



**Odero & Associates Advocates v Macharia-Mwangi & Njeru Advocates
(Civil Miscellaneous Application E172 of 2021) [2021] KEHC
42 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 42 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL MISCELLANEOUS APPLICATION E172 OF 2021
WA OKWANY, J
SEPTEMBER 16, 2021**

BETWEEN

ODERO & ASSOCIATES ADVOCATES APPLICANT

AND

MACHARIA-MWANGI & NJERU ADVOCATES RESPONDENT

RULING

1. The client/applicant herein filed the application dated 9th March 2021 seeking the following orders: -
 - 1) Spent
 - 2) THAT the appellant be granted leave to file a reference out of time
 - 3) THAT the Honourable court be pleased to stay the execution for the costs awarded to the respondent
 - 4) THAT the ruling and/or decision delivered herein on 22nd January 2021 by the Honourable Taxing Master Honourable S. Githongori, dismissing the party and Party bill of costs dated 21st August 2020 with costs to the respondents be reviewed, varied and or set aside
 - 5) THAT the bill of Costs dated 21st August 2020 be remitted back for re-taxation and or assessment in the proper court in the alternative this Honourable court do tax the party and party bill of costs
 - 6) Costs of the application be provided for
2. The application is supported by the affidavit of Diana Odero and is based on the following grounds; -



- 1) THAT the taxing master erred in law in failing to dismiss the Applicants bill of costs with no cost to the respondent.
 - 2) THAT the said ruling was set to be delivered on the 22nd February 2021 but was instead delivered on the 22nd day of January 2021 a month earlier than the scheduled date in the absence of the applicant.
 - 3) THAT the applicant did not have a chance to seek stay of execution of the said ruling and orders thereto and only learnt of it a month after the delivery of the ruling.
 - 4) THAT the taxing master erred in law and in fact in failing to take into consideration that the said dismissal bars the applicant for applying for assessment of costs in the Chief Magistrates Courts and the Applicants will suffer injustice as they have lost out on their costs as awarded by the trial courts.
 - 5) THAT the taxing master erred in principle and reached an erroneous conclusion thus denying the applicant the fruits of its judgment
3. The respondent opposed the application through the replying affidavit sworn by its Senior Partner Mr. Elijah Mwangi Njeru who states that after the Respondent's client, Kenya Commercial Bank, remitted the judgment sum and costs totaling Kshs 256,195 to the applicant. He states that after the remittance, he noted that the applicant had filed an itemized bill of costs dated 21st August 2020 but that the said bill was dismissed by the taxing master in her ruling dated 22nd January 2021. He states that there has been a delay of more than 45 days in filing this reference and that this application is an abuse of the court process because by dint of the provisions of Section 27 of the *Civil Procedure Act*, costs arising from the Milimani CMCC No 6210 of 2012 ought to have been assessed before the lower court.
 4. The application was canvassed by way of written submissions which I have considered. The first issue is whether the application was filed out of time and is therefore bad in law.
 5. The procedure for challenging the results of taxation is provided for under Paragraph 11 of the Advocates Remuneration Order which provides as follows; -
 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 his 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) for 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.



6. It was not disputed that the application was filed out of time. The applicant submitted that the delay was not deliberate as it was not aware that the ruling had been delivered and only came to learn about it upon being served with the respondent's bill of costs. In a rejoinder, the respondent submitted that there was no plausible reason advanced by the applicant for the delay of 45 days' delay in the filing of the reference. In *George Kagima Kariuki & 2 Others V George M. Gichimu & 2 Others* the court observed as follows on the issue of delay: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

7. The same position was adopted in *Stanley Kaboro Mwangi & 2 Others v Kanyamwi Trading Company Limited* where the court was of the view that: -

“A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”

8. From the above decided cases, it is clear that delay per se does not invalidate an application as the court is still clothed with the discretion to allow an application where the applicant demonstrates that there was sufficient cause for the delay. In the instant case, the applicant explained that it was not aware of the ruling on taxation and only became aware of it when it was served with the respondent's bill of costs.

9. My finding is that the explanation offered by the applicant is plausible as its explanation for the delay was not controverted by the respondent. I also find that the delay is in the circumstances not inordinate and that no prejudice will be occasioned to the respondent if the applicant's reference is considered on its merits.

10. Turning to the second issue of whether the taxing master erred in law and principle while taxing the bills of costs, I find that it is trite that the court will not interfere with the decision of the Taxing Master unless there is an error of principle. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* Ojwang, J (as he then was) expressed himself 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 interference that it was based on an error of principle.”

11. In *Machira & Co. Advocates v Magugu* it held that: -

“As I understand 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 a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

12. *Joreth Ltd v Kigano & Associates Civil Appeal No.66 of 1999 [2002] 1 EA 92* it was held that unless the taxing officer had misdirected himself on a matter of principle, the judge sitting on a reference against the assessment ought not to interfere with the findings. An exception to the general rule was pronounced by Ringera J (as he then was) in *First American Bank of Kenya v Shah & Others* 64 at 69, as follows: -

“First I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.”

13. Similarly, in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* the Court of Appeal held as follows: -

“On 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.”

14. In the present case, the applicant contended that the taxing master did not exercise her discretion properly when dismissing the bill of costs instead of transferring the matter for assessment in the lower court. In a rejoinder, the respondent argued that the matter having arisen from the magistrates court the applicant ought to have filed its bill of costs for assessment before the lower court. According to the respondent, the taxing master was justified in dismissing the bill as she did not have jurisdiction to tax it.
15. My finding is that the taxing master had no jurisdiction to entertain the applicant’s bill of costs as such costs could only be assessed by the lower court. In the same vein, I find that the mandate of Deputy Registrar, while acting in her capacity as a taxing master was only limited to taxing bills of costs emanating from High Court matters and that such mandate does not extend to transferring matters to the lower court as was suggested by the applicant. I therefore find that the taxing master did not err in principle in dismissing the bill of costs.
16. Consequently, I find that the instant application lacks merit and I therefore dismiss with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17th APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Odero for the applicant.

Mr. Kimani for the respondent.

Court Assistant: Sylvia.

