



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. APPLICATION NO. 4 OF 2019

DORIS AWINO ABIRA APPLICANT

-VERSUS-

M. I. WAFULA & CO. ADVOCATESRESPONDENT

RULING ON REFERENCE

1. By a Ruling dated 10th June 2019 the learned Taxing Officer awarded to the Respondent, **M. I. WAFULA & CO. ADVOCATES**, the sum of Kshs. **204,067.50**.
2. Being dissatisfied with the said Ruling, the Applicant filed a Reference to this court, seeking the review of the sums awarded.
3. On the face of the Reference, the Applicant asserted that the sums awarded were exaggerated and were contrary to the law.
4. The Applicant further asserted that the Taxing Officer had erred in both law and fact, when he taxed the Bill of Costs without giving any valid reasons for the decision made.
5. It was therefore the view of the Applicant that the best interests of justice demanded that the court should review the sums awarded by the Taxing Officer.
6. Through the supporting affidavit sworn by **DORIS AWINO ABIRA**, the Applicant suggested that the Taxing Officer ought to have awarded a sum not exceeding Kshs 112,882.50.
7. The Respondent filed a replying affidavit, which was sworn by **MAKINIA I. WAFULA**.
8. It was the Respondent's view that the learned Taxing Officer had exercised his discretion judiciously when he taxed the Bill of Costs. Therefore, the Respondent submitted that the Applicant had not demonstrated any sufficient reason to warrant a review of the orders made by the Taxing Officer.
9. At paragraph 9 of the replying affidavit, it was deponed thus;

“THAT in view of the foregoing, we pray that

the application be dismissed with costs to the

Firm and the award on the Bill of Costs dated

17/09/2018 of Kshs 204,067.50 be set aside

and substituted with an award of Kshs

295,730.40, for being inordinately low as

submitted in our submissions dated

02/04/2019.”

10. In the alternative to that deposition, the Respondent invited this court to dismiss the Reference, and to uphold the sums awarded by the Taxing Officer.

11. Both parties are in agreement concerning the applicable law.

12. On her part, the Applicant submitted that;

“It is a well established principle of review that the exercise of the Taxing Master’s discretion will not be interfered with unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which were improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.”

13. Meanwhile, on its part, the Respondent submitted thus;

“It is our humble opinion that before the court interferes with the decision of the taxing master, it must be satisfied that the taxing master’s ruling was clearly wrong, as opposed to the court being satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master’s view of the matter differs so materially from its own that it should be held to vitiate the ruling.”

14. When the award is either too high or too low, the Court would be entitled to conclude that it was erroneous. A decision on taxation can only be either too high or too low when the taxing officer failed to apply the correct principles, or applied the principles wrongly, or took into account irrelevant considerations, or failed to take into account the relevant considerations.

15. In this case, the Respondent presented a Bill of Costs in which the Firm claimed the total sum of Kshs 160,020/=, inclusive of the

additional 50% on account of Advocate/Client Costs.

Instruction Fees

16. The Respondent claimed the sum of Kshs 60,000/= as Instruction Fees for the “*Petition and for letters of administration intestate.*”

There was a separate claim for Kshs 3,000/= as Instruction Fees for filing an application for provision of Defendants.

17. In his Ruling, the Taxing Officer awarded Kshs 100,000/=, based on the Estimated Value of the Estate, which was Kshs 6,000,000/=.

18. **Schedule 10** stipulates the fees chargeable in Probate and Administration matters.

19. **Paragraph 1 (a) of Schedule 10** stipulates the Instruction Fees;

“..... where the gross capital value of the

property

Exceeds Kshs 1,000,000, (the fee shall be

calculated as follows)

5 per cent of the value on the first Kshs

1,000,000 thereof and 1% over Kshs

1,000,000/=.”

20. My calculations shows that the sum adds up to Kshs 100,000/=.

21. However, the Respondent’s Bill of Costs had only asked for Kshs 60,000/=.

22. In my considered opinion, the Bill of Costs, as drawn, is akin to a pleading. Therefore, if the Respondent wanted to ask the Taxing Officer to award a higher Instruction Fee than that which the Firm had asked for in the Bill of Costs, the Firm ought to have sought an amendment to the Bill of Costs.

