



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 484 OF 2017**

**ROSEMARY WANGARI CHEGE T/A**

**R.W. CHEGE & ASSOCIATES ADVOCATES.....ADVOCATE/APPLICANT**

**-VERSUS-**

**DUNCAN MUGAMBI T/A WRIGHT AUCTIONEERS.....CLIENT/RESPONDENT**

**RULING**

1. This ruling is the product of the Chamber Summons dated 29<sup>th</sup> May, 2019 filed by the advocate/applicant and supported by the affidavit sworn by the applicant. The applicant is seeking the following orders as set out in her application:

***(i) THAT the ruling and taxation delivered by the taxing master on 28<sup>th</sup> March, 2019 in relation to item 1 of the Bill of Costs be set aside.***

***(ii) THAT an order do issue that the applicant is entitled under item 1 of the Bill of Costs to instruction fees on the basis of the taxed relevant party and party costs increased by half of Kshs.172,669.50 and a certificate of costs to issue accordingly.***

***(iii) THAT costs of the application be provided for.***

2. In her affidavit, the applicant explained that upon filing the Advocate-Client Bill of Costs, the same was taxed by the learned taxing master, who reasoned that item 1 on instruction fees was based on costs in respect to the application previously filed by the applicant on behalf of the respondent and which costs could not be termed as party and party costs.

3. According to the applicant, since the taxing master has concurrent jurisdiction as the taxing master who taxed the costs and thereafter issued the certificate of taxation, she cannot sit on review or appeal against the taxation by the erstwhile taxing master. On the same note, the applicant maintained that the taxation ruling on the party and party Bill of Costs earlier filed and/or the certificate of taxation have not been objected to, hence the taxing master in question was wrong in her reasoning set out hereinabove.

4. Further to the above, it was the applicant's assertion that the subject matter she was instructed to handle by the respondent was of a weighty nature entailing contempt of court proceedings and that the taxing master ought to have taken this factor into account in assessing the instruction fees.

5. In opposing the Reference, the respondent swore the replying affidavit on 16<sup>th</sup> July, 2019 averring that he was not a party to the suit but was only enjoined in the application for contempt of court in his capacity as the auctioneer for the plaintiff, which application was dismissed with costs.

6. According to the respondent, he paid the applicant's legal fees as previously agreed upon between them for defending the application and that without his knowledge, the applicant proceeded to tax the costs previously awarded to him in the sum of Kshs.115,113/=. In the respondent's view the applicant cannot be heard to base her instruction fees on the abovementioned costs and that in any case, the taxed amount on the instruction fees was fairly made. The respondent urged that the Reference be dismissed with costs.

7. Parties filed and exchanged written submissions on the Reference. In her submissions dated 6<sup>th</sup> September, 2019 the applicant restated that the finding of the taxing master was erroneous in view of the earlier finding of a different taxing master in respect to the costs awarded in the Bill of Costs filed by the applicant on behalf of the respondent.

8. The applicant further maintained that the learned taxing master did not have jurisdiction to vary the earlier taxation and certificate of taxation, further reiterating that no objection has been raised against the said taxation.

9. It was the applicant's contention that the learned taxing master ought to have considered the nature of the matter and the amount of work put in by herself in defending the respondent, thus causing her to be obligated to tax the instruction fees in accordance with the certificate of taxation plus one-half of the minimum fees set out under Schedule VI, Paragraph B (b) of the Advocates Remuneration Order. The applicant relied on the Court of Appeal case of **Joreth Limited v Kigano & Associates [2002] eKLR** wherein it was held *inter alia*, that factors such as the nature and importance of the cause or matter, in addition to the interest of the parties, should be taken into consideration in calculating the instruction fees payable to an advocate.

10. In the end, the applicant took the stand that this is a matter in which the taxing master's ruling ought to be interfered with, citing the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** and **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR** where the Court of Appeal in both instances reasoned that where a taxing master is found to have committed an error of principle, then a judge has the discretion to either remit the bill of costs for taxation afresh before a taxing master or deal with the matter personally.

11. The respondent on his part stood his ground that the learned taxing master correctly arrived at the finding that the instructions given to the applicant by the respondent were limited to defending him in the application for contempt of court, further arguing that the learned taxing master's determination as per Schedule VI of the Advocates Remuneration Order 2006 to the effect that the minimum fees allowed in such instance is Kshs.3,500/ and her decision to tax the same at Kshs.65,853/ was correct and rightly guided by her discretion.

12. The respondent equally drew this court's attention to the principles that offer guidance as to whether the decision of a taxing master is deserving of interference, as laid out in **First American Bank of Kenya v Shah and others [2002] EA 64** such as whether the taxing master applied a wrong principle or whether the taxing master awarded manifestly high fees. In the respondent's view, the taxing master applied an assessment consistent with the provisions of the Advocates Remuneration Order, 2006.

13. More importantly, it was the respondent's submission that the amount of Kshs.115,113/ taxed by the erstwhile taxing master was all inclusive and not restricted to the instruction fees, hence there would be no basis on which to assess the instruction fees from the said amount.

