



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL SUIT NO. 264 OF 2009**

**NICHOLAS ANGWENYI SIRO T/A RIVERSIDE CONTINENTAL  
RESORT.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**FINLAY KIRUL.....1<sup>ST</sup>DEFENDANT/APPLICANT**

**MILLENIA MULTIPURPOSE CO-OPERATIVE SOCIETY**

**LIMITED .....2<sup>ND</sup>DEFENDANT/ APPLICANT**

**RULING**

1. The applicants herein have filed Chamber Summons dated 9<sup>th</sup> August 2019 pursuant to **Rule 11(2)** of the **Advocates Remuneration Order** seeking the following orders;

a. That the court be pleased to review, set aside and/or vary the decision of the Taxing Officer made on 8<sup>th</sup> July 2019 in respect of the following items of taxation of the Party- Party bill of costs dated 22<sup>nd</sup> February 2019 namely items 1,2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 41, 44, 45, 46, 48, 50, 52, 54, 56, 58, 60, 65, 66, 68, 73 and 79;

b. The costs of this application be provided for.

2. The application was supported by the affidavit of the applicant's counsel Peter M. Karanja dated the 9<sup>th</sup> August 2019 and was also based on the following grounds;

A. The taxation of item 1 of the bill being the instruction fee was erroneous and ignored all the principles applicable in the taxation of instruction fees.

B. In taxing items 2, 3, 4, 5, 6, 8, 9, 13, 14, 15, 17, 20, 22, 24, 26, 28, 30, 41, 65, 66, 68 and 73 of the items of taxation, the Taxing Officer misdirected herself when she equated the pages of the documents to be the same as folios, without realizing that a folio means 100 words or in some cases, part of 100 words, in terms of rule 17 of the Advocates Remuneration Order and thus reached erroneous taxations on the said items;

C. The taxation of items 32 was erroneous as there was no basis for finding that the hearing lasted one hour as opposed to ½ day as stated in the bill;

D. The taxation of item 36 under paragraph 8(d) of the schedule is erroneous as that paragraph relates to perusals, while the item charged attendance was for ½ day and ought to have been taxed as prayed in the bill at Kshs. 7,100/= or at worst at Kshs. 3,000/= for one hour attendance;

E. In taxing off items 44 and 45, the Taxing Officer termed them unfair, while at the same time holding that indeed the service charged was done, and without stating any valid reason for the perceived unfairness of the service;

F. In taxing off item 46, the Taxing Officer erred by holding that there were no proceedings, yet the record shows that the

Applicant's advocate attended court;

G. In taxing item 79, getting up fees at Kshs. 20,000/= the Taxing Officer took into account the erroneous taxation of item 1;

H. Other grounds as may be argued with the leave of the court.

3. The respondent in his affidavit sworn on 10<sup>th</sup> September 2019 opposed the application on the grounds that it had not been filed within the time stipulated in Rule 11 of the Advocates Remuneration Order. He averred that the applicant had not applied and obtained the reasons for taxation from the taxing master as required by the law and therefore the application was an abuse of court process. He also deposed that the matter was *sub judice* as he had filed a Notice of Appeal against the court's judgment and urged the court to dismiss the application for lacking merit.

4. Directions were taken to canvass the application by way of oral submission.

5. Learned counsel for the applicant, Mr. Karanja submitted that on the instruction fees, the subject matter was to be determined from the pleadings, judgment or settlement as per schedule 6 paragraph 1 (b) of the Advocates Remuneration Order 2009. He argued that the claim in this case was for special damages of Kshs. 87,000,000/= which had been clearly set out in the pleadings. He submitted that the court had systematically considered the claim and held that if it was successful he would have allowed Kshs.678, 943/=. Counsel argued that the Deputy Registrar erred in principle in finding that the subject matter was for Kshs.678, 943/= as the claim was discernible from the pleadings. He argued that the courts have held that where the claim is specific, the court should use it as instruction fees.

6. He also submitted that the Taxing Officer had erred in taxing a page as a folio which was an equivalent of 100 words and not a page under Rule 17. He therefore urged the court to direct a reassessment of the items listed in paragraph B of the application and items C, D, E, F, & G which he argued were self-explanatory.

