

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC MISC. CIVIL APPLICATION NO. 9 OF 2023

-
WILLIAM ODHIAMBO NYAMOLO.....
.....PLAINTIFF/APPLICANT

-VERSUS-

YUSTO OURU KISIA.....
.....DEFENDANT/RESPONDENT

-
RULING

Introduction

1. The Applicant, **Mr. William Odhiambo Nyamolo**, has approached this Honourable Court vide a **Chamber Summons** dated **20th June 2023**, brought under **Rule 11(1) & (2) of the Advocates (Remuneration) Order, Sections 1A, 1B & 3A of the Civil Procedure Act, and Articles 159 and 165 of the Constitution, 2010**, seeking to review, vary, and/or set aside the decision of the **Honourable Taxing Master** delivered on **30th May 2023** in respect of the Applicant's **Bill of Costs dated on 14th March 2023 ("Marked as WA04")** among other Orders .

2. The Reference is premised on the grounds contained in the **Supporting Affidavit of Winny Adhiambo Ochwal**, learned counsel for the Applicant, sworn on **20th June 2023**, wherein it is averred that the **Taxing Master erred in principle** in assessing the Bill of Costs, particularly by: Failing to appreciate that the **instruction fees and getting-up fees** ought to have been separately computed for both the **main suit and the counter-claim**; Misapplying the provisions of the **Advocates (Remuneration) Order, 2014**; and arriving at an award of **Kshs.85,200/=**, which was **inordinately low** and not reflective of the nature, scope, and complexity of the matter.
3. The Applicant contends that the taxation as carried out was **contrary to the Judgment delivered on 15th September 2022** in *Migori ELC No. 38 of 2019 (formerly Kisii ELC No. 415 of 2015 and Migori ELC No. 223 of 2017)*, wherein the Court had expressly awarded him **costs of both the suit and the counter-claim**.
4. The Respondent, though duly served with the Reference, did **not file any response or submissions** in opposition.

Submissions by the Applicant

5. In his written submissions dated **23rd October 2023**, the **Applicant** reiterated that the **Taxing Master erred in principle** and exercised her discretion wrongly, thereby arriving at an **inordinately low award of Kshs.85,200/=**.

6. The Applicant submitted that the Taxing Master **failed to appreciate the nature and complexity of the suit**, which involved both a **main claim and a counter-claim**, and which proceeded to **full hearing and judgment**. It was therefore erroneous, in the Applicant's view, for the Taxing Master to **disallow instruction fees on the counter-claim**, since under the **Advocates (Remuneration) Order, 2014**, a counter-claim is treated as a **separate and distinct suit** for purposes of costs.
7. The Applicant further contended that the **Taxing Master misdirected herself** by failing to award **getting-up fees**, notwithstanding that the matter proceeded to hearing. Under **Paragraph 2 of Schedule 6** of the Advocates (Remuneration) Order, getting-up fees are **automatically payable** where a case is prepared for hearing and is not settled before trial.
8. The Applicant also faulted the Taxing Master for **taxing off items relating to perusal, drawing, making copies, and service**, which are explicitly recognized as **chargeable items** under **Schedules 6 and 7** of the Remuneration Order. He argued that these items represented **substantial and necessary work** done in the conduct of the case and ought not to have been excluded.
9. The Applicant relied on the decisions in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR** and **Republic v Minister for Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others [2006] eKLR**, to emphasize that while the discretion of a Taxing

Master is respected, the Court must interfere where there is **an error of principle** or where the award is **manifestly low** as to occasion injustice.

10. In conclusion, the Applicant urged the Court to **set aside the Ruling and Certificate of Costs** issued on **30th May 2023** and to either **substitute it with a proper assessment** or **remit the Bill of Costs** for fresh taxation before a different Taxing Officer, with **costs of this Reference** awarded to him.

Issues for Determination

11. Upon considering the **Reference**, the **Applicant's submissions**, and the **record of taxation**, the Court is of the view that the following issues arise for determination:
- a) **Whether this Court should interfere with the decision of the Taxing Master dated 30th May 2023, and the principles governing such interference.**
 - b) **Whether the Taxing Master erred in principle in assessing the Applicant's Bill of Costs dated 14th March 2023, particularly in relation to instruction fees, getting-up fees, and other disallowed items.**
 - c) **Whether the Applicant is entitled to the reliefs sought in the Reference, including the setting**

aside or re-taxation of the Bill of Costs, and who should bear the costs of this application.

