



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT MISC CIVIL APPL NO. 141 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

IN THE MATTER OF CIVIL SUIT NO 1045 OF 2016

GLADYS PERERUAN.....PLAINTIFF/APPLICANT

VERSUS

BETTY CHEPKORIR.....DEFENDANT/RESPONDENT

AND

IN THE MATTER OF APPLICATION FOR TAXATION OF PARTY & PARTY BILL OF COSTS

BETWEEN

GLADYS PERERUAN.....PLAINTIFF/APPLICANT

VERSUS

BETTY CHEPKORIR.....DEFENDANT/RESPONDENT

RULING:

Applicant has filed a Reference via Chamber Summons Application dated **17/12/2019** and filed in court on the same date against the Ruling of the Hon H.O. Barasa delivered on **27/5/2019**. The application is supported by an Affidavit sworn by his advocate, Mrs. Badia. A. Fiona and the same is premised on the provisions of **Articles 48 and 50(2) (e), Constitution of Kenya 2010, Section 27 (1) of the Civil Procedure Act Paragraph 11 (2), 22, 49 (1), (2), 51 and 52 of Advocates (Remuneration Order)**.

The application has been vehemently opposed by the Respondent's counsel, **Andrew Nyachiro** via a replying affidavit sworn on **2/9/2020**.

On **6/10/2020** when this matter came up for mention for directions in court, parties agreed to have the application disposed of by way of written submissions. Consequently, the applicant's counsel was granted seven (7) days within which to file and serve his submissions while the respondent's counsel was granted seven (7) days to file and serve his submissions, upon service of submissions by the applicant.

On **24/11/2020** when the matter came up for mention to confirm filing of submissions, counsel for the applicant, Mr. Badia indicated to court that they had filed and served their submissions while the respondent's counsel Mr. Ndege indicated that they had not filed theirs and sought for more time which was declined.

THE APPLICANT'S SUBMISSIONS

The applicant's counsel Mr. Badia filed his submissions on **1/10/2020** and he has extracted 3 issues for determination as follows;

- 1. Whether the Plaintiffs/Applicant's Bill of Costs dated 21/1/ 2019 and filed in court on an even date was opposed by the Defendant/Applicant**
- 2. Whether the Hon. H.O. Barasa properly exercised his judicial discretion while guided by the principles that guide the**

courts in assessment of Bill of Cost when doing assessment of the Plaintiffs/Applicant's Bill of Costs dated 21/1/2019 generally.

3. Whether the Hon H.O. Barasa properly exercised his judicial discretion in taxing the Plaintiffs/Applicant's Bill of Costs under Schedule 7 of the Advocates (Remuneration) (Amendment) Order 2014 as opposed to Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014.

On whether the plaintiff's/applicant's bill of costs dated 21/1/2019 and filed in court on an even date was opposed by the defendant/applicant, he submitted that Order 51 Rule 14 of the Civil Procedure Rules provides;

0.51 R. 14 (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents-

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said document in sub-rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

He relied on the case of; **Nairobi Miscellaneous Case No 206 of 2015; Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited**; where **JA. Makau** at paragraph 8 on the failure to file a Replying Affidavit specifying the grounds of objection of a Bill of Costs, stated as follows;

“ . . .It is contended by the Client/Respondent, that the instructions to the Advocate/Applicant herein were given on the basis of the understanding, that she would charge her fees under schedule VI1 of the Remuneration Order and as such the Advocate is therefore estopped from disowning the agreement or purporting to move from schedule VI1 by giving a notice of election to proceed with taxation under schedule V of the Advocates Remuneration Order. The Client/Respondent urged therefore the purported notice to the client is null and void; however, I have noted in this matter the Client/Respondent did not challenge the application or controverted the same by way of filing a Replying affidavit and attaching to it the alleged instructions in writing to the Advocate/Applicant. The Client/Respondent filed only grounds of opposition to which no such grounds has been raised leave alone filing of a Replying affidavit....”

He submitted that the defendant was served with the letter from F.A. Badia & Company Advocates addressed to the Chief Executive Officer, Chief Magistrate's Court; Eldoret dated 21/1/2019; Instruction note from F.A. Badia & Company Advocates and Gladys Pereruan dated 8th September 2016 and plaintiffs Bill of costs dated 21/1/2019; all filed in court on 21/1/2019 at 12.37 pm.