7. On the respondent's argument that they had not complied with Rule 11 of the Advocates Remuneration Order, counsel submitted that he gave a Notice of Objection after which the Deputy Registrar wrote a letter stating that the reasons for the taxation were set out in the Ruling of 8<sup>th</sup> July 2019. He stated that they had collected the ruling and filed the reference on 13<sup>th</sup> August 2019 within the requisite time. Counsel relied on the case of ***Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005]eKLR*** to support the proposition that there was substantial compliance where the Deputy Registrar relied on the ruling on the bill of costs as opposed to giving separate reasons for the decision.

8. Mr. Nyambati, learned counsel for the respondent countered that in the application, the court had not been requested to refer the matter to another Deputy Registrar for reassessment. That nevertheless a Notice of Appeal had been filed against the judgment and therefore the matter was *sub judice* as the appeal touched on the entire judgment. He argued that if the court allowed the reference it would affect the entire appeal.

9. He also submitted that the bill of costs that was subject to taxation was a party to party costs therefore the principles applied by the court in the case of ***Kipkorir, Titoo & Kiara Advocates (supra)*** were distinguishable from the present case. Counsel also faulted the application on the ground that the issues deposed in the affidavit in support of the application were issues of fact which an advocate cannot depone to in an affidavit.

10. On the issue of the application being *subjudice*, Mr. Karanja responded that there was no order staying the proceedings pending determination of the appeal. He also submitted that in as much as the decision in ***Kipkorir, Titoo & Kiara Advocates (supra)*** related to Client/Advocate taxation the principles regarding taxation were similar with those in Party/Party taxation. He also submitted that it was within the court's discretion to order that the bill be reassessed since all they sought was a review of the Deputy Registrar's determination.

## **DETERMINATION**

11. After considering the averments and the submissions of both parties on this matter, I find that the issues arising herein are twofold. The first is whether the reference was defective for being brought contrary to the law. Second, is whether the taxing officer erred in taxing items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 41, 44, 45, 46, 48, 50, 52, 54, 56, 58, 60, 65, 66, 68, 73 and 79 in the bill of costs dated 22<sup>nd</sup> February 2019.

12. The respondent herein had sued the applicant for damages following an accident that occurred on 24<sup>th</sup> September 2007, in which the applicants' motor vehicle registration number KAU 240L/Trailer ZC 3437, rammmed into Riverside Continental Resort and destroyed the premises. The respondent sought compensation for special damages amounting to Kshs. 87,000,000/=, general damages for loss of business, reputation and loss of earnings, cost of the suit and interest.

13. After hearing the matter, the court found that the respondent lacked the requisite capacity to sue and dismissed the suit with costs. In his decision, Majanja J. proceeded to analyze the substantive issues raised in the suit and found that the only amount proved by the respondent was Kshs. 678,943.80/=.

14. Following that decision, the applicants filed a Party/Party bill of costs for a sum of Kshs. 8,510,315/=. The Deputy Registrar considered the parties' submissions on the bill of costs and taxed the bill at Kshs.152, 677/= on 18<sup>th</sup> July 2019. The applicants who were the defendants in the main suit, were aggrieved by the Deputy Registrar's assessment of the bill of costs hence the reference.

15. Contrary to the respondent's objection, the applicants' reference to this court was duly filed within the stipulated time as provided under **Rule 11** of the **Advocate Remuneration Order** which stipulates;

11 (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.

16. The applicants filed a Notice of Objection on 22<sup>nd</sup> July 2019 within 14 days against the decision which was made on 18<sup>th</sup> July 2019. In their Notice of Objection they sought reasons for the taxation of the items they had objected to and filed reminders on 30<sup>th</sup> July 2019 and on 5<sup>th</sup> August 2019. The applicants' advocate averred that he received a letter from the Deputy Registrar dated 26<sup>th</sup> July 2019 stating that the reasons requested for were contained in the annexed ruling dated 18<sup>th</sup> July 2019. Counsel annexed a stamped copy of the Deputy Registrar's letter showing that he had received it on 8<sup>th</sup> August 2019. His averment was not refuted and I therefore find that the reference filed on 13<sup>th</sup> August 2019, was filed within the stipulated time.

17. The respondent argued that the issues deposed in the supporting affidavit were issues of fact which an advocate cannot depone to in an affidavit. I find this argument untenable since the matters deposed by the counsel in his affidavits were matters within his knowledge.

