (Remuneration) (Amendment) Order, 2014.

8. Directions were issued that the Application be canvassed by way of written submissions and the parties complied.

Appellant's Submissions

9. The Appellant filed his Submissions dated 17th October 2024 and submitted that the Taxing Master erroneously awarded getting up fees in clear contravention of the law. The Appellant averred that on Appeals, getting up fees is not considered or awarded unless the judge who heard the Appeal certified that the Appeal is one requiring consideration of a getting up fee. The Appellant stated that there was no such certification by the judge and the Respondent is not entitled the getting up fees hence the amount of Kshs. 37,500/= ought to be taxed off.

10. On attendances, the Appellant submitted that the amount chargeable and/or payable depends on the purposes for the attendance, that is whether it is a normal attendance to the court registry, a mention on a hearing in respect of the suit and the time spent. The Appellant argued that the Taxing Master failed to consider the fact that the Appeal was heard by way of written submissions and that at no point was the matter heard for more than one hour. He posited that items No. 4 to 10 ought to be charged at the sum of Kshs. 1,100/= and the same should be applied to item 12 to 14. He further submitted that the amount stated under item No. 23, and 15 to 21 are erroneous as no amount is chargeable for filing. He stated that any amount purported to be chargeable for filing is already covered under disbursement and drawings and any purported taxation for attending registry to file a document would

amount to double taxation. He averred that the courts have embraced technology through the Court Tracking System and documents are now being filed in court online through the said E-filing system and therefore one cannot allege to have attended the registry to file any document and the amount of Kshs. 4000/= should subsequently be taxed off from the amounts charged in items 11 and 15 to 21.

11. On disbursements, the Appellant advanced that items number 38 to 35 of the Respondent's Bill of Costs relates to expenses supposedly incurred for purposes of furtherance of the Respondent's case but direct expenses by way of disbursements ought only to be allowed where supported by official receipts to evidence such expenditure. He submitted that the same ought to be disallowed. He relied on the case of Maina Murage & Company Advocates Vs Mae Properties Limited (2018) eKLR and the case of Ngatia & Associates Advocates Vs Interactive Gaming & Lotteries Limited (2017) eKLR where the courts agreed with the position that disbursements must be proved by way of receipts.

12. On drawings, the Appellant argued that the Respondent has adduced no proof on the allegation of having drawn a Mention Notice dated 22nd July, 2023, a Mention Notice dated 29th September 2023 and a Hearing Notice dated 24th March 2023. The Appellant relied on the case of Odera Obar & Co. Advocates Vs Hellen Odido (2017) eKLR where the court held the position that the burden of proof is on the Applicant to prove that they indeed drew the alleged Notices.

13. The Appellant further averred that Item No. 30 to 37 of the Bill of Costs claimed a sum of Kshs. 1,100/= as fees chargeable for the drawing of the Respondent's Submissions which has been listed twice, 2 Mention Notices, a Hearing Notice, the Bill of costs, a Taxation Notice and a Replying Affidavit but the said items do not fall under Schedule 6(4) of the Advocate (Remuneration) (Amendment) Order, 2014. He further argued that a Mention Notice, a Hearing Notice, Submissions, Bill of Costs and a Taxation Notice are not and cannot be construed to be pleadings and the amount proposed by the Respondent is erroneous and should not have been awarded. The Respondent posited that any cost for filing the said documents ought to have been charged under Schedule 6 (4) (d) of the Advocate (Remuneration) (Amendment) Order, 2014 and the amount chargeable for item 30 to 34 and 36 to 38 is the sum of Kshs. 180/=. He also posited that the amount chargeable under item number 35 of the bill of costs ought to be taxed off in its entirety as there is no proof that the Respondent filed two sets of submissions in the Appeal.