That an affidavit of service sworn by Vincent Ogutu Process server on 24/1/2019 was filed on the same day as proof of service and that as at 21/1/2019 when the matter was scheduled for taxation before the Honourable Barasa Court No. 2; and listed as number 1 in the cause list under taxation; neither of the documents envisaged under Order 51 Rule 14 of the CPR had been filed in court by the respondents herein.

That according to the Ruling delivered by Honourable H.O. Barasa on 27/5/2019 the defendant opposed the Plaintiffs Bill of Costs in the following terms as extracted hereunder;- ***“the defendant was however opposed to most of the items and urged the Court to strike them off...”***

He further submitted that the Applicant's Advocates' final Submissions and Authorities on its Bill of Costs dated 21/1/2019 was ignored and rubbished by the court without consideration and that if the court had considered their Submissions specifically on issue 2 thereof, it would have been clear to the court upon interrogation of the court file that no legal objection was filed by the Defendant.

As to whether Hon H.O. Barasa properly exercised his judicial discretion while guided by the principles that guide the courts in assessment of bill of cost when doing assessment of the plaintiff's/applicant's bill of costs dated 21/1/2019 generally, the Counsel submitted that the circumstance under which the High Court can interfere with the taxing officer's discretion in taxing a bill of costs is well elaborated in a number of cases which the Plaintiff/Applicant shall seek to rely on.

He relied on the case of **Kakamega Miscellaneous Reference Application No 84 of 2018; Hezron Odhiambo Abok v Prajapat Pravinbhai Jivabhai t/a Mitra Enterprises (K) Ltd**; where the Hon. Judge at paragraphs 7, 8, and 9 set down principles under which the judge can interfere with the taxing officer's discretion in taxing a bill of costs as was also elaborated in the case of **National Oil Corporation Limited vs, Real Energy Limited & Another [2016] eKLR**, in which the Court stated that:

“The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of 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 manifestly excessive as to justify an inference that it was based on an error of principle;

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;

(2) 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;.....”

These principles were also reiterated in the cases of *First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64*; *Joreth Limited vs. Kigano & Associates CIVIL APPEAL NO. 66 OF 1999 [2002] 1 EA 92* ; *Kanu National Elections Board & 2 Others vs. Salah Yakub Farah [2018] eKLR*; *Nairobi Miscellaneous Application No 259 of 2013*; *Anthony Thuo Kanai T/A A. Thuo Kanai Advocates v John Ngigi Ng'ang'a*; *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [19721 EA 162*; *Nairobi Miscellaneous Advocates v Invesco Assurance*; *Nairobi Civil Case No 265 of 2011*; *John Maina Mburu T/A John Maina Mburu & Co. Advocates v George Gitau Munene (Sued as Administrator of the Estate of Samuel Gitau Munene) & 3 others*; *A. Mabeya*

His submission is also that in the ruling delivered by the Honourable H.O. Barasa on 27/5/ 2019; the Honourable H.O. Barasa opined that it does not make sense to assess the Plaintiffs Bill of Costs at **Kshs.569, 362.80** as costs should not be more than the decretal amount, thus he stated;

“...I have duly gone through the said Bill of Costs. It is significant to note that Judgement was entered for the Plaintiff as against the Defendant for Kshs 212, 500/=. Which sum is way below what the plaintiff is asking in terms of costs. It would not make sense for this court to assess costs at Kshs 569,362.80 as urged by the Plaintiff's Counsel. In my view, costs should not be more than the decretal sum (Emphasis mine...)”

Counsel submitted that the said extract is a personal opinion of the Honourable Magistrate not based on any known provision of the law, statutory or otherwise and that this contravenes the provisions of **Section 27 of the Civil Procedure Act** which provides in a nutshell that costs follow the event.

