



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 16 OF 2016**

**PHILIP MUCHIRI MUG.....APPLICANT/DEFENDANT**

**-VERSUS-**

**MUGO KITHAKWA.....DECEASED**

**MBEU KITHAKWA.....RESPONDENT**

**RULING**

1. The applicant **Philip Muchiri Mugo** filed an objection to taxation under **Order 11(1) and (2)** of the **Advocates (Remuneration Order, Cap. 16 Law of Kenya)** seeking orders that decision given by the Deputy Registrar be reviewed and set aside as the bill was taxed excessively and reasonably (sic). That the Deputy Registrar/Taxing officer's decision on the bill of costs is illegal as it was based on the value of land which legally belongs to the deceased Mugo Kithakwa not Mbeu Githakwa the Respondent. The Deputy Registrar therefore acted in error of law or in excess of its jurisdiction.

2. The application is based on four grounds on the face of the application.

***(i) That no proper services of the bill of costs was done to the Applicant as he was served by the Counsel of the respondent in court during the hearing. That was not only unreasonable but illegal Notice.***

***(ii) That the award of the amount is exorbitant and unreasonable into consideration of the total and objectionable items.***

***(iii) That the judge do review and set aside the cost awarded and award only the items which was not opposed by the Applicant or the ones which the law allows.***

***(iv) That an illegality is an illegality. Anything done pursuant to an illegality has no dividends, no fruits and will not receive a court of law approval and/or sanction.***

According to the applicant, there was no proper service of the bill of costs as he was served by the counsel for the respondent in court during hearing. That was not only unreasonable but illegal notice. That according to him the amount was exorbitant and unreasonable taking into consideration of the total and objectionable items. That the judge does review and set aside the costs awarded and allow those not opposed or the ones the law allows. That there was an illegality which the court should not allow.

3. The applicant supports the application with an affidavit sworn on 16<sup>th</sup> June, 2016 wherein he reinstates the above grounds.

4. In opposing the application, the respondent Mbeu Githakwa filed a replying affidavit sworn on 18<sup>th</sup> July, 2016. According to the Respondent the applicant failed to disclose material facts and has given falsehoods and half truths.
5. On matters relevant to this application the respondent deposed that after the applicants application was dismissed, a party and party bill of costs was filed and costs were assessed at Ksh.56,270/-. According to the respondents, the costs were not based on the value of land but as per the **Schedule – 7(2) of Advocates Remuneration Order 2014**.
6. The applicant filed application No. 80/2015 to delay execution of the decree. The applicant was given sufficient time to file objection which he never did but only stated the items which he opposed. That the court delivered a ruling on party and party bill of costs of Ksh.61,955/-.
7. According to the respondent, the applicant overlooked the provisions of **Advocates Remuneration Order** with regarding to writing to the taxing Master to give reasons and listing the items he objected to. That it was the taxing master who should have referred the matter to the High Court. That litigation must come to an end and the application ought to be dismissed.
8. The brief facts of the case are that the applicant filed a miscellaneous civil application No. 80/2015 in the Chief Magistrate’s Court wherein he was seeking orders that:  
  

***“That the officer commanding Kerugoya Police Station be ordered to provide security on the material day of the burial of remains of Mugo Kithakwa – Deceased.”***
9. He was seeking the orders amongst others against Mbeu Kithakwa.
10. A preliminary objection to the application was successfully raised. The application was dismissed with costs.
11. The Respondent filed a bill of costs which was taxed at Kshs.55,855.
12. The applicant filed an objection to the taxation. The Deputy Registrar gave a ruling on the opposed items but did not record and serve the applicant with the reasons for taxing the bill in the manner that she did.
13. Based on the ruling, the applicant filed a reference to this Court by way of objection to taxation. Justice Limo gave directions for the application to proceed by way of submissions.
14. I have considered the application, the grounds and the averments in the affidavit. The issue for determination is whether this Court should review the decision given by the Deputy Registrar on taxation of the bill of costs.
15. The Applicant has raised the issue of service. He admits that he was served by counsel for the Respondent in court. The Applicant annexed a copy of the bill of costs showing that it is the Court which ordered that he be served. He was served. I find that the applicant was duly served with the bill of costs and he has therefore not suffered any prejudice. He has acknowledged that he was indeed served.
16. From the ruling of the Deputy Registrar Hon. J. Kasam dated 9<sup>th</sup> June, 2016, the Applicant who was the respondent had objected to item 1 which was on instructions fees. She noted that what the applicant had filed was an application in respect of Land Parcel No. **INOI/KERUGOYA/796**. That application was struck out in court. The Deputy Registrar went ahead to cite **Schedule 7(2) of the Advocates (Remuneration Order)** which stipulates a minimum fee payable could be 50,000/= where the value of the disputed property was not quoted in the pleadings and allowed the same.
17. The Deputy Registrar also awarded Kshs.1400/= for service. Kshs.2000/= was awarded for attendance. The Registrar also awarded Kshs.2000/= for the respondent’s two days court attendance.