14. On Service, the Appellant contended that no proof of physical service of the documents listed under item No.22 to 29 in the Respondent's Bill of Costs has been rendered. He argued that the law mandates that for service to be proved, the process server undertaking the said service is obligated by law to depone and file in court an Affidavit of Service outlaying the conduct of such service. He submitted that since there was no proof of service under item 22 to 29 in the bill of costs, the same need to be struck off in their entirety. He further posited that the calculations by the Respondent are erroneous as they purport to multiply the amount alleged to be awarded by two without any legal justification. The Appellant submitted that the entire amount stated under item 22 to 29 amounting to the sum of Kshs. 203, 840/= ought to have been taxed off.

15. On perusing, the Appellant argued that the amount stated under item 46 to 52 are erroneous since the amount chargeable is clearly stipulated under schedule 8 (b)of the Advocate (Remuneration) (Amendment) Order, 2014 which provides for a charge of Kshs. 50/= that is not to be increased per folio. He submitted that the sum of Kshs. 9,000/= from the amount stated under number 46 of the Respondent's bill of costs should be taxed off.

16. The Appellant finally submitted that the court should find that the bill of costs dated 17th February 2024 should be disallowed in its entirety as it is irregular, excessive, inequitable, and unjustifiable.

Respondent's Submissions

17. The Respondent submitted on two issues:-

    I. Whether or not the Taxing Master exercised his authority in a manner that is prejudicial thus failing to determine the matter on merit.

    II. Whether or not the Respondent's bill of costs is drawn to scale.

18. On the first issue, the Respondent averred that the Taxing Master appreciated the principles set out in Premchand Rainchand Ltd and Another Versus Quarry Services of East Africa Ltd and Others (1972) E.A 162 where the court held that a successful litigant ought to be fairly reimbursed for the costs he had incurred in the litigation. The Respondent further relied on the case of Peter Muthoka & Another Vs Ochieng & 3 Others (2019) eKLR and the case of Republic Versus Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna (2006) eKLR where the courts emphasized the discretion of the Taxing Masters and the slowness of the court in interfering with the said discretion.

19. On the second issue, the Respondent submitted that the Taxing Master in his well-reasoned ruling dated 30th August 2024 opined that the Bill of Costs was drawn to scale and proceeded to allow the same as drawn. He relied on the case of Ahmed Nassir Vs National Bank of Kenya Ltd (2006) E.A where the court held that where reasons for the taxation on the disputed items are already contained in the considered ruling, there is no reason for a party to seek further reasons simply because the wording of sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so.

20. The Respondent submitted that the instant Application is destitute of merit, misplaced and brought in bad faith with the aim of delaying the course of justice.

Analysis

21. After considering the Application, the response thereto and the submissions by the parties, I find that the main issues for determination are:

    a. Whether the Reference is competent.

    b. Whether there are sufficient grounds for interfering with the taxing officer's ruling dated 30th August 2024.

    c. Whether the Respondent's Bill of Costs dated 17th February 2024 should be taxed afresh before a different taxing master.

I. Whether the Reference is competent.

22. The procedure for filing a Reference is set out in Paragraph 11 of the of the Advocates Remuneration Order. Rules 1-4 provide thus:-

> "(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons which shall be served on all the parties concerned, setting out the grounds of this objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) far the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

23. In the instant Application, it is noted that the Appellant indeed gave a notice of objection to the taxing officer but no reasons thereof have been attached. Does this then render the Application fatal? This question has been the subject of diverse interpretation by the Courts.

24. In the matter of Independent Electoral and Boundaries Commission vs John Omollo t/a Ganijee & Sons [2021] eKLR, the court held as follows:-

> "Under Paragraph 11 (2) of the Advocates Remuneration Order, it is a requirement that after a Taxing Master has received an objection from any party, he or she is mandated to respond to the objector and thereafter the objector may file a Reference before a Judge. It is therefore true that the Applicant was under a mandate to wait for such reasons from the Taxing Master."