23. Submissions, whether they are for an application or the substantive suit or even a taxation cannot constitute a forum through which pleadings or a Bill of Costs can be amended.

24. As the Respondents did not amend the Advocate & Client Bill of Costs dated 17th September 2018, the Taxing Officer erred, in law, by awarding a sum which was higher than that sought in the Bill of Costs.

25. I am alive to the fact that the Taxing Officer has the discretion to increase the quantum of costs awarded in respect of Instruction Fees, in appropriate circumstances.

26. However, the said discretion can only be exercised where the person whose Bill of Costs was being taxed had sought, in his Bill of Costs, a sum which was higher than the stipulated minimum amount for any particular sum claimed.

27. For instance, if the prescribed minimum in the applicable Schedule was Kshs 50,000/=, yet the sum claimed under that head was Kshs 80,000/=, the Taxing Officer could, if satisfied that the circumstances of the case so warranted it, award up to the sum of Kshs 80,000/=.

28. In that scenario, the Taxing Officer could not award even a shilling more than the sum of Kshs 80,000/=, even if the person whose Bill was being taxed appeared to be very persuasive.

29. In the result, under **Item 1**, I set aside the award of Kshs 100,000/=, and I substitute it with the award of Kshs 63,000/= which was the sum specified in the Bill of Costs.

Item No. 5 – Disbursements

30. The Respondent claimed the sum of Kshs 11,200/=, without giving any breakdown for it.

31. Disbursements are payments made, especially by an advocate to a third party, and then claimed back from the client.

32. As these are actual payments made, the person making the same claims a reimbursement for the exact sums paid for each specific payment.

33. In this instance, the Respondent provided seven (7) receipts, for the total sum of Kshs 7,915/=, (including Kshs 850/= for the Bill of Costs and the Chamber Summons, with Orders).

34. A perusal of the said receipts shows that the Court Fees totaling Kshs 6,905/= constitute the sums claimed under **Item No. 2**.

35. Therefore, once the claim for that sum was allowed under **Item No. 2**, it cannot be awarded again under **Item No. 5**, as that would constitute a duplication.

36. Secondly, there are "*Petty Cash Vouchers*" which the Respondent produced, with a view to proving its claim for disbursements.

37. The Vouchers include sums described as having been for Filing Fees (Winam); Court Attendance; Printing; Certification etc.

38. In respect of Court filing fees, the disbursement must be supported by an official receipt issued by the court at which the fees were paid.

39. An Attendance Fee is not recoverable as a disbursement.

40. If printing and certification are paid for, the cost can be reclaimed upon production of receipts; not payment vouchers.

41. Otherwise, when an advocate draws pleadings or makes copies thereof, the Remuneration Order stipulates the manner for incorporation of such costs into the Bill of Costs, as it is appreciated that the advocate would not issue a receipt to his own firm, for services rendered by the said firm.

42. In conclusion, all the sums awarded under **Item 5** are hereby set aside.

43. Similarly, the sums allowed under **Item 4** are disallowed.

44. By my calculations, the total amount to be reduced from the taxed costs is Kshs 68,395/=, comprising the following;

a. Item 1 - *Less 40,000/=*

b. Item 4 - *Less 16,510/=*

c. Item 5 - *Less 11,885/=*

68,395/=

45. That sum would then be deducted from the taxed costs (on Party & Party basis) of Kshs 136,045/=, leaving a balance of Kshs 63,650/=.

46. As this was an Advocate/Client Bill of Costs, the said balance is to be increased by 50%, thus bringing the final tally to Kshs 102,592/=.

47. In the result, the reference is successful. I set aside the sums awarded by the Taxing Officer, and substitute that figure (of Kshs 204,067/50), with a new figure of Kshs 102,592/=.

48. The costs of the reference are awarded to the Applicant.

DATED, SIGNED and DELIVERED at KISUMU

This 15th day of **April** 2020

FRED A. OCHIENG

JUDGE