



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 44 of 2016 (Formerly 127 of 2012)

IN THE MATTER OF THE ADVOCATES ACT CAP 17 LAWS OF KENYA

IN THE MATTER OF TAXATION OF COSTS BETWEEN THE ADVOCATE AND THE CLIENT

MEREKA & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

THOMAS NGUGI MBUGUA

SUSAN WANJIKU MBUGUA NGUGI

VIVIENNE LINDA MBUGUA NGUGI

EMMANUEL SAWE.....CLIENTS/RESPONDENTS

ARISING FROM

HC SUCCESSION CAUSE NO. 416 OF 2006 CONSOLIDATED WITH HC SUCCESSION CAUSE NO. 354 OF 1995 IN THE MATTER OF GRACE WANJIKU NGUGI (DECEASED)

JOHN MBUGUA NGUGI.....PETITIONER

VERSUS

THOMAS NGUGI MBUGUA

SUSAN WANJIKU MBUGUA NGUGI

VIVIENNE LINDA MBUGUA NGUGI

ATHMAN PETER NGUGI

IRENE WAMBUI WANJIKU

MELINDA LEMMY KIWANA.....BENEFICIARIES

RULING

1. Before me for consideration is a reference by way of chamber summons dated 23.4.15 (the Reference) filed by Mereka & Co. Advocates (the Advocate/Applicant) against the taxation of 24.10.14 in respect of an advocate/client bill of costs. The said bill of costs relates to the Advocate/Applicant's representation of the Client/Respondents in High Court Succession Cause No. 416 of 2006 consolidated with High Court Succession Cause No. 354 of 1995.

2. The Advocate/Applicant filed a bill of costs against the Clients/Respondents dated 12.4.12. The taxing master D. Wasike in her ruling of 24.10.14, taxed the bill of costs at 3, 055,235/= having taxed off 8,439,594/=. The Advocate/Applicant by the Reference seeks the setting aside of the said ruling relating to the entire bill of costs save for items 174 and 299 which were taxed as drawn. The Advocate/Applicant also prays that bill of cost be taxed afresh and /or the Court do proceed to re-tax the said items in the bill of costs.

3. The grounds of the Application are that the taxing master erred in principle and in law when she taxed the instruction fees at Kshs. 2,000,000/=. The said sum is manifestly low and warrants a re-taxation. The Advocate/Applicant contends that he handled 2 very complex succession matters involving the distribution of assets worth over Kshs. 100,000,000/=. The matters involved disputes over many parcels of land and beneficiaries based in USA, Australia and Tanzania. The matter took several years and involved travel by the Advocate/Applicant severally between Nairobi and Mombasa. The Advocate/Applicant further claims that the Clients/Respondents being aware of the complexity of the matter had offered him the sum of Kshs. 5,600,000/= which he declined as it was not a proper recompense for the work done. The taxing master erred in principle and in law in by failing to take into account the fact that he acted for 5 beneficiaries all seeking their own entitlements. The taxing master further failed to take into account that early in the litigation on 15.7.11, the previous advocates were paid tax the taxed amount of Kshs. 1.8 million. The taxing master further erred in law by taxing items 17, 26, 33, 50, 146, 2161 and 144 at the minimum fee of Kshs. 500 for 15 minutes attendance yet hearing of applications ordinarily take more than 1 hour. The taxing master further erred in law by taxing items 194, 220, 387, 388, 289, 391, 407 and 408 at a lower scale.

4. The Court has considered the written submissions filed by the parties together with the authorities cited. In spite of having been served Advocate/Applicant did not attend Court to highlight his submissions.

5. The Advocate/Applicant reiterated the averments in the application. He takes issue with the fact that the taxing master in taxing the instruction fee at Kshs. 2,000,000/= and failed to take into account the fact that he acted for 5 beneficiaries in the 2 highly complex Succession matters. The taxing master failed to take into account that the previous advocates whom the Advocate/Applicant replaced had been paid Kshs. 1.8 million very early into the matter.

6. The Advocate/Applicant takes issue with the fact that the taxing master ruled that Schedule X (10) and not Schedule V (5) was applicable in the matter. He contends that in doing so, the taxing master disagreed with the Advocate/Applicant as well as the Respondents' advocates who were of the view that the applicable schedule was Schedule 5 and not 10. In order to determine the applicable scale in the matter, it is necessary to examine the relevant law. Paragraph 22 of the Advocates Remuneration Order (ARO) 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 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

7. The ARO contains schedules that are applicable to various types of matters. Paragraph 22 however allows an advocate to make an election to charge his fees according to schedule 5 rather than the applicable schedule. In order to benefit from this election, the advocate must signify to his client that he has made such election either before or contemporaneously with rendering his bill of costs. Where an advocate fails to make such election and to inform his client of the election then Schedule 5 becomes inapplicable and the relevant schedule applies. Paragraph 51C provides:

Subject to paragraph 22, the scale of costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule 10.

8. In the present case, other than stating that the taxing master ruled that the applicable scale is Schedule 10 and that she disagreed with the Advocate/Applicant and the Respondents' advocates, no evidence was placed before the Court to show that the Advocate/Applicant made the election envisaged under paragraph 22 or that he signified to his clients the election either before or contemporaneously with rendering the bill of costs. In the premises the Advocate/Applicant cannot benefit from the scale set out in Schedule 5 and is confined to the scale in Schedule 10 which is the applicable scale for Probate and Administration matters.

