



**Patrick v Nyabuto (Miscellaneous Civil Application E983 of 2023)
[2024] KEHC 15203 (KLR) (Civ) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E983 OF 2023**

**CW MEOLI, J
DECEMBER 2, 2024**

BETWEEN

PATRICK GITHINJI ALIAS PATRICK RUNJUGI APPLICANT

AND

CYNTHIA NYABUTO RESPONDENT

RULING

1. The live prayers for consideration in the chamber summons dated 16.07.2024 filed by Cynthia Nyabuto, the Respondent in the matter seek; -
 - “1. Spent
 2. Spent.
 3. Spent.
 4. That the decision of the taxing officer on the Applicant’s bill of costs dated 16th August 2023 delivered on 17th May 2024 as regards Items 4a, b, c, d, e, f, g, h, 5 and 6 be set aside.
 5. That the bill of costs dated 16th August 2023 be referred ..for taxation under a different taxing officer with appropriate directions
 6. That this honorable Court grants any other relief that may be just to meet the ends of justice in this case.
 7. That the costs of this application be provided for.”
2. The chamber summons is expressed to be brought under Paragraph 11 of the Advocates Remuneration Order, and premised on grounds on the face of the motion, as amplified in the supporting affidavit



sworn by Beatrice Mwaura, counsel for the Applicant. The gist of counsel's affidavit is that Patrick Githinji alias Patrick Runjugi, the Applicant in the matter, filed a Party and Party Bill of costs dated 16.08.2023 against the Respondent for costs of Kshs. 50,460/- arising from Small Claims Cause No. E2424 of 2022 on a personal injury claim. That in the Respondent's submissions in opposition to the bill, it was submitted that the bill of costs be taxed as per the Second Schedule of the Small Claims Court Rules, 2019 and read with Section 33 of the [Small Claims Court Act](#). She goes to depose that the taxing officer in his ruling considered irrelevant factors and proceeded to tax the bill at a sum of Kshs. 43,200/-.

3. That the Respondent is aggrieved with the decision of the taxing officer and particularly takes issue with Items 4a, b, c, d, e, f, g, h, 5 and 6 of the bill of costs, which the taxing officer failed to tax as per the Second Schedule of the [Small Claims Court Rules](#) but instead taxed the same under Schedule 7 of the [Advocates Remuneration Order](#). She complains that the taxing officer failed to understand that the bill of costs arose from a Small Claims matter and as a consequence set bad precedent, which is prejudicial to the Respondent in light of the spirit of the Small Claims Court. That in any event the Applicant has an opportunity to apply for a certificate of costs at the Small Claims Court but instead filed a bill of costs at the High Court which was taxed in excess and contrary to the Second Schedule of the Small Claims Court Rules. Therefore, it is in the interest of justice that that the Respondent's reference is allowed to enable the bill of costs be re-taxed accordingly.
4. The Applicant opposes the chamber summons through his replying affidavit dated 03.10.2024. He asserts that the Respondent has placed reliance on beguiling grounds in support of the motion. Because, it is evident from her submissions before the taxation Court that the Respondent guided the taxation Court and conceded to the applicability of the Schedule 7 of the [Advocates Remuneration Order](#) to the matter. That the Respondent's advocates had every opportunity to raise a preliminary objection during the proceedings and before the delivery of the taxation ruling but did not. Moreover, it is only the Deputy Registrar of the High Court who has the exclusive jurisdiction to tax a bill of costs. In conclusion, he deposes that Respondent has not provided proof and or demonstrated how she stands to suffer loss in adhering to the just ruling requiring her to pay rightful costs owed. Therefore the application ought to be dismissed with costs.
5. The chamber summons was canvassed of by way of written submissions, which this Court has duly considered in their totality.
6. Counsel for the Respondent began by asserting that it was not contested that the Applicant's bill of costs was a Party and Party Bill of costs which emanated from the Small Claims Court. While calling to aid the decision in [Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited & another](#) [2016] eKLR, counsel posited that it is settled that costs emanating from a matter before the subordinate Court can only be assessed and or taxed before the subordinate Court under Schedule 7 of the [Advocates Remuneration Order](#). That the Applicant by filing a bill of costs before a superior Court in a matter heard and determined before the subordinate Court is guilty of gross abuse of the Court process. The action being contrary to the provisions of Rule 37 of the [Small Claims Court Rules](#), [Advocates Act](#), and the [Advocates Remuneration Order](#), regarding the law and practice on assessment of costs in a subordinate Court matter.
7. It therefore follows that the taxing officer lacked the requisite jurisdiction to entertain the bill of costs and ought to have downed his tools. It was further submitted without prejudice to the above that , even if the taxation Court had jurisdiction to entertain the bill of costs, by the fact of the subject matter having proceeded and concluded in the Small Claims court, the costs were subject to the provisions of the Second Schedule to the [Rules](#) as provides by the Small Claims Court Rules as read with Section 3 of the [Small Claims Act](#) , the latter which espouses the purpose of the Court.