25. In Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR, the court opined that:-

> "It is therefore clear that the interpretation by the Court especially the High Court on this issue is far and varied. In my view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.
>
> However, where there are reasons on the face of the decisions, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of a reference since that insufficiency may be the very reason for preferring a reference."

26. The Taxing master in this case taxed the bill as drawn since he was of the opinion that the bill was drawn to scale. This has been considered as a sufficient reason in the case of Sheikh & another v Mas Construction Limited & 5 others [2024] eKLR where the court held that:-

> "A copy of the Taxing Masters ruling has not been attached to the Reference. However, the Court has been able to peruse the said ruling which is on record. The Taxing Master indicates that he perused the items in the bill, considered the submissions and found that the bill was drawn to scale in accordance with the 2014 Advocates Remuneration Bill. The Court considers that these are indeed reasons, the adequacy thereof will be discussed under the following head."

27. Similarly, I find that the failure to attach reasons by the Taxing Master does not render the Application futile since the reason given in the Taxing Master's Ruling is considered sufficient.

II. Whether there are sufficient grounds for interfering with the taxing officer's ruling dated 30th August 2024

28. It is trite law that the court will only interfere with the decision of a taxing officer in cases where there is demonstration of an error of principle. In Republic v Ministry of Agriculture & 20 others Ex-parte Muchiri W' Njuguna [2006] eKLR, the court 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 is 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."

29. The Court of Appeal in the case of Kipkorir, Titoo& Kiara Advocates v Deposit Protection Fund Board NRB [2005] eKLR similarly stated that:-

> " On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."

30. The Respondent herein alleges that his submissions were not considered at all by the Taxing Master. The court in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR held that:-

> " Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. …Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondents. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained."

31. The court in Del Monte Kenya Limited v Kenya National Chamber of Commerce and Industry (KNCCI) Murang'a Chapter & 2 others [2021] eKLR expressed itself on the issue of consideration of Submissions by a party:-

> " This does not mean that the Court will ignore the submissions. What the Court does is to look at their relevance and take them into consideration, but is not bound by them."

32. In the instant Application, the Taxing Master did not only fail to consider the Appellant's submissions but also failed to recognize the existence of the same. The Taxing Master rendered the Bill of Costs as unopposed and taxed the same as drawn while the Appellant was actually opposed to the suggested bill through the submissions that the Taxing Master failed to consider. In this regard, I find that the Appellant was ousted from the seat of Justice since he was not accorded a chance to be heard before the said Bill of Costs was assessed. This was an error in Principle by the Taxing Master and I find that it is sufficient ground to indulge this court in a reassessment as follows:-

a. Getting up Fees

33. First, the Appellant is opposed to the getting up fee taxed in the bill of costs, stating that there was no certification from the judge who heard the Appeal requiring consideration of a getting up fee.

34. Schedule 6 Paragraph 3 of the Advocate (Remuneration) (Amendment) Order, 2014 provides: -

> "In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee."

35. The court in Narok County Government v Kemboy Law Advocates (2024) eKLR expressed itself on the issue of getting up fees in an Appeal as follows: -

> "The Court's understanding of the above provision of the Advocates (Remuneration) (Amendment) Order, 2014 is that getting up fees is actually payable to an Advocate but only if the same is certified by the Court based on the extend and difficulty of the work down in lodging and handling the Appeal. Consequently, a Taxing Officer can only award getting up fees if there is a certification by the Appellate Judge that such an Appeal was of a difficult nature in its preparation and subsequent prosecution to warrant the getting up fee."

36. Similarly, the court in National Bank of Kenya v Rachuonyo & Rachuonyo Advocates [2021] eKLR held that: -

> "Eligibility for getting up fees is dependent on certification by the Court entertaining the Appeal, at the conclusion of the hearing, that in view of the extent and difficulty of the work after the lodging of the appeal, the case is a proper one for consideration of getting up fees."

37. In this respect, a perusal of the proceedings in the Appeal file does not show that these proceedings were certified by the Judge that the Advocate is entitled to getting up fees.