He further submitted that the Honourable Magistrate seems to have been aiding the Defendant in an impermissible manner not to pay costs duly and properly incurred by the Plaintiff/Applicant in prosecution of Eldoret CMCC 1045 of 2016 ; as it is on record that the Plaintiffs Advocates on record prosecuted the suit from Nairobi, while the Plaintiff herself is based in Bissel about 100 kilometers away from Nairobi thereby naturally incurring huge expenses in commuting to Eldoret via flights for Court appearance.

On whether the Hon H.O. Barasa properly exercised his judicial discretion in taxing the plaintiffs/applicant's bill of costs under schedule 7 of the Advocates (Remuneration) (Amendment) Order 2014 as opposed to Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014, counsel submitted that **Paragraph 22 (1) and 22 (2) of the Advocates Remunerating Order provides;**

(1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule. "

On this he relied on the case of *Machakos Civil Misc. 176 of 2007*; *NYAMOGO & NYAMOGO ADVOCATES v PROTEX (K) EPZ LIMITED*; where Hon. J Isaac Lenaola at paragraphs 5, 6, 7 and 8 stated; *"In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under the Schedule, his remuneration shall be according to the scale applicable under the other Schedule. "*

Further, he relied on the case of *Aldrin Ojiambo t/a Ojiambo & Co. Advocates vs Mohamedraza Hussein Jaqani & Another Misc. Cause 320/2005 (U.R) at Milimani where* Ochieng J held; *"The paragraph speaks for itself clearly... it is not open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate. "*

He also relied on the cases of *Nairobi Miscellaneous Application No 259 of 2013*; *Anthony Thuo Kanai T/A A. Thuo Kanai Advocates v John Ngigi Ng'ang'a*; *Nairobi Miscellaneous Case No 206 of 2015*; *Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited*; *Mutisya & Co. Advocates Vs. Lazaro Omita Nyagol [20041 eKLR* *Anthony Thuo KANAI T/A Thuo Kanai Advocates Vs. John Ngigi Ng'ang'a [2014] eKLR*

His submissions is that the Honourable Magistrate opined that he would proceed to assess the costs in accordance with Schedule 7 of the Advocates Remuneration Order in order to bring the figure to a reasonable one thereby aiding the Defendant in an impermissible manner not to pay costs duly and properly incurred by the Plaintiff/Applicant in the prosecution of *Eldoret CMCC 1045 OF 2016* as stated;

“Having said that, I shall proceed to assess the said costs in accordance with Schedule 7 of the Advocates Remuneration Order so as to bring the figure to a reasonable one. ”

That it is clear that the Plaintiff's submissions on their Bill of costs was ignored and rubbished by the taxing officer and that if the court had considered their Submissions vis a vis letter from F.A. Badia & Company Advocates dated 21/1/ 2019 addressed to the Chief Executive officer; Instructions note dated 8/9/2016 between F.A. Badia & Company Advocates and Gladys Pereruan Tutui alias Gladys Pereruan and

Bill of Costs dated 21/1/ 2019 all filed in Court on 21/1/2019 and bound in a single booklet, it would have proceeded to assess the costs pursuant to **Schedule 5** as opposed to **Schedule 7** of the Advocates Remuneration Order.

That the Honourable taxing master illegally, irregularly and un-procedurally struck off items **1, 11, 12, 13, 14, 15, 16, 17, 20, 24, 25, 26, 27, 28, 29, 30, 34, 35, 36, 37, 39, 40, 42, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 60, 63, 67, 68, 71, 72, 73, 75, 76,77, 78, 79, 80, 81 and 82** on the Bill of costs dated 21/1/ 2019 on the pretext that no original receipts were supplied to the court and that it is a cardinal and well settled principle of law that in assessment of Bill of costs; legal charges are pursuant to the relevant and applicable schedule of the ARO in the circumstances of the particular case while disbursements are pursuant to actual expenses incurred and buttressed by copies of receipts as envisaged under **Paragraph 74, 74 A and 75 of the ARO.**

That the Honourable taxing officer via Ruling dated 27th May 2019 proceeded to illegally, irregularly and un-procedurally taxed items **4, 7, 9, 21, 44, 59, 69 and 70 at Kshs.1400/=** contrary to the provisions of Schedule 5 of the ARO.