18. The Applicant filed an objection dated 12<sup>th</sup> May, 2016. The ruling by the Deputy Registrar is dated 9<sup>th</sup> June, 2016.

19. The Respondents filed written submission and raised the point of law that under **Para 11** of the **Advocates Remuneration Order** the procedure for objection to taxation is laid out. It is provided:

*“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

*“(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within 14 days from the receipt of the reasons apply to a judge by chamber summons which shall be served on all the parties concerned setting out the grounds of his objection.”*

*“(3) “Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may with the leave of the judge, but not otherwise, appeal to the Court of Appeal.”*

The respondent submits that the application herein is a contravention of the law as he ought to have written to the taxing officer objecting to the taxation and ask for reasons why the bill was taxed as it was.

20. The Respondent relied on the case of **Bernard Gichobi Njira -V- Kanini Njira Katheroki & Another (2015) eKLR** where a similar argument was advanced. The holding in the case was that, “The applicant should have appealed against the decision of the learned trial magistrate because the operation of **paragraph 11 of the Advocates Remuneration Order** can only be invoked after taxation or assessment.

21. The applicant filed an objection to taxation under **Order 11 (1) and (2)** of the **Advocates (Remuneration Order)**. He filed the objection on 16<sup>th</sup> June, 2016 after the ruling on his objection was delivered by the Deputy Registrar on 9<sup>th</sup> June, 2016. This objection was within 14 days. Apart from the ruling there is no evidence that the Deputy Registrar wrote to the Applicant giving reasons for the way the bill was taxed. **Order 11 (2)** quoted above provides that it is the taxing officer who where a party objects to decision on taxation, is supposed to record and forward to the objector the reasons for his decision.

22. In the case of **Kipkorir Titoo & Kiara Advocates –Vs- Deposit Protection Fund Board, Court of Appeal C.A. No. 220/2004** it was held:

*“By Rule 11(2) of the Order, the taxing officer was required on receipt of the notice to record the reasons forthwith and forward them to the respondent’s advocate who were then required to file a reference to the judge within 14 days from the receipt of reasons.”*

23. The Deputy Registrar did not give reasons. Instead she gave a ruling outside the 14 days on 9<sup>th</sup> June, 2016. The applicant then filed this application in the High Court. Justice Limo, gave directions that parties were at liberty to file written submissions. As observed in the above authority, since the Deputy Registrar did not record the reasons but wrote a ruling which indicated the formula that the taxing officer used, there was substantial compliance with **Rule 11 (2)** of the **Order**. The absence of such reasons would not preclude the objector from filing a competent reference.

24. The Applicant filed an objection and not a reference. The contention by the Respondent that the Applicant has brought this matter to the High Court on his own motion acting is *ultra vires* of the law is with respect not correct. **Order 11 Rule 2** provides that it is the objector who may within 14 days from the receipt of the reasons apply to a judge setting down the grounds of his objection.

25. The fact that he filed objection is a procedural technicality. This should not deny the Applicant justice. **Article 159 (2) (d) of the Constitution** provides:

***“In exercising judicial authority the courts and tribunals shall be guided by the following principles:-***

***Justice shall be administered without undue regard to procedural technicalities.***

This is buttressed by **Section 1A (1) and 2** of the **Civil Procedure Act** which provides for overriding objectives. It provides:

***“The overriding objective of this Act and the rules made here under is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***The Court shall in the exercise of its powers under this Act or the interpretation of any of its provision, seek to give effect to the overriding objective specified in subsection (1).”***

26. The Applicant raised objection on the ground that the Deputy Registrar based the taxation on the value of land parcel which belongs to the deceased. I am in agreement, that the Deputy Registrar erred not only in basing the taxation on the land belonging to the deceased but also on basing the taxation on the value of the land as there was no suit. The reason is that the matter which was in court was an application not a suit.