18. The respondent also attacked the reference on the ground that it was *sub judice* since a Notice of Appeal had been filed against the judgment. I have perused the record and have found that there was no stay of proceedings as rightly indicated by the applicants.

19. Turning to the substance of the reference before me, I am mindful that a court will not interfere with the exercise of discretion by the taxing officer on reference unless it is shown that the taxing officer erred in principle in assessing the costs or awarded costs that are manifestly low or high as to justify an inference that the taxing officer acted on the wrong principles. (See **Arthur v Nyeri Electricity Undertaking [1961] EA 497, Premchand Raichand Limited & Another versus Quarry Services of East Africa Limited and Another [1972] E. A. 162 and First American Bank of Kenya v. Shah and others [2002] E.A.L.R 64**)

20. The first item disputed by the applicants in the reference was the Deputy Registrar's assessment of the instruction fee. In her decision, the Deputy Registrar held;

"In the judgment delivered in this matter, the court dismissed the plaintiff's claim for want of locus but at paragraph 25 thereof, the court held 'I would award Kshs. 678,943' and thereafter said it would have dismissed all the other claims for want of proof. I will go by the award of Kshs. 678,943 as the value of the subject matter.

Paragraph 1(b) of the 2006 Schedule applies to this item. The sale fees is Kshs. 77,000 for a value between Kshs.50, 000 to Kshs. 1,000,000. Kshs. 678,943 falls within this bracket."

21. The taxing officer properly found that the instruction fee in this matter was to be taxed in accordance with paragraph 1(b) of Schedule VI of the Advocates (Remuneration) (Amendment) Order 2006. The Remuneration Order provides that for such assessment the value of the subject matter is to be determined from the pleadings, judgment or settlement.

22. This principle was restated by the Court of Appeal in the case of **Joreth Limited v Kigano & Associates Civil Appeal No. 66 of 1999 [2002]eKLR** thus;

We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment 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 fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

23. The claim in this case was from the plaintiff. The respondent sought special damages for a sum of Kshs. 87,000,000/=. As per the respondent this was a fair estimate of the loss and damage suffered as a result of the accident. From the submissions the applicants' advocate took instructions and defended the suit taking this figure into account. They also took into consideration that in addition to the claim for special damages the respondent had sought general damages for loss of business, reputation and loss of earnings, hence their reliance on these persuasive authorities of **Santam Sing Bahra v Joseph Mungai Gikonyo t/a Garam Investments & Another Civil Suit No. 467 of 2002 [2012] eKLR** and **D. Njogu & Company Advocates v Panafcon Engineering Limited MiscAppli 942 of 2005 [2006]eKLR**. From these decisions the courts held that where the value of the subject matter can be ascertained from the pleadings the instruction fees awardable should be based on that amount.

24. My understanding of the judgment of Justice Majanja is that the court would have awarded a sum of Kshs. 678,943/= as damages if the respondent was properly suited. Submitting that the taxing officer should have taken the sum claimed in the plaintiff in my view is wrong. The damages claimed were subject to proof by the claimant. The judgment clearly indicated what would have been awarded and what was not proved. I therefore find that the taxing officer didn't err in disregarding the pleadings and computing the instruction fees based on the sum of Kshs. 678,943/=.

25. Further in taxing off the instruction fees payable, the Deputy Registrar had regard to the complexity of the matter when she held as follows;

“This claim was a simple and straightforward claim for material damage. I have not noted any complexity in the issues raised. I note however that the case is of a considerable interest to the parties given the nature of claim. As regards the amount of time taken to conclude the case, I note that the matter was inactive for five years between 11/01/10 and 26/02/2015. The defendants did nothing about it and it is unfair to lay the blame on the plaintiff solely. The reports and financial statements said to be lengthy are less than ten pages each. ...”

26. I find the foregoing analysis by the taxing officer sound and uphold it as is.

27. Having found allowed the reference on the instruction fee, I find that the taxing officer did not err in taxing getting up fees at Kshs. 20,000/= since the instruction fee forms the basis for assessing getting up fees.

28. The applicants also contended that in taxing items 2, 3, 4, 5, 6, 8, 9, 13, 14, 15, 17, 20, 22, 24, 26, 28, 30, 41, 65, 66, 68 and 73 of the bill of costs, the taxing officer misdirected herself when she equated the pages of the documents to be the same as folios, without realizing that a folio meant 100 words in terms of **rule 17** of the **Advocates Remuneration Order**.