That the Plaintiff's Advocates having elected to bill their Court attendance per schedule 5 of the ARO, proof of the same having been supplied to the court; the court was mandated by law to bill the said court attendances in the face of Boarding Passes/Tickets under Schedule 5 more specifically Journey from Home.

That Even if the Plaintiffs/Advocate's had not elected to bill their Bill of Costs under Schedule 5, thereby making the applicable Schedule being Schedule 7, the award of **Kshs.1,400/=** would have still been illegal, irregular and unprocedural as **Kshs.1,400/=** is payable under item 6 of Schedule 7 for 'on any necessary application to or attendance on Magistrate in Court or chambers.'"

He submitted that the taxing officer did not properly exercise his judicial discretion in taxing the Plaintiffs/Applicant's Bill of Costs under Schedule 7 of the Advocates (Remuneration) (Amendment) Order 2014 as opposed to Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014 hence the entire assessment is faulty.

As to whether the Hon H.O. Barasa, the taxing officer properly exercised his judicial discretion while guided by the principles that guide the courts in assessment of bill of costs when striking off the plaintiffs/applicants disbursements as contained in her bill of costs dated 21/1/2019 in oblivion of the provisions of **paragraphs 74, 74a and 75** of the Advocates Remuneration Order, the

Counsel relied on the case of **Kakamega Miscellaneous Reference Application No 84 of 2018; Hezron Odhiambo Abok v Prajapat Pravinbhai Jivabhai t/a Mitra Enterprises (K) Ltd (supra)** where the Court relied on the case of **Muthoga Gaturu & Co. Advocates vs. Naciti Engineers Limited Misc. Case No. 51 of 2001, where Mwera J. (as he then was)** held

"74. Subject to paragraph 74A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer

In this matter it is not shown that the taxing officer required the advocate to produce vouchers and receipts for the items of disbursements referred to above. Accordingly, the taxing officer would have done well to allow those items which totaled Kshs. 1, 200/- only.

30. I do not understand the learned Judge to have been laying down a genera/ rule, that if the taxing officer failed to ask the advocate to produce receipts and vouchers, the sums claimed as disbursements should be allowed.

31. In order to get a better appreciation of paragraph 74, it is necessary to compare it to paragraph 74A, which states as follows;

"1) The taxing officer shall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors....."

31 In effect, the advocate had no receipts which she could have produced even if the taxing officer had asked her to produce them. Therefore, whether or not the advocate had been asked to produce receipts or vouchers to prove the disbursements incurred, the taxing officer would not have been given anything more. It is not the failure by the taxing officer which was the cause for the advocate's failure to make available the requisite proof. The inability to produce proof rests completely at the advocate's door, as she did not have evidence to support the disbursements claimed.

He further relied on the case of ***Maina Murage & Company Advocates vs. Mae Properties Limited [20181 eKLR,*** the Court declined a claim for disbursements on the basis that that the applicant did not provide receipts to prove the said disbursements and the number of folios in the photocopying had not been specifically stated. The Court further stated that; ***"...On the basis of the above authorities, it is my finding that it was incumbent upon the applicant to prove the disbursements he claimed...."***

That in the present case, the Honourable court in its Ruling illegally, irregularly and un-procedurally struck off items **6, 7, 8, 9, 12, 13, 17, 19, 22, 23, 26, 27, 30, 31, 34, 36, 38, 39, 40, 41, 42, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 66, 71, 72, 73, 74** being disbursements, without giving any reason known in law statutory or otherwise.

That the Honourable Magistrate in his Ruling also irregularly and unprocedurally assessed items **3, 10 and 46** of the Bill of Costs at **ksh.1400/=.**

He concluded by urging the court to order that the Bill be re-taxed guided by Kuloba J. in Judicial Hints on Civil Procedure that:-

"Whether, if the matter were to be remitted, it should be remitted to the same or to another different taxing officer; The proper course, where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a retaxation of the bill in terms of the court's ruling....."

Similarly, he urged the court to be guided by the court's decision in the case of Kakamega Miscellaneous Reference Application No 84 of 2018; Hezron Odhiambo Abok v Prajapat Pravinbhai Jivabhai t/a Mitra Enterprises (K) Ltd (supra) where W. Musyoka J.