Analysis and Determination

Issue No. 1: Whether this Court should interfere with the decision of the Taxing Master dated 30th May 2023, and the principles governing such interference

12. It is now well settled that the jurisdiction of this Court when dealing with a reference from the decision of a Taxing Master is **supervisory, not appellate**. The Taxing Officer exercises a **judicial discretion** under the **Advocates (Remuneration) Order**, and such discretion will not be lightly interfered with unless it is demonstrated that the decision was **based on an error of principle**, or that the amount awarded was **manifestly excessive or inordinately low**, thereby amounting to a miscarriage of justice.
13. In **Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**, the Court of Appeal held that: *“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.”*
14. Similarly, In **Arthur v Nyeri Electricity Undertaking [1961] EA 497**, the predecessor of this Court said at page 492 paragraph 1: ***“where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers***

are particularly fitted to deal and the court will interfere only in exceptional cases”. (emphasis by Court)

15. The same position was reaffirmed in **Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR**, the Court emphasized that matters of taxation fall squarely within the province of the Taxing Master, and that the High Court must be **slow to interfere** unless the discretion was **improperly exercised**, resulting in **misdirection or manifest injustice**. The Court stated that: ***“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so the High Court upon a reference will be slow to interfere with them.”***

-

16. Therefore, the burden rests squarely upon the **Applicant** to demonstrate, with particularity, that the Taxing Master **misapplied the law, took into account irrelevant factors, omitted relevant considerations, or adopted a wrong schedule or paragraph** under the **Advocates (Remuneration) Order**. In the present case, the Applicant contends that the Taxing Master failed to apply the correct principles in disallowing instruction fees on the counter-claim and other chargeable items. The Court must, therefore, first determine whether the impugned taxation was indeed tainted by **error of principle** to justify interference.

Issue No. 2: Whether the Taxing Master erred in principle in assessing the Applicant's Bill of Costs dated 14th March 2023

17. The Applicant's primary contention is that the **Taxing Master erred in principle** by disallowing key items in the **Bill of Costs**, particularly **instruction fees on the counter-claim, getting-up fees**, and other items for **perusal and drawing of pleadings**, all of which are expressly provided for under the **Advocates (Remuneration) Order, 2014**. It was argued that the Taxing Master's assessment of **Kshs.85,200/=** was **inordinately low**, arbitrary, and failed to reflect the scope and complexity of the work done.
18. The Applicant submitted that since the Judgment in *Migori ELC No. 38 of 2019* expressly awarded him **costs of both the main suit and the counter-claim**, the Taxing Master was bound to treat each component separately, including distinct **instruction fees** and **getting-up fees** for the counter-claim. The failure to do so, it was argued, amounted to a **misdirection in law** and a denial of fair remuneration.
19. It's important at this Juncture for the court to take a moment and refer to the Judgement delivered in ***Migori ELC No. 38 of 2019* on 23rd August 2022** at Page 7 of the Judgement the court in the last Paragraph states as follows and I quote **"The Plaintiff is awarded costs of this suit and Counterclaim to be borne by the Defendant"**
20. The law on this issue is well settled in **Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4**

others [2014] KEELC 214 (KLR) at Paragraph 57 O. A. Angote stated that: *“A Counter-claim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff’s claim. A Counter claim is therefore in all respects a suit by the Defendant.”*

21. Similarly In the English case of **Amon vs Bobbet [1889] 22 Q.B.D. 543** in it was held as follows: *“That for purposes of taxation the claim and Counter-claim must be treated as independent action; that the costs of the Counter- claim followed the ordinary rule as to costs and that the Plaintiff was entitled to have the costs of his defence to Counter-claim taxed on the High Court scale.”*
22. These authorities make it clear that a counter-claim assumes the character of an independent suit, attracting its own **instruction fee** under the Advocates (Remuneration) Order. Accordingly, disallowing a separate instruction fee for the counter-claim particularly where costs were expressly awarded on both the main suit and the counter-claim amounts to an error of principle. However, the position is different in respect of getting-up fees, which are only payable where the matter has been fixed for hearing and sufficient preparation for trial is demonstrated.
23. On the issue of **getting-up fees**, this Court does not fault the Taxing Officer. As correctly stated in **Kagwimi Kang’ethe &**