29. That provisions stipulates;

17. A folio shall for all purposes of this Order be deemed to consist of 100 words and any part of a folio shall be charged as one folio. A sum or quantity of one denomination stated in figures is to be counted as one word: eg. “£25,564 16s 8d.” is to be counted as three words, and “254 feet 11 inches” is to be counted as four words.

30. The above definition is necessary in taxing costs payable for drawing pleadings, making copies of documents and perusing documents. A review of the disputed items shows that the Deputy Registrar applied the proper schedule but disregarded the foregoing definition of the word folio. I therefore allow the reference on items 2, 3, 5, 8, 9, 13, 14, 15, 17, 20, 22, 24, 26, 28, 30, 41, 65, 66, 68 and 73.

31. I however disallow the reference on items 4 and 6 which I find were properly taxed. The Deputy Registrar taxed those items at Kshs. 126/= and Kshs. 210 for drawing memorandum of appearance and attending the registry to file appearance respectively.

32. I also dismiss the applicants’ reference on item 32 as I find that this is a matter of quantum which the Deputy Registrar properly exercised her discretion on.

33. The applicant discontent with the manner in which item 36 was taxed is also unfounded. Item 36 was particularized as “attending court for hearing ½ day.” The applicants contend that the Deputy Registrar erred in taxing the item under paragraph 8(d) of the schedule. From her assessment and taxation of the item, it is evident that the Deputy Registrar applied paragraph 7 (d) of Schedule VI of the 2014 Advocates (Remuneration) (Amendment) Order which puts attendances in court for one hour at 2,300/= in the ordinary scale. I find that her reference to paragraph 8 (d) as opposed to paragraph 7 (d) was merely a clerical error since the Deputy Registrar awarded Kshs. 2,300/=.

34. In taxing off items 44 and 45 which were particularized as service of list of witnesses and service of list of documents on the plaintiff’s advocates respectively, the Taxing Officer held that these documents were served on the same day the list of issues (item 43) was served upon the plaintiff’s advocate and it would be unfair to award costs for these items. In my view, the reasons given for taxing off items 44 and 45 were valid and clear and I find no reason to disturb the finding.

35. The court record shows that there were indeed no proceedings on 26<sup>th</sup> June 2017 and the reference on item 46 for court attendance on that day is dismissed.

36. In *Kipkorir, Titoo & Kiara (supra)* the court held that the general practice where a reference is allowed is to remit the question of quantum for the decision of the taxing officer. In the case of *Joreth Limited v Kigano & Associates [2002] eKLR*, the Court of Appeal advised against re-taxation by a judge stating that this it was not within the province of a judge to re-tax the bill. The Court quoted the case of *Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factor Ltd (1970) E.A. 141* where Spry JA held;

“Counsel for the appellant submitted, relying on *D’Souza v. Ferao [1960] EA 602* and *Arthur v. Nyeri Electricity Undertaking [1961] EA 492* that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement that is correct, adding only that it is a matter of juridical discretion.”

37. As held in the foregoing authorities, the decision of whether to re-tax a bill of cost or not is a matter that falls within the discretion of the court and the fact that the applicant did not expressly seek such reassessment by a different Taxing Officer was not fatal to his case.

38. In the end I allow the reference with respect to items 2, 3, 5, 8, 9, 13, 14, 15, 17, 20, 22, 24, 26, 28, 30, 41, 65, 66, 68 and 73 for the foregoing reasons. The bill of costs dated 22<sup>nd</sup> February 2019 is remitted for taxation before any other Deputy Registrar to tax items 2, 3, 5, 8, 9, 13, 14, 15, 17, 20, 22, 24, 26, 28, 30, 41, 65, 66, 68 and 73 in accordance with the provision of Schedule VI of the Advocates (Remuneration) (Amendment) Order 2006 and 2014 were appropriate.

39. There will be no order as to costs as the reference has only been partially successful.

**Dated, signed and delivered at Kisii this 12<sup>th</sup> day of February 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Applicant Absent**

**Miss Auma h/b for Mr. Nyambati For the Respondent**

**Ms.Rael Court Assistant**