

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MISC APP NO. E 050 OF 2023

**ANNE WANJIKU KAMAU (Legal representative o of the
Estate of Margaret Gacigi
Gecaga)**
APPLICANT

VERSUS

J M NJENGA & COMPANY ADVOCATES.....2nd
RESPONDENT

RULING

1. By Chamber Summons Application dated 20th July 2023 presented under Sections 1A, 3B, 3A of the Civil Procedure Act, Rule 11 of the Advocates Remuneration Order and Order 21 Rule 9A of the Civil Procedure Rules, 2020 the Applicant seeks the following orders-

- 1) THAT the decision of the Taxing Officer dated 6th July 2023 be set aside and taxed afresh by this Honourable Court
- 2) THAT in the alternative, the Honourable Court be pleased to order that the respondent's bill of costs be taxed afresh by another taxing master
- 3) THAT the costs of this Application be in the cause

2. The applicant is aggrieved that the taxing master taxed Bill of Costs dated 28th February 2023 at Kshs 41,502,693.24. She faults the decision of the taxing master on two main grounds that the taxing master erred to tax the Bill in the absence of supporting documents. Secondly, the taxing officer erred in his exercise of discretion in his computation of the instruction fee. Ultimately it is submitted that the Bill as taxed is exorbitant and unconscionable.
3. The respondent *vide* affidavit sworn on 14th October 2023 opposes the application. He defends the ruling and has submitted an affidavit lodged in the succession cause enumerating the assets of the estate of the deceased. It is averred that based on that list the approximate given by the taxing master is not exaggerated.
4. The Application was canvassed via written submissions, only the respondent filed submissions.
5. The Submissions of the respondent are a reiteration of his replying affidavit. It is submitted that the failure to attach the

supporting documents was not fatal as the Court called for and considered the parent file.

6. Further it is submitted that the Court did not err in exercising its discretion in valuing the property, as it was informed by the pleadings. Reference is made to the decision in Nairobi **Court of Appeal, Civil Appeal No.170 of 2010 Kipkorir, Titoo & Kiara Advocates v June Nduta Kinyua.**
7. It is submitted that whether the matter was concluded is not an issue in determining the instruction fee and reference made to the decision in **Joreth vs Kigano & Associates 2002 1 EA 92**

ANALYSIS AND DETERMINATION

8. Having regard to the foregoing, the issue for determination is whether this Court should set aside the decision of the taxing officer and what if any will be the consequential orders?
9. In **Chande & Another v Kwale & 3 Others [2025] KECA 688 KLR**, the Court of Appeal reiterated the grounds upon

which a Judge may interfere with the taxing officer's decision as set out by the Supreme Court in **Non-Governmental Organization Board V EG & 5 Others (Petition (Application) 16 of 2019) [2023] KESC 102(KLR) (CIV)** as hereunder-

[21] A certificate of taxation will be set aside, and a single judge can only interfere with the taxing officer's decision on taxation if

- (a) there is an error of principle committed by the taxing officer;**
- (b) the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy; (and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).**
- (c) the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and**
- (d) the award proposed is so far as practicable, consistent with previous awards in similar cases.**

To these general principles, I may add that;

- i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,**

- ii. **Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,**
 - iii. **The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes.**
10. As is evident from the ruling the taxing officer called for and referred to the parent file when taxing the Bill. The failure to attach documents was therefore not fatal.

11. The 2nd issue is whether the taxing officer erred in the calculation of the instruction fee. In arriving at the value of the Estate the taxing officer specifically stated that he had deduced the value of the estate from the assets enumerated in the parent file. The Supreme Court in the decision of **Kenya Airports Authority v Otieno Ragot & Company Advocates** [2024] KESC 44(KLR), states thus

[76] As emphasized in the many authorities and submissions made to us, instruction fees ought to take into account the amount of work done by an advocate, the prevailing economic times and should be reasonable to a level where the charges should not impede access to justice. Odunga, J, (as he then was) in *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd*, HC Misc No 843 of 2013; [2014] eKLR expressed as follows:

“... the instructions fees ought to take into account the amount of work done by the advocate, and where

relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.”

Equally, the finding by Ojwang, J (as he then was) in *Republic v Ministry of Agriculture & 2 others ex parte Muchiri W’Njuguna & 6 others*, HC Misc 621 of 2000 [2006] eKLR, resonates with the matter at hand. He stated as follows:

“Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the Taxing Officer is to provide only for reasonable compensation for work done; the should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious; (Emphasis Supplied)

12. I am guided by the edict that this Court can only interfere with the discretion of the taxing officer in limited circumstances. Even then I am required to confirm that the exercise of discretion was within the law. In **Kenya Women**

Microfinance Ltd v Martha Wangari Kamau [2021]

eKLR, the court there stated: -

[57]. In Kenya Tourist Development Corporation v Sundowner Lodge Limited (supra), it was emphasized that an appellate court should pay some deference to decisions made in exercise of discretion but should not follow them slavishly.

Where there is a basis for upsetting such decisions, the court should do so if the findings in question are based on no evidence, or a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown demonstrably that the court acted on wrong principles in reaching a particular finding of fact

13. In addition, Justice Odunga J, (as he then was) in **Teacher Service Commission v Ex-parte Patrick M Njuguna [2013]** eKLR had this to say: -

In John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163 it was held that: "...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent

14. In **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W' Njuguna & 6 Others, HC Misc 621**

of 2000; [2006] eKLR, Ojwang J (as he then was) framed the requirement for judicious exercise of discretion as follows-

Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the Taxing Officer's discretion, must be specified cogently and with conviction....

It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed. (Emphasis Supplied)

15. The Court in exercise of its discretion must ensure that the rationale of the decision is evident and that it is balanced. In the circumstances, the Court as obligated to consider other factors in addition to the value of the Estate as stated by the Supreme Court, failure to do so in my mind would expose the decision to a successful charge of being arbitrary.

16. For this reason, I am inclined to set aside the decision of the taxing officer and remit the file back to a different officer to tax.

17. On costs each party will bear their own costs.

18. Parties at Liberty to appeal, party exercising their appeal to do so within 30 days.

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY IN
NAIROBI ON 20th DAY OF FEBRUARY, 2026.**

**P M NYAUNDI
HIGH COURT JUDGE**

In the presence of:

Ms. Wambuga for Advocate

Mr. Mugo for Applicant

Fardosa Court Assistant