38. I find that the Taxing Master misdirected himself in allowing the award of Kshs. 37,500/= as getting up fees without the certification of the court as required under Schedule 6 Paragraph 3 of the Advocate (Remuneration) (Amendment) Order, 2014.

b. Attendances

39. On the charges for attendances, the Appellant averred that items 4 to 10 and 12 to 14 should be charged at the sum of Kshs. 1,100/= since the said attendances did not take more than an hour. I find that items 4, 5, 7, 8, 10, and 12 ought to have been charged at Kshs. 1,900/= each, being the higher scale since the suit was defended and since the attendances were for mentions which are usually less than an hour.

40. Item 6 should be charged at Kshs. 500/= in accordance with Schedule 6 Paragraph 7(b) of the Advocate (Remuneration) (Amendment) Order, 2014 since the attendance was at the registry.

41. Item 9 and 14 were properly assessed by the Taxing officer and shall remain the same. On item 15 to 21, I find that the same was properly charged despite the Appellant's contention that the matters were filed through the E-filing system and that one cannot allege to have attended the registry to file any document. Filing documents in the Court Tracking System is just as time consuming as filing the

documents in the registry is since there is a step-by-step process in filing matters through the CTS which is equally time consuming.

c. Drawings

42. On the drawings, the Appellant argued the Respondents did not furnish any proof of having drawn items 30-34 and 36-37 and that if at all there is proof of having drawn the same, the documents ought to be charged under Schedule 6 Paragraph *4* (d) and not under paragraph 4 (a) of the Advocate (Remuneration) (Amendment) Order, 2014 as presented in the Bill of Costs. I find that items 30, 31, 33 and 36 are to be charged at Kshs.180/= per folio and not at Kshs 1,100/= as presented by the Respondents since the same are not pleadings. Item 34 is to be charged at Kshs. 1,100 since it qualifies as a pleading. Item 32 and 37 should taxed off in their entirety since there is no evidence of the said documents being filed.

d. Service

43. On Service, the Appellant claimed that items 22 to 29 ought to be taxed off in their entirety since there was no proof of physical service. The Appellant was also in contention with the Respondent's calculation of multiplying the alleged award by two which he claimed was without any legal justification.

44. I find that proof of service has only been adduced for Item 23, 25 and 28. I am however averse to the method of calculation used by the Respondent in arriving at the charges for the said service. The court in Premchand Rainchand Ltd and Another Versus Quarry Services of East Africa Ltd and Others (1972) E.A 162 set out principles that courts should adhere to in taxation and stated that: -

> " Costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy."

45. I find that the criteria used to arrive at the sum of Kshs. 25,480/= per each service was excessive. The cost for service ought to have been calculated in terms of the of traveling and subsistence expenses incurred by the process server plus the cost of service within three kilometers of the High Court or district registry of the High Court in Nairobi in accordance to Schedule 6 Paragraph 9(a) and (c) of the Advocate (Remuneration) (Amendment) Order, 2014.

e. Perusals

46. On the perusals, I find that the same were properly assessed by the Taxing officer and shall remain the same.

f. Disbursements

47. On disbursements, the only documents on record that were properly assessed and filed are under item 39, 40 and 43 which were properly charged. Item 44 should be charged at Kshs. 500/= and not Kshs. 750/= as it was in the Bill of Costs. There is no evidence on record for item 38, 41, 42 and 45 and the same should be taxed off in their entirety.

Determination

48. The upshot is that he Bill of costs dated 17th February 2021 is excessive, inequitable and unjustifiable and a departure from the known principles of taxation. The ruling dated 30th August 2024 adopting

the said Bill of costs as it was is hereby set aside. Consequently, the Bill of costs is referred to the taxing master for fresh taxation. The Applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Shikanda holding brief for Mr. Ashioya for Appellant

Mr. Alukwe holding brief for Ms. Anono for the Respondent

Court Assistant: Polycap