



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 1 OF 2019**

**LJA ASSOCIATES.....APPLICANT**

**VERSUS**

**THE ESTATE OF REYNOLDS MWANGI KINYANJUI**

**(ADMINISTRATORS – JOYCE WAKONYO MWANGI,**

**ELIKANAH KINYANJUI MWANGI, ANNE WAIRIMU KURIA AND**

**JAMES WANJAMA KINYANJUI) .....RESPONDENTS**

**RULING**

1. Before court is a reference filed by the Applicant following a taxation of bill of costs between the Applicant and the Respondents on the 7<sup>th</sup> of July, 2019.
2. The Applicant represented the estate initially as the Respondents were applying for Grant of Letters of Administration.
3. Upon filing the initial set of documents, it was realized that the pleadings were incorrect and it is at the point the respondents chose to move to another firm of advocates.
4. The next counsel on record amended the pleadings including the value that was initially attributed to the estate.
5. Notwithstanding the above the applicant's contention is that it ought to be paid fees for having taken instructions based on the initial value attributed to the estate and for work done on account of the deceased before his demise  
  
The initial value attributed to the estate was Kshs.497,000,000/- as opposed to the value contained in the amended petition of Kshs.150,000,000/-.
6. The applicant faulted the taxing officer for considering the 2<sup>nd</sup> value as opposed to the sum attributed to the initial value.
7. It was further contended that the taxing officer erred in principle by failing to take into account work done upon instruction received from the deceased before his demise, where the taxing officer cited lack of evidence and taxing off the same.
8. Further that the taxing officer failed to increase the advocates/client's bill of cost by 50% as provided for in the Remuneration Order.
9. In objecting to the reference counsel for the Respondents relied on a replying affidavit and submissions already forming part of the record relied upon before the taxing officer.
10. The Respondents' counsel seems to say that the Applicant does not deserve any fees as he failed to execute instructions; that he filed wrong pleadings in court which necessitated an amendment thereof, the value attached to the properties by the Applicant was erroneous. The Respondents urged that the Applicant exaggerated the value of the Estate.

Thirdly, the work done before the demise of the deceased ought not be contained in the bill of cost touching on the instructions issued by the administrators. That in any event the sums awarded were in excess in view of the Applicant's conduct of the matter.

11. Having considered submissions by parties, the issues before court are;

- i. **whether or not to allow the reference? If in the affirmative,**
- ii. **whether to refer the matter for fresh taxation by another taxing officer.**

12. The principles upon which a Judge can interfere with the taxing officer's award are well settled. See First American Bank of Kenya vs Shah & Others [2002] 1 EA 64 and Republic vs Minister for Agriculture & 2 Others, Exparte Samuel Muchiri W'njuguna & 6 Others [2006] eKLR.

13. There are also several parameters apart from mathematics that a taxing officer considers. A taxing officer has to consider the value and complexity of the matter, general conduct of the proceedings and any order the court may have issued. In the case of Republic vs Minister for Agriculture & 2 Others Exparte Samuel Muchiri W'Njuguna & Others Ojwang J (as he then) was aptly enumerated factors for consideration by a taxing officer 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, and particularly where he is an officer of great experience, merely because it thinks the award was somewhat too high or too low: it will only interfere if it thinks the award was 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 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.... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considered a fair value upon the work done and responsibility involved.... since costs are the ultimate expression of essential liabilities attendant on the litigation event.....”**

14. The above sentiments were also captured by the Court of Appeal in Joreth Limited vs Kigano & Associates [2001] 1 EA – 92 at 99 where it stated as follows;

**“The value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, amongst other matters the nature and importance of the proceedings, any direction by trial judge and all other relevant circumstances..... In principle the instruction fee is an independent and static item it is charged only once and is not affected or determined by the stage the suit has reached. The taxing officer whilst taxing his bill of costs is carrying out his function as such only.....”**

15. It is not clear to the court how the Applicant arrived at the initial value attributed to the estate at close to Kshs.500,000,000/-. Nevertheless, this court is of the view that the sum currently relevant is what in the relevant pleadings (amended) pleadings. The Court cannot therefore fault the decision of the taxing officer. Faced with two figures and in the circumstances of the case the taxing officer exercised her discretion by rightly making reference to the value in the amended pleadings.

The court finds the argument by the Applicant that the figures were altered in the pleadings so as to defeat its taxation to be callous and farfetched.

16. As stated in the authorities quoted above taxation is not merely arithmetic, but much more is considered including the nature of the matter, the general conduct of the proceedings in the words of Ojwang J (as he then was) in Republic vs Minister for Agriculture & 2 Others Exparte Samuel Muchiri W'njuguna (supra)

**“.....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 the responsibility involved.....”**

17. In the instant case the applicant upon instructions filed papers that were rejected by court as they were not properly drawn, secondly the sums on the said documents were disputed by the Respondents necessitating an amendment of the same. The above mentioned informed the reason the Respondents left the law firm for another. The applicant was certainly negligent in its preparation of the pleadings which is affirmed as the new counsel for the Respondents had fresh papers filed in court. Can one fault the taxing officer who may have considered the conduct of counsel and did not multiply the fee further? This court declines to interfere with the opinion and thought that went into the figure arrived at by the taxing officer. It declines to fault the taxing officer's decision.

18. The next issue relates to Item 2 on the bill of costs that involved other matter(s) altogether though involving the deceased. This court is of the view that the taxing officer was right in taxing off the same as in does not touch on the succession issue which is the subject matter herein.

A separate bill ought to have been and any sum due recovered from the estate as a debt to the estate.

19. For the reason above the application is dismissed with costs.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 11<sup>th</sup> DAY OF NOVEMBER, 2021.

.....

ALI-ARONI

JUDGE