".....It is not really in the province of a Judge to re-tax the bill,, If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done....."

He therefore invited the court to find in favour of the applicant and allow application dated 17/12/2019.

ANALYSIS AND DETERMINATION

Having considered the application at hand, the response to the application and the applicant's submissions on record and authorities in support thereto, the following issues sprouts for determination;

ISSUES FOR DETERMINATION

a. Whether this Court has jurisdiction to entertain the application at hand

The application has been brought under the provisions of **Articles 48 and 50(2) (e) of the Constitution of Kenya 2010, Section 27 (1) of the Civil Procedure Act Paragraph 11 (2), 22, 49 (1), (2), 51 and 52 of Advocates (Remuneration Order)**

A party who invokes the jurisdiction of the taxing officer can only challenge that decision to the judge in chambers by way of a reference. Ringera J in Machira and Company Advocates V Magugu [2002] 2 EA 248 at page 422 put it aptly *inter alia* that:

"...secondly, as I understood the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order."

Similarly, in Donholm Rahisi Stores (firm) V EA Portland Cement Ltd [2005] e KLR Waweru J held:

"taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order. The present application is not a reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself."

What was filed herein is a reference and therefore this Court has jurisdiction to entertain the application.

b. Whether the taxing officer erred in applying the provisions of schedule 7 of the Advocates Remuneration Order as opposed to Schedule 5

The applicant has alleged that the taxing officer did not properly exercise his judicial discretion in taxing the Plaintiffs/Applicant's Bill of Costs under Schedule 7 of the Advocates (Remuneration) (Amendment) Order 2014 as opposed to Schedule 5 of the Advocates (Remuneration) (Amendment) Order 2014 rendering the taxation faulty.

Counsel for the applicant has submitted that the learned magistrate should have been guided by Paragraph 22 (1) and 22 (2) of the **Advocates Remunerating Order** which provides;

(3) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(4) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule. "

In my view, the above provisions refer to an **advocate-client bill of costs** while the bill of costs which is the subject of this reference is a **party and party** bill. The learned taxing officer therefore was right in applying the provisions of **Schedule 7 of the Advocates Remuneration Order**.

It should also be noted that the Advocates Remuneration Order does not provide for taxation of party and party bill of costs in a subordinate Court but rather provides for assessment as stated by

Kasango J in *Angelo Gitonga V Angelo Gitonga & Another [2010] e KLR* that:

“..... there is no provision on the Advocates remuneration Order for taxation of subordinate Courts Costs. A practice is however arising, where parties in the subordinate Court file laborious and detailed bills of Costs, and then engage the Magistrate in taxation. That in my view is uncalled for and should be discouraged. Subordinate Court’s party and party costs should be assessed following the provisions of Schedule VII of the order...”

Furthermore, **Paragraph 51 of the Advocates Remuneration Order** for which the applicant has relied on clearly gives the applicable scale to be used in the subordinate courts as **Schedule VII**.

The Court in the foregoing-mentioned authority further held that the legal position is that costs in the subordinate Court matters are assessed (not taxed) under **Schedule V11** of the Advocates Remuneration Order which is specifically titled: **“costs of proceeding in Subordinate Courts.”**

Thus, the court held that”*the above position is further fortified by paragraph 51 of the Advocates Remuneration Order which provides...”*

“Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Khadi’s courts is that set out in Schedule V11.....”

It is therefore not correct as alleged by the applicant’s counsel that the bill should have been assessed as per schedule 5 of the advocate remuneration order and not schedule VII.

c. Whether the learned Magistrate/ erred in principle hence calling for disturbance of his decision on assessment of costs

The principles for disturbing a taxing officers’ decision are as set out in the case of *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162* where the Court stated as follows:

(a) successful litigant ought to be fairly reimbursed for costs he has had to incur; (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and; (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances; (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically; (g) 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.”

The Court further stated that the duty of a taxing officer is to assess the fair and reasonable remuneration under the Advocates Remuneration Order that a party or an advocate is entitled to pay to the other party who is said to have won the legal contest.