8. Submitting on Items 4a, b, c, d, e, f, g, h & i on attendances as taxed by the taxing officer, it was summarily argued that the Second Schedule does not provide for attendances. Because, the Small Claims Court being a cost-efficient forum all the attendances are capped at 500/- under regulations guiding the Small Claims Courts. In the alternative, it was submitted that in the event the Court elects to apply Schedule 7 of *Advocates Remuneration Order*, the attendances lasted less than an hour and should be taxed at Kshs.1000/- pursuant to Paragraph 9 (i) of the of Schedule 7. Concerning Item 5, it was submitted that the Second Schedule contemplates costs of Kshs.500/- for a distance of over 10km covered during service. However, the Deputy Registrar failed to recognize the Second Schedule to the *Rules* and proceeded to tax each service at Kshs.1,400/- in line with the Schedule 7 of Advocates Remuneration Order. Besides, all services were done via WhatsApp and no distance was covered, therefore the Court was urged to tax the item on service at Kshs.100/- each making the total 500/-. And that the Second Schedule contemplates remuneration for physical services and kms have been covered.
9. Addressing Item 6, it was submitted that the Second Schedule clearly provides that fees recoverable on execution of a Decree or Order of the Court shall not exceed 10% of the aggregate value of the subject matter together with disbursements on account of the fees specified in this Schedule to the Rules. Therefore, citing the case of *Doris Awino Abira v M. I. Wafula & Co. Advocates* [2020] eKLR it was asserted that the taxing officer completely ignored the Second Schedule and proceeded to award the said disbursements of Kshs.5,000/- despite Schedule 7 of the Advocates Remuneration Order not providing for disbursements . And in any event disbursements ought to have been proved by way of receipts. In conclusion, the Court was urged to re-tax the Respondent’s bill of costs.
10. The Applicant ideally defended the taxing officer’s decision. Responding to the Respondent’s submissions on jurisdiction, counsel argued that the provisions of the Small Claims Court Rules are yet to come into operation and gain full force of the law, which fact can be ascertained from the Judiciary’s website. Hence the Respondent’s decision to file the bill of costs in this superior Court. It was further submitted that Paragraph 10 of the *Advocates Remuneration Order* lawfully clothes the Deputy Registrar of the High Court with jurisdiction to tax the bill while paragraph 51 stipulates that schedule 7 shall be the applicable scale of costs in subordinate Courts which includes the Small Claims Court. That reading Section 48 of the *Small Claims Court Act* as read with Article 2 & 165(3)(a) & (3) and (6) of the *Constitution*, the Respondent was not barred from instituting the proceedings to tax the bill of costs in the High Court as done. Hence, the taxing officer lawfully exercised lawful jurisdiction in taxing the Respondent’s bill of costs. On whether the bill ought to be re-taxed, counsel reiterated the foregoing submission and asserted that taxing officer rightly applied the lower scale of the Schedule 7 of the *Advocates Remuneration Order* in taxing the bill of costs in a bid to justly compensate the Applicant as such there is no basis whatsoever for the bill of costs to be re-taxed.
11. The Court has considered the grounds advanced in the reference as well as the affidavit material and submissions. As regards the nature of taxation proceedings, the Court in *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd* [1972] EA 162, Spry, V-P. stated at p.164 that: -

“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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat is 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.”