14. I have taken into consideration the grounds featuring in the Chamber Summons, the facts deponed to in the affidavits supporting and opposing it, and the rival submissions alongside the cited authorities.

15. According to the facts presented by the parties, the proceedings namely HCCA 485 OF 2011 (Ronald Kaburia v Joddies Foods Limited) were instituted, though the details thereof have not been disclosed by either of the parties. The parties are also in agreement that soon thereafter, an application seeking an order for contempt of court was lodged and it is at this point that the respondent came on board as one of the respondents, being represented by the applicant, which application was eventually dismissed.

16. The record shows that subsequently, the respondent through the applicant filed the party and party Bill of Costs dated 26<sup>th</sup> March, 2013 which was then taxed. However, none of the parties ensured to avail a copy of the taxation ruling for this court's reference but I have seen the certificate of taxation dated 18<sup>th</sup> September, 2013 issued to that effect and indicating that the respondent's party and party Bill of Costs was allowed in the sum of Kshs.115,113/ as against Joddies Foods Limited and Eco Gas & Petroleum (K) Limited, being the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively in that instance.

17. Going by the record, the applicant then filed the advocate-client Bill of Costs dated 3<sup>rd</sup> October, 2017 against the respondent. The same went before the Deputy Registrar L. Mbacho who taxed it at the sum of Kshs.46,663/. Nevertheless, what now constitutes the subject of the Reference is the instruction fees taxed at Kshs.50,000/.

18. The courts have previously considered factors that would trigger the interference of a taxing master's decision on appeal. Take for example the case of **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** where the Court of Appeal held thus:

***“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”***

The court went ahead to reason that an error of principle would include the excessive award of costs or the over emphasis on factors such as the nature and complexity of the matter at hand.

19. The above was echoed in the case of **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR** equally decided by the Court of Appeal.

20. The issue for determination therefore is whether the taxing master committed an error of principle in assessing the instruction fees. First and foremost and as has already been established, the party and party bill of costs mentioned earlier on was taxed at Kshs.115,113/. When the applicant later filed the advocate-client Bill of Costs, she urged the taxing master to apply the above sum plus ½ in determining the instruction fees payable to herself, totaling Kshs.172,669.50/.

21. The proposed sum was opposed by the respondent, who instead urged that the taxing master do award the reasonable sum of Kshs.35,000/ as instruction fees pursuant to Schedule VI, Paragraph 1 (o) (viii) of the Advocates Remuneration Order, 2006.

22. Ultimately, the taxing master in her ruling reasoned that the respondent was not a party to the suit but was only enjoined in the application for contempt whereby he instructed the applicant to represent him. In the premises, the taxing master found that the costs already awarded in the Bill of Costs cannot be termed as party and party costs as they were merely costs resulting from the dismissal of the application for contempt. The taxing master then applied the provisions of Schedule VI, Paragraph 1 (o) (viii) of the Advocates

Remuneration Order, 2006 in assessing the instruction fees at Kshs.50,000/ as opposed to the Kshs.172,669.50/ proposed by the applicant.

23. From the foregoing, I have established that on the one part, given that the party and party Bill of Costs filed earlier on by the respondent was allowed by the erstwhile taxing master and in the absence of an indication that such decision has been challenged or objected to, there was no basis for the taxing master in question to determine that the costs could not be termed as party and party costs.

24. On the other part, I have looked at Schedule VI, Paragraph 1 (o) (viii) of the Advocates Remuneration Order, 2006 and ascertained that the same is relevant since it provides for the assessment of instruction fees in instances where an application is either opposed or unopposed. In the present scenario, it would appear the respondent was enjoined in the proceedings relating to HCCA 485 OF 2011 in his capacity as an auctioneer and only at the point of filing the application for contempt, which application the applicant defended on the respondent's behalf. In the circumstances, the taxing master was correct in drawing guidance from the above-cited provision which stipulates that where an application is opposed, then a reasonable sum not less than Kshs.3,500/ is applicable.

25. Moreover, I am satisfied that in assessing the instruction fees, the learned taxing master considered the relevant principles set out in *Joreth Limited v Kigano & Associates [2002] eKLR*. In the said case, the court rendered *inter alia*, that:

***“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.”***

26. In any case, I would agree with the respondent that the applicant has offered no basis as to why the taxing master ought to have applied the earlier costs of Kshs.115,113/ since there is nothing to show that the same in any way relates to the subject matter in question. Further to this, it is appreciated that the respondent's and consequently the applicant's participation was limited to the application for contempt as opposed to the suit proceedings as a whole. There is nothing to indicate that the applicant would have been required to put in a large amount of time in defending the respondent's interests in the application.

27. I therefore have no doubt in my mind that the learned taxing master arrived at a reasonable assessment of the instruction fees and offered a proper explanation for the same.

28. The upshot is that the Chamber Summons lacks merit and I am only left to dismiss it with no orders as to costs.

**Dated, signed and delivered at NAIROBI this 7<sup>th</sup> day of November, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Advocate/Applicant

.....for the Client/Respondent