Co Advocates v Nairobi Mamba Village Limited [2015]

KEHC 8276 (KLR), C. M. Kamau (as he then was) observed at paragraph 35 that: *“Evidently, the general principle is that a party is only entitled to getting-up fees if a matter has been fixed for hearing. If more than one suit proceeds separately, getting-up fees would be payable in all suits that have proceeded as such. However, if the suits are consolidated, getting-up fees are only chargeable once and if the matter is fixed for hearing. It is irrespective that such a matter does not proceed for hearing on the day that such matter had been set down for hearing. It is sufficient that an advocate has prepared to proceed with the trial on a particular day.”*

24. In light of the above, the entitlement to getting-up fees arises only where the matter has been fixed for hearing and actual preparation for trial is demonstrated. In the present case, while the Applicant asserts that the matter was heard, the record before the Taxing Master does not clearly show that the counter-claim was independently fixed for hearing or that substantial trial preparation specific to it was undertaken. The Taxing Officer therefore cannot be faulted for her cautious approach in disallowing that item.

Issue No. 3: Whether this Court should interfere with the Taxing Master’s discretion and grant the reliefs sought

25. Having found that the Taxing Master erred in principle in the assessment of the Applicant’s Bill of Costs specifically in failing to separately consider the instruction fee on the counter-claim the next question is whether this Court should interfere with that decision, and if so, to what extent.

26. It is trite that the decision whether or not to interfere with a Taxing Master's discretion must be exercised with caution. The Court does not sit on appeal over taxation but only intervenes where a clear error of principle or a manifestly unjust result has been demonstrated. This supervisory jurisdiction is intended to ensure that the taxation process remains fair, rational, and consistent with the Advocates (Remuneration) Order.
27. In **First American Bank of Kenya Ltd v Shah & Others [2002] 1 EA 64**, the Court held that where an error of principle is established, the proper course is normally to remit the Bill of Costs to the Taxing Officer for fresh taxation, unless the error does not materially affect the outcome or the record enables the Court to substitute its own assessment.
28. In the present case, this Court has found that the Taxing Master failed to apply the correct principles in relation to the **instruction fee on the counter-claim**, contrary to the authority in **Amon v Bobbett [1889] 22 QBD 543**. However, the Court finds no fault in the Taxing Master's approach to the **getting-up fee**, as the record did not demonstrate that the counter-claim was separately fixed for hearing. The error identified, therefore, relates solely to the treatment of the instruction fee.
29. Given that the Court's role is not to conduct a fresh taxation but to correct an error of principle, the appropriate remedy is to set aside the impugned taxation and remit the Bill of Costs dated **14th March 2023** for fresh taxation before a different

Taxing Officer, who shall take into account the directions of this Court regarding separate consideration of the main suit and the counter-claim.

30. As to costs, the general rule is that costs follow the event. However, considering that the error arose from the exercise of discretion by the Taxing Master rather than any fault on the part of the Respondent, this Court finds it just that each party bears its own costs of this Reference.

-

DISPOSITION

31. For the foregoing reasons, this Court finds that the **Applicant's Reference** dated **20th June 2023** is **meritorious**. The Applicant has demonstrated that the **Taxing Master's decision dated 30th May 2023** was affected by **error of principle**, particularly in the failure to treat the **counter-claim** as an independent cause for purposes of taxation and in the omission to properly apply the relevant provisions of the **Advocates (Remuneration) Order, 2014**.
32. Consequently, the **Ruling and Certificate of Costs** issued by the **Taxing Master on 30th May 2023** are hereby **set aside**. The **Bill of Costs dated 14th March 2023** shall be and is hereby remitted to the Taxing Master for reconsideration of Item of the said Bill of Costs. Each party shall **bear its own costs** of this Reference.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **31st** day of **October, 2025**.

-

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

N/A for the Applicant

N/A for the Respondent

Philomena W. Court Assistant

Original File Copy