



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 32 of 2017

HELLEN WAITHIRA KABUGI

(Suing as the wife and personal representative of the estate of

JOHN PAUL MIHESO SHIKUTA (DECEASED).....APPLICANT

VERSUS

LEONARD KAMAU NJUGUNA1ST RESPONDENT

AUTOMAX LIMITED.....2ND RESPONDENT

RULING

1. The 1st Respondent filed Limuru CMCC No. 146 of 2016 vide a Complaint dated 29/06/2016. It is a wrongful death case in which the husband died. The Applicant filed a Miscellaneous Application in this Court seeking for the transfer of the suit to Milimani Commercial Court. The Miscellaneous Application was dismissed by this Court after opposition by the Respondents and a hearing.
2. Since the Application was dismissed with costs and the parties could not agree on the costs, the 1st Respondent filed a Bill of Costs and the matter proceeded for taxation. The Taxing Master issued a ruling on 17/07/2017 awarding Kshs. 57,506/- to the 1st Respondent. The 1st Respondent wants judgment be entered for the amount and a Certificate of Costs and a decree of the Court be issued against the Applicant.
3. The Applicant, on the other hand, wishes to have the decision of the Taxing Master delivered on 17/07/2017, the consequential Certificate of Taxation and other orders be set aside or varied and the Bill of Costs be remitted back for taxation before a different taxing master.
4. The Applicant's complaint is, briefly, as follows. It is common that the Bill of Costs was filed on 03/03/2017. The parties, then, filed Written Submissions. The matter was fixed for mention on 30/03/2017. The Applicant says that thereafter, the 1st Respondent filed a fresh and/or amended Bill of Costs which was never served upon the Applicant. He now complains that the Taxing Master proceeded to deliver a ruling on taxation ex parte. He further complains that it is not clear which Bill of Costs the Taxing Master based his ruling on. Finally, the Applicant complains that it was wrong for the Taxing Master to tax on an Amended Bill of Costs which was un-served.
5. In the affidavit supporting the Application, the Applicant had claimed that the Taxing Master had directed the 1st Respondent to file and serve an amended Bill of Costs.
6. I have now had an opportunity to look at the Court file. I have not seen any directions by the Taxing Master that the 1st Respondent should file an Amended Bill of Costs. I have also seen the alleged Amended Bill of Costs. Other than the heading, it is a carbon copy of the earlier one. It is, therefore, a tad of an exaggeration for the Applicant to claim that the taxation was based on a Bill of Costs which was not served on them. The truth of the matter is that the Written Submissions by the Applicant covered all the substantive aspects of the taxation. What is more, although the Applicant's counsel was aware of the scheduled mention on 27/04/2017, they did not show up for the case. Neither did they follow up to know the new mention date assigned or the ruling date finally assigned to the case. The Applicant cannot place blame for that failure on any other party other than his counsel. For this reason, I decline to set aside the Certificate of Taxation based on this reason.
7. I will now turn to the complaints by the Applicant that the Taxing Master erred in law and in principle in awarding manifestly excessive instructions fees in respect of a fairly straight forward Application where no complexity or novel issues of law were raised during the hearing of the Application.
8. The 1st Respondent had wanted the instructions fees pegged on the anticipated general damages she expects to recover from the Primary Trial. The Taxing Master correctly declined. This is because the subject matter of the Miscellaneous Application which was being taxed

was not the Primary Suit – but the Application to transfer the suit.

9. Hence, the Taxing Master was correct that the applicable provision is the one in Schedule Six of the Advocates Remuneration Order, 2014 that provides fees for presenting or opposing any other application not otherwise provided for where the application is opposed. That provision says that the instructions fees to oppose such an application is “such sum as may be reasonable but not less than Kshs. 5,000/- ... provided that...(i) the taxing officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances...”

10. The Learned Taxing Master thought that the appropriate sum for the case was Kshs. 20,000/-. He then enhanced it to Kshs. 30,000/- on the account of it being “advocate-client cost”.

11. The Applicant complains against both the award of Kshs. 20,000/- as instructions fees finding it “manifestly excessive” as well as the enhancement by 50% on account of it being an “Advocate-client” taxation.

12. In short, I agree with the Applicant on both scores. While a Judge will rarely interfere with the exercise of discretion of a Taxing Master, and will, certainly, never do so only for the reason that he would have reached a different outcome, in appropriate cases, a Judge can vary an award where it is manifestly high or low as to suggest that it was based on the wrong principle. See *Nyaundi Tuiyott & Co. Advocates v Tarita Development Ltd [2016] eKLR* and *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board (2005) 1KLR 528*.

13. In the instant case, the underlying Application that was being taxed was a fairly straightforward application to transfer the suit to Milimani Commercial Court. No complex issues of law or fact were involved. It is excessive to quadruple the amount envisaged for such applications. I would think that an award of Kshs. 10,000/- is sufficient.

14. Secondly, it was a clear misdirection for the Learned Taxing Master to enhance the amount awarded as instructions fees on account that this was an advocate-client taxation. It was not. It is a Party and Party Costs taxation.

15. Finally, while the Applicant scoffs at an award for “getting up” arguing that such should never be awarded for Applications, I disagree. This was an Application sui generis – in the sense that it was a self-standing Cause. The parties needed to prepare for it in a way un-related to the Primary Suit. I think that the award of a sum for getting up is warranted. The amount should, of course, be based on the varied instructions fees of Kshs. 10,000/-

16. Before ending, I should state that I have noted the technical protestations by the 1st Respondent to the effect that the Applicant failed to strictly comply with the provisions of Paragraph 11(1) & (2) of the Advocates Remuneration Order. The Complaint is that the Applicant should have given notice in writing to the Taxing Master of the exact items he objected to so that the Taxing Master can give reasons for his decision on those items – before applying to the Judge in Chambers within 14 days.

17. I am not enamoured of this technical argument. I note that in this case, the Taxing Master gave a written ruling based on the Written Submissions by the parties. No other reasons for his decision were expected and so it would be technicality on stilts to require the Applicant to fulfil this step before perfecting their appeal before the Judge.

18. The upshot is that the Certificate of Costs will be varied only in the following aspects:

- a. Instruction Fees will now be reduced to Kshs. 10,000/-**
- b. Getting up Fees will now be Kshs. 3,333/-**
- c. All the other items will remain as they were taxed by the Learned Taxing Master.**

19. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE