



**Muthembwa v Muthembwa (Civil Appeal (Application)
329 of 2017) [2024] KECA 93 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 93 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 329 OF 2017
GWN MACHARIA, JA
FEBRUARY 9, 2024**

BETWEEN

COSMAS KYALO MUTHEMBWA APPELLANT

AND

EUNICE KYALO MUTHEMBWA RESPONDENT

(Being an application for reference from the decision of the Taxing Master made on 15th November 2023 in an appeal against the ruling and order of the High Court of Kenya at Nairobi (Mugo, J.) dated 25th November 2011) in HCCC No 2562 of 1994 (OS))

RULING

1. Following the withdrawal of this appeal at the behest of counsel for the applicant, this court constituted differently, by an order dated September 25, 2019, allowed the withdrawal with costs to the respondent.
2. The respondent then filed a Bill of Costs dated January 28, 2020, which was taxed on November 15, 2023 at Kes 433, 324.50. Being dissatisfied with the decision of the Taxing Master, the applicant filed this reference dated November 22, 2023. The applicant invoked the then rule 112 (2) & (3) of the [Court of Appeal Rules, 2010](#) (which is now rule 117 (1) & (3) of the [Court of Appeal Rules, 2022](#)).
3. The grounds in the reference as preferred by the applicant are:
 - i. That the sum taxed as Kes 412, 690/= in all circumstances, is manifestly excessive.
 - ii. That the court erred in law and in fact in finding that the bill of costs is unopposed yet the appellant filed written submissions dated June 22, 2023 in opposition thereto.
 - iii. That the appeal was withdrawn and it was not heard and determined by the Court on merit.
4. The respondent filed written submissions dated December 6, 2023. It was submitted that this appeal came up for hearing on September 25, 2019, but that the applicant withdrew it. It was contended



that the applicant had ample time before the date set for hearing to ventilate that the appeal would be withdrawn, but he did not inform the respondent's counsel on time who had prepared to proceed with the hearing. The respondent urged therefore, that the instruction fee of Kes 400,000/= was justified.

5. It was further submitted that the allegations that the bill of costs was opposed is untrue, since there is no record of the alleged submissions dated June 22, 2023; that the applicant was served with the bill of costs on July 21, 2023, and he was required to file the submissions within 7 days which he did not; thus, the respondent urged that his bill of costs stood unopposed, and that the reference herein is unmerited and it should be dismissed with costs.
6. The applicant did not file submissions despite receiving a hearing notice with instructions to file submissions.
7. I have considered the grounds in the reference, the submissions of the respondent and all the documents on record.
8. On the allegation that the applicant opposed the bill of costs, the court record speaks for itself. There is no evidence that the applicant filed any submissions in opposing the bill of costs. Undoubtedly therefore, the Taxing Master rightly found and held that the bill of costs was unopposed.
9. While it is true that the appeal was not heard and determined, but was instead withdrawn, the applicant contends that the sum taxed as Kes 412, 690/= was manifestly excessive in the circumstances. In reaching her findings, the Taxing Master referred to the provisions of paragraph 9 (2) of the third schedule under the *Court of Appeal Rules*, which gives the guiding principles that the Taxing Master should consider in exercising his or her discretion on instruction fees. It reads thus:

The fees to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.

10. Most importantly, the Taxing Master noted that the value of the subject matter in dispute which is ascertainable from the pleadings was Kes 27,242,505/=, and she reached the conclusion that the drawn instruction fees of Kes 400,000/= was reasonable.
11. I am of the view that the instruction fee of Kes 400,000/= was reasonable in the circumstances, more so having regard to the fact that the applicant had the opportunity to communicate his intention of withdrawing the appeal earlier, but he did not. Counsel for the respondent took instructions from his client, and he came to Court prepared to proceed with the appeal. I find no reason to interfere with the decision of the Taxing Master.
12. I have also considered the other items that were allocated respective costs, whilst others were rightfully taxed off. Those that were accordingly taxed were drawn to the scale, and I therefore find no reason to interfere with the decision of the Taxing Master. In so holding, I find solace in the case of *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board* (2005) eKLR for the proposition that a judge will not interfere with the discretion of the taxing officer unless the taxing officer erred in principle in assessing costs.



13. Further, in *Joreth Limited v Kigano & Associates* [2002] eKLR, Kwach, Shah & Bosire, JJ.A. outlined the principles a Taxing Officer should observe in exercising his/her discretion in assessing instruction fees as follows:

“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.”

14. I have not found an error in principle to warrant my interference with the discretion of the taxing master.

15. In the end, I find that the taxing master adopted the correct approach and applied the proper principles in reaching her findings. Conversely, the applicant has not presented any compelling material to justify my interfering with the discretion of the Taxing Master.

16. Hence, I find no merit in the reference dated November 22, 2023. I hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

G. W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