12. The Court of Appeal in the above decision laid down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs as follows:-

“

- “(a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- (d) that so far as practicable there should be consistency in the awards made.”

See also *Rodgers Mwema Nzioka v The Attorney General & 9 Others* [2007] eKLR and *Rogan Kamper v Grosvenor* (1978) eKLR

13. Ojwang, J. (as he then was) in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others* [2006] KEHC 3504 (KLR) observed that: -

“Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

See also *First American Bank of Kenya v Shah & Others* [2002] 1 EA 64 at p.69

14. Before addressing the substance of the reference herein, the court must first deal with the preliminary question raised by the Respondent in her submissions, namely, whether the taxing officer was vested with jurisdiction to entertain the bill of costs as presented. Ordinarily an objection appertaining jurisdiction constitutes a pure point of law. The words of Nyarangi, JA, in the locus classicus decision in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 require no restatement save for the exhortation which still endures that “Jurisdiction is everything. Without it, a court has no power to make one more step.” Further, the Court in *Macharia & another v Kenya Commercial Bank*



Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) succinctly put it that a Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

15. In retort to the preliminary issue, the Applicant contends that the Respondent's advocates had every opportunity to raise a preliminary objection during the proceedings and before the delivery of the taxation ruling but did not. This argument is unsustainable in view of the Court of Appeal decision in Kenya Port Authority v Modern Holding [2017] eKLR citing with approval the High Court decision in Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR, wherein it was observed that:

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

16. The Respondent has argued that the filing of the Applicant's bill of costs before a superior Court in a matter heard and determined before the subordinate Court flies in the face of the provisions of Rule 37 of the Small Claims Court Rules, Advocates Act, and the Advocates Remuneration Order. And consequently, the taxing officer lacked the requisite jurisdiction to entertain the bill of costs and ought to have downed his tools. The Applicant's riposte is first, that the Small Claims Court Rules are yet to come into operation; secondly, that Paragraph 10 & 51 of the Advocates Remuneration Order clothe the Deputy Registrar of the High Court with jurisdiction to tax the bill; and thirdly pursuant to Section 48 of the Small Claims Court Act as read with Article 2 & 165(3)(a) & (3) and (6) of the Constitution, the Applicant was not barred from filing the bill of costs in the High Court and the taxing officer properly exercised jurisdiction in entertaining the bill of costs.

17. At the outset, the Applicant's argument that the Small Claims Court Rules are yet to come into operation and gain full force of the law is misplaced; the rules were operationalized by dint of Legal Notice 145 of 2019. Secondly, it is undisputed that the bill of costs was a Party and Party Bill of Costs originating from the Small Claims Court and not an Advocate-Client Bill of Costs. To determine whether the taxing officer was vested with jurisdiction to tax the Applicant's bill of Cost, the Advocates Remuneration Order and the Small Claim Court Act as read with the Rules must be considered. Paragraph 2 of Advocates Remuneration Order provides that: -

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and in a Tribunal established under the Rent Restriction Act (Cap. 296).

18. Reading of the above provision as well as Paragraph 13 and Paragraph 52, a taxing officer is duly vested with jurisdiction to tax matters as either between Party and Party or Advocate-Client. However, the Small Claims Court is a specialized Court though a subordinate Court by a reading of Article 162(4) as read with Article 169(1)(d) of the Constitution. These provisions and the Advocates Remuneration Order may not expressly oust the jurisdiction of a taxing officer from taxing a Party and Party Bill of Costs originating from the subordinate Court other than the Court(s) specified in Paragraph 2 thereof.