27. The matter which was the subject of the taxation before the Deputy Registrar was a Miscellaneous Application No. 80 of 2015. From the proceedings attached by the Applicant, it was a burial dispute. In her ruling the honourable magistrate stated that:

***“By a notice of motion dated 16<sup>th</sup> September, 2015 said to have been brought under Section 1A, 3A Civil Procedure Act and Order 51 Civil Procedure rules, the applicant sought the following order;-***

28. This shows that what was before the trial court was an application and not a suit. The Deputy Registrar when taxing the bill of costs noted that the matter was an application in respect of Land Parcel No. **INOI/KERUGOYA/769** and based the taxation on **Schedule 7(2)** of the **Remuneration Order**. The rule provides:

***“In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below) such costs as the court in its discretion but not less than Ksh.20,000/- if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Ksh.50,000/-***

The provision relates to a suit or appeal but not an application. The Honourable magistrate erred by basing the taxation on a suit when what was before her was an application which was dismissed on a preliminary point. There was no justification for such award.

29. In the case of **Moronge & Company Advocates -V- Kenya Airports Authority (2014) eKLR** it was held:

***“In our view the issue of the jurisdiction of the High Court Judge to tax contested taxation on a reference is settled. A judge of the High Court has jurisdiction to tax the bill himself.”***

In the case of **Kipkorir Titoo & Kiara Advocates -V- Deposit Protection Fund C.A. No. 220/2004 U.R.**, the Court of Appeal held:

***“We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in Schedule VI or fails to give due consideration to all relevant circumstances of the case.....that would be an error in principle. And if a judge on reference from the taxing officer finds that the taxing officer has committed an error of***

***principle, the general practice is to remit the question of quantum for the decision of taxing officer. The judge has however, a discretion to deal with the matter himself if the justice of the case so requires.”***

30. In this matter the Deputy Registrar committed an error of principle by basing the instructions fees on the wrong provision of the law. By so doing she arrived at an exorbitant and unreasonable quantum on instructions fees. The judge has jurisdiction and discretion to deal with the matter.

31. Considering that what was before Court as pointed out above was an application instructions fees claimed on Item -1- which applicant objected, to defend an application should have been under **Schedule VII** paragraph -5- which provides:-

***“On any application, Notice of Motion, Chamber Summons or execution proceedings, to include taking instructions to proceed or oppose, drawing application, engrossing and filing, Ksh.3000/-.”***

The applicant also objected to Item No. 5. The Respondent was claiming travelling to court on 23<sup>rd</sup> September, 2015 to file pleadings. Ksh.1400/- was awarded. This award was in error. **Schedule VII** Paragraph -6- the amount is paid when attendance is before a magistrate. It is provided:-

***“On any necessary application to or attendance on Magistrate in court or in Chambers, Ksh.1400.”***

The amount ought not to have been awarded for attendance at the registry to file pleadings. This is covered under Note -1- of **Schedule VII**. Item -6- which was opposed, the sum of Ksh.2000/- was in error. Under paragraph 6 above Ksh.1400/- is provided. This is the same with item -7- that is Ksh.1400/-. Item 9 the Court in its discretion awarded Ksh.1000/- per attendance. The amount should be Ksh.1000/- as he only attended one day i.e. 1<sup>st</sup> October, 2015.

32. For these reasons, I find that the application by the Applicant has merits. The bill of costs is reviewed and set aside. On item (1) on the bill Ksh.47,000/- is taxed off, item (6) Ksh.600/- is taxed off, item (7) Ksh.600/- is taxed off and item (9) Ksh.1000/- is taxed off. The total taxed off is Ksh.50,600/-. The bill of costs is taxed at Ksh.11,155. I award the costs of the application to the applicant.

***Dated and delivered at Kerugoya this 3<sup>rd</sup> day of March, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open court, Mr. Kamenju holding brief for Wanjiru for Respondent, applicant – absent, court assistant Naomi Murage this 3<sup>rd</sup> day of March, 2017.

**L. W. GITARI**

**JUDGE**