



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 141 OF 2017

IN THE MATTER OF TAXATION OF PARTY & PARTY BILL OF COSTS

ADVOCATES ACT, REMUNERATION AMENDMENT ORDER 2014

BETWEEN

BONIFACE MUNYAO MUINDE.....APPLICANT

-VERSUS-

FREDRICK KATUVA MOSE..... RESPONDENT

(Being a reference from the decision made on 02/08/2018 by the Taxing Master Hon. Otieno J. sitting at the Makueni Law Courts).

RULING

1. The Applicant, being the successful party in this appeal, filed a party and party bill of costs for Kshs.116,975/= and through a ruling delivered by the taxing master on 02/08/2018, Kshs.103,675/= was taxed off.

2. Aggrieved by the ruling, the Applicant filed this reference seeking that the ruling of the taxing master be set aside and the bill dated 29/05/2018 be taxed afresh. He relied on the following four grounds;

- a) **That** the taxing master exercised her discretion wrongly by under-assessing the instruction fees.
- b) **That** the taxing officer made an error by failing to consider principles governing taxation particularly instruction fees.
- c) **That** the taxing officer erred by taxing off items which were obvious and do not need strict proof.
- d) **That** the taxing master proceeded on wrong principles hence awarded very low, negligible and unrealistic charges.

3. The reference was canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

THE APPLICANT'S SUBMISSIONS

4. The Applicant submits that the taxing master erred by taxing off Kshs.60,000/= on item 1 and awarding Kshs.10,000/= yet he had paid his advocate on record the full instruction fee of Kshs.70,000/=.

5. That item 2 should not have been reduced from Kshs.7,000/= to Kshs.1,100/= considering that it included the fee for the advocate on record and transport for the return journey from Machakos to Wote Law Courts.

6. That by taxing off items No. 2, 3, 4 and 5 entirely, the taxing master failed to note that the Applicant and his advocate were travelling from Nairobi and Machakos respectively to confirm transfer of the court file from Machakos High Court to Makueni High Court.

7. He submits that the taxing master erred by taxing off obvious items and failing to consider that money for court service is paid directly to the court process server hence no receipts are issued.

8. He also submits that the common practice is that affidavits of service are filed on the morning of the hearing and when parties confirm court attendance or meet in the court premises, it becomes a waste of resources to file the same. Further, he submits that most cyber cafes do not issue receipts upon photocopying. He therefore contends that it was erroneous to tax off items 6 and 7.

9. That taxing off items 9 and 10 was a deliberate omission because paragraphs 4 and 5 of the judgment delivered by Kariuki J. show that the Applicant had filed his submissions.

10. That items 11 and 12 were under taxed because the amounts included lunch and transport for the advocate and accommodation for the Applicant.

11. He prays that the bill of costs be allowed as drawn or taxed afresh to realistic charges.

THE RESPONDENT'S SUBMISSIONS

12. The Respondent submits that the evidence presented by the Applicant was not enough to award the costs as prayed. That the taxing master has the mandate to tax the bill according to the provisions of the remuneration order and not as per the wishes of the Applicant.

13. That in reaching her decision, the taxing master appreciated that the appeal was simple and did not have complex issues.

14. According to the Respondent, the reference is an abuse of the court process and should be dismissed with costs.

ANALYSIS AND DETERMINATION

15. The Applicant is dissatisfied with the taxing master's decision on all the items in the bill of costs.

16. In **Nyangito & Co. Advocate –Vs- Doinyo Lessos Creameries Ltd (2014) eKLR, Odunga J.** emphasized that 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: -

a) It must be 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;

b) 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 importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial judge;

c) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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 was high.

d) 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.

e) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

f) The full instructions fees to defend a suit are earned the moment a defence has been filed and the subsequent progress or the matter is irrelevant to the item of fees;

g) The mere fact that the Defendant does research before filing a defense and then puts a defense informed of that 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 should not be turned into an advantage against the adversary.

17. In her ruling, the taxing master stated that the appropriate remuneration order to use was; **The Advocates (Remuneration) (Amendment) (No. 2) Order, 2014**. It is noteworthy that this order was purposely passed to amend schedule 7 of the **Advocates Remuneration Order, 2009** (Principal order). Schedule 7 thereof deals with 'costs of proceedings in the subordinate courts' yet the bill of costs before the taxing master was with regard to proceedings before the High Court. To that extent, it is my view that the taxing master erred in principle.

18. The principal order was the last comprehensive order to be published and it continues to be applied with amendments that have been made over the years. It was amended by legal notices Nos.50/2009, 35/2014 and 45/2014 (the one quoted by the taxing master).

19. After drawing guidance from the principles in the Nyagito case, I have gone through each and every item as per the ruling and as presented by the Applicant. I have equally considered the submissions. I have found that even in instances where a service was rendered but there were no receipts the taxing master did not award any costs, leave alone what is provided for as per the scale in the ARO.

20. The award of Kshs.10,000/= in **item I** was much lower than what is prescribed under the ARO, that is an obvious error in principle. **I have found errors in items 1, 3, 4, 5, 7, 9, 10, 11 and 12, which reflects ¾ of the bill.**

21. **I therefore set aside the ruling of the taxing officer dated 2nd August, 2018 and direct that the bill of costs dated 29th May, 2018, be taxed afresh, bearing the observations made in this ruling.**

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.

.....

HON. H. I ONG'UDI

JUDGE