However, by dint of Order 21 Rule 9, 9A, 9B, 9C & 9D of the Civil Procedure Rules, Party and Party Costs from Magistrate Court's, as a subordinate Court, are assessed and not taxed and are a preserve of the subordinate Court and not a taxing officer. As such, there may be an argument that Party and Party Costs from the Small Claims Court ought to be assessed and not taxed. In an ideal situation, there should exist proper provisions regarding costs in the Small Claims Court Act and Rules similar to Order 21 Rule 9, 9A, 9B, 9C & 9D of the CPR, to remove unambiguity. And give effect to the raison d'être of the establishment of the Small Claims Courts, inter alia, to reduce delay and costs of litigation. Accordingly, the Respondent's preliminary contestation on the taxing officer's jurisdiction to entertain the bill of costs is not well taken.

19. Moving on to the gist of the reference, the Respondent takes issue with the awards by the taxing officer under Items 4a, b, c, d, e, f, g, h, 5 & 6 of the Applicant's Party and Party Bill of Costs. She argues that the subject matter having proceeded and concluded in the Small Claims Court, the costs in the matter are strictly subject to the provisions of the Second Schedule on accord of Rule 37 of Small Claims Court Rules as read with Section 3 of the Small Claims Act, that espouses the purpose of the Court. The Applicant's rejoinder is that by dint of Paragraph 51 of the Advocates Remuneration Order the taxing officer rightly applied the lower scale of the Schedule 7 of the Advocates Remuneration Order in taxing the bill of costs in a bid to justly compensate the Applicant as such there is no basis whatsoever for the bill of costs to be re-taxed.
20. By his ruling delivered on 17.05.2024, the taxing officer stated inter alia that: -

“The Applicant filed its bill of costs dated 16th August 2023. Applicant's written submission in support of the party & party bill of costs dated 16th August 2023 were filed. The Respondent's submission in respect to the Applicant's bill of costs dated 16th August 2023 are on record.

I have considered the bill of costs by the Applicant, and I will be guided by the Advocates Remuneration Order 2014” (sic)

21. It is not clear whether the taxing officer took note of the origin of the bill of costs before him. The ruling does not refer to the subject matter as originating from the Small Claims Court. However, as presented, the bill is patently described as arising from the Small Claims Court Claim No. E2424 of 2022 (Annexure BM-1) and similarly described in the body of the Respondent's submission. (Annexure BM-2). Section 33 of the Small Claims Court Act states that: -

- “(1) The Court may award costs to the successful party in any proceedings.
- (2) In any other case parties shall bear their respective costs of the proceedings.
- (3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursement incurred on account of the proceedings.
- (4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

22. Rule 37 of the Small Claims Court Rules on its part provides that: -

In assessing costs recoverable under section 33(1) of the Act, the Court shall be guided by the Second Schedule to these Rules.



23. The Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR stated as follows in respect of reference before a Judge;

“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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“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 interfere only in exceptional cases”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel* (No. 2), [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D’Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel* (No. 2) (supra).

24. Here, it is apparent that the taxing officer applied the wrong statute in taxing the Applicant’s Party and Party Bill of costs; he relied on the *Advocates Remuneration Order* 2014 instead of the Second Schedule to the *Small Claims Court Rules*. Thus, he erred in principle. Undeniably, taxation is not a mathematical exercise, and the taxing officer enjoys wide latitude or discretion. However, as observed by Ojwang, J. (as he then was) in *Ex-parte Samuel Muchiri W’Njuguna & 6 others* (supra), taxation of costs is a judicial function to be conducted regularly, based on rational established criteria encapsulated in principles, which are clearly expressed for the parties to perceive with ease. The taxing officer conduct his judicial function regularly based on rational established criteria encapsulated in principles in the applicable law, and related jurisprudence.
25. In the Court’s considered view, the taxing officer’s decision is irregular, and the Respondent’s reference allowed with costs capped at Kshs. 5000/-. The decision of the taxing officer dated 17.05.2024 is hereby set aside in toto. The subject bill of costs will be taxed afresh before a different taxing officer under the Second Schedule of the *Small Claims Court Rules* pursuant to Rule 37 of the said Rules, as read with Section 33(1) of the *Small Claims Court Act*.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Nyabuto for the Applicant:



Mr. Owago for the Respondent:

C/A: Erick