Also in the case of **Republic v Ministry of Agriculture & 2 Others Exparte Muchiri 2006 eKLR, Ojwang, J (as he then was) held** that the jurisdiction by the High court to interfere with the decision of a taxing officer must only be on the basis that there were misdirections amounting to errors of law in the findings of the certificate of costs in respect of the material issues and evidence placed before the taxing officer. That the misdirection and error entitles the court to upset the finding of fact and law by the taxing officer. The court thus held *inter alia* 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 course, 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 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...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 authorising clause in the law, or a particularised 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 had to be classified, assessed 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...”

While remitting the matter for fresh taxation the learned Judge in the above matter gave the following guidelines:

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 sector;*
2. *the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;*
3. *the taxation of advocates' 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 summarised form.*

And that; -

"...it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wanted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with convictionif novelty is involved in the main proceedings thenature 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 inordinately time consuming, the details of such a situation must be set out in a clear manner..."

The Court further in the decision of **Kipkorir T. Too & Kiara Advocates v Deposit Protection Fund eKLR 2004 Premichand Raichand Ltd (Supra)** stated that;- the costs taxed at the conclusion of the bill of costs paint a picture where the taxing officer ignored and failed to apply the principles of taxation established by the above cases and others not specifically referred to in this matter. There should be always a principle to consider in all taxation that no advocate or litigant should profit from a litigation.

In the instant case, it is contended that the taxing officer in his ruling never gave reasons for taxing off some items in the ruling dated 27/5/2019.

The taxing officer in my view applied wrong principles in failing to give reasons for striking off items

1, 11, 12, 13, 14, 15, 16, 17, 20, 24, 25, 26, 27, 28, 29, 30, 34, 35, 36, 37, 39, 40, 42, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 60, 63, 67, 68, 71, 72, 73, 75, 76,

77, 78, 79, 80, 81 and 82 and also 6, 7, 8, 9, 12, 13, 17, 19, 22, 23, 26, 27, 30, 31, 34, 36, 38, 39, 40, 41, 42, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 66, 71, 72, 73, 74 on disbursements and further for assessing items 4, 7, 9, 21, 44, 59, 69 and 70 at Kshs 1,400/=.

Also in holding that *"...I have duly gone through the said Bill of Costs. It is significant to note that Judgement was entered for the Plaintiff as against the Defendant for Kshs 212, 500/=. Which sum is way below what the plaintiff is asking in terms of costs. It would not make sense for this court to assess costs at Kshs 569, 362.80 as urged by the Plaintiff's Counsel. In my view, costs should not be more than the decretal sum (Emphasis mine)*

This is a clear indication that some of the reasons given for taxing off some items were based on the Court's personal opinion and not based on the law. The applicant's counsel has submitted that the learned magistrate assessed the costs without giving any reason known in law, statutory or otherwise, of which I find to be correct.

I therefore find that the assessment and taxation carried out by the taxing officer deserves interference.

It should however be noted that a judge deciding on a reference has the discretion upon finding merit on a reference application, to either tax the bill afresh on his/her own or submit the same to the taxing officer for a fresh taxation. This was illustrated in the case of; - **Kipkorir Titoo & Kiara Advocates -V- Deposit Protection Fund C.A. No. 220/2004 U.R.**, where the Court of Appeal held:

“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in Schedule VII or fails to give due consideration to all relevant circumstances of the case..... that would be an error in principle. And if a judge on reference from the 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. The judge has however, a discretion to deal with the matter himself if the justice of the case so requires.”

Based on the foregoing finding and having concluded that the assessment officer did not exercise his discretion judiciously, in reaching her decision I do find the Application dated 17/12/ 2019 merited, I allow the same and proceed to issue the following orders:-

(i) That the taxation of the plaintiff's s Bill of Costs dated 21/1/2019 and all the consequential orders are hereby set aside.

(ii) That the said Bill of Costs be and is hereby remitted back to the subordinate court to be assed afresh by a taxing officer/Magistrate, different from the one who assessed the bill initially, on the items objected to by the Plaintiff/Applicant.

(iii) That each party shall bear its own costs for this Application.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 10th day of March, 2021.

In the presence of:-

Mr. Badia for the applicant.

Mr. Nyachiro for the respondent (absent)

Gladys - Court Assistant