9. Guided by Schedule 10, the taxing master calculated the instruction fee at Kshs. 1,136,250/=. This amount was based on the value of the estate in respect of which she stated:

I therefore find that the gross value of the Estate as can be ascertained from the properties listed in the Grant of Administration (sic) is over 100,000,000/=. With no other value given to the contrary, I will use 100,000,000/= as the value.

10. In exercise of her discretion the taxing master added the sum of Kshs. 863,750/= to make a total of Kshs. 2,000,000/=. To the Advocate/Applicant, this is a paltry sum and the taxing master who ought to exercise her discretion judicially failed to give reasons for the same nor did she cite any authorities to support the figure she arrived at.

11. In the cited case of Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR, Odunga, J had this to say concerning the interference of the exercise of discretion by a taxing officer:

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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration 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; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item

of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64.

12. In the present case, it is clear that the Advocate/Applicant has taken issue with what he refers to as a paltry sum that the taxing master awarded as instruction fee. The taxing master stated that she called for the 2 parent files and perused the same. She then observed:

Indeed as stated earlier, I have perused all the files. The Succession was very contentious and very important to the parties to the extend (sic) that accounts had to be filed in Court. The interests of all the parties in all Succession matters is very high. I also note that the Court ordered that some moneys be held pending the taxation of the Bill of Costs. Given also the value of the Estate, in exercise of my discretion, I shall enhance the Instruction fee to Kshs. 2,000,000/=.

13. The above are the factors that the taxing master considered in the exercise of her discretion. Guided by the principles set out in the case of First American Bank of Kenya supra, it would appear to me that the Advocate/Applicant has not demonstrated that the decision was based on an error of principle to warrant the interference of this Court. In my view, the taxing master took into account relevant factors and there is nothing on record to show that she considered irrelevant factors. Further, it is within the discretion of the taxing master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary. The taxing master set out the basic instruction fee and then proceeded, in her discretion, to increase the instruction fee and in exercise of her discretion, increased the same to Kshs. 2,000,000/=.

14. The Advocate/Applicant is clearly aggrieved by the quantum of instruction fee. To the Advocate/Applicant, the increase was grossly inadequate and in his opinion the taxing master ought to have enhanced the instruction fee by no less than 5 times. To my mind, to tinker with quantum would be to interfere with the discretion of the tax master. In any event, quantum is not an error in principle. In this regard, the statement of Odunga, J in the Nyangito case (supra) is instructive:

Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job;

15. Indeed Courts have taken the position that the award of the taxing master should not be interfered with merely because a Court thinks the award somewhat too high or too low. In the case of Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR, Ojwang, J (as he then) cited the words of Spry, V-P. in Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd & Another [1972] E.A. 162.

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 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.

16. The Advocate/Applicant laments that the taxing master did not take into consideration the amount offered by the Clients/.Respondents of Kshs. 5,600,000/= which he rejected as not being a fair recompense for his services. To this, the taxing master had this to say in her decision:

The taxing master is under no obligation to consider the amount offered and is bound by the principles of taxation. I shall therefore proceed to tax the Bill as Mr. Mereka was not satisfied with the offer of Kshs. 5,600,000/=.

17. I agree with the taxing master that she is only bound by the principles of taxation. Indeed to take into account the amount offered would in itself be an error of principle as this is an irrelevant factor. As stated in First American Bank of Kenya (supra), according to the Remuneration 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. A remuneration offer made by a client is not one of the stated relevant factors.

18. Further the Court of Appeal in Joreth Limited v Kigano & Associates [2002] eKLR cautioned against interference with the assessment of costs by the taxing master unless on a matter of principle. The Court had this to say:

What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

19. As regards items 17, 26, 33, 50, 146, 161 and 144, the Advocate/Applicant is aggrieved that the taxing master taxed the same at the minimum fee of Kshs. 500 for 15 minutes attendance yet in his view, hearing of applications ordinarily take more than 1 hour. The taxing master stated that these items must stand as drawn and cannot be amended. I have looked at the Bill of Costs and indeed the sums indicated against these items by the Advocate/Applicant are Kshs. 500/=. I need not say more.

20. I now turn to items 194, 220, 387, 388, 289, 391, 407 and 408. The taxing master stated in her reasons regarding item 194 stated that attendance for hearing of an application takes about 1 hour. As the Advocate/Applicant did not indicate the time it took, she taxed off Kshs, 3,000/=. On item 220, the taxing master disputed that the time to extract an order cannot be 2 ½ hours and was of the opinion that the time to do so cannot exceed 30 minutes. She accordingly taxed off the sum of Kshs. 4,000/=. The amount taxed off in respect of items 387, 388, 289, 391 was based on the vouchers and receipts produced to the taxing master. As regards items 407 and 408, the taxing master taxed the amounts in their entirety as the same were unsupported. The taxing master gave an explanation for the amount taxed off in respect of each of the items. As Odunga, J stated in the Nyangito case (supra), it has been held that the Court should not interfere with the decision of the taxing

master in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.

21. The foregoing analysis leads me to draw the conclusion that the Advocate/Applicant has not laid sufficient basis upon which the Court can interfere with the decision of the taxing master. In the result, this Reference is found to be lacking in merit and the same is dismissed. The Reference having arisen from a family matter, I direct that each party bears own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of March 2019

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M. THANDE

JUDGE

In the presence of: -

.....**for the Advocate/Applicant**

..... **for the Clients/Respondents**

.....**Court Assistant**