



Lusasi (Suing as the Legal Representative of the Estate of Samuel Lusasi - Deceased) v APA Insurance Limited (Civil Application 18 of 2018) [2024] KECA 831 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 831 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 18 OF 2018
HA OMONDI, JA
JULY 19, 2024**

BETWEEN

ESTHER M. LUSASI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL LUSASI - DECEASED) APPELLANT

AND

APA INSURANCE LIMITED RESPONDENT

(Being an application from the Judgment and Decree of the High Court of Kenya at Kisumu (T.W. Cherere, J.) dated 23rd November 2017 in Civil Appeal No. 48 of 2011)

RULING

1. The application dated 23rd November 2022 is made pursuant to Rule 11 of the [Advocates Remuneration Order](#); and seeks that the decision of the taxing master dated 10th November 2022 as regards the applicant's bill of costs dated 28th July 2022 be set aside in terms of item No. 3 & 4; and this Court do re-tax the said items; in the alternative, that the bill of costs dated 28th July 2022 be remitted to the Taxing Master for re-taxation on the court's guidelines, more so on the instruction and getting up fees; and that cost of this reference be borne by the respondent. The application is supported by the affidavit of even date sworn by Peter Onyango Daniel, counsel for the applicant.
2. The applicant had filed Winam PMCC No. 518 of 2006 against the respondent; and judgment was entered in favour of the applicant. On appeal, the respondent took the firm position that they did not take over the business assets and liabilities of Pan African Insurance Company Limited and therefore were not liable for any judgment against their insured; the High Court found that the respondent was not liable to settle the declaratory judgment in Winam PMCC No. 518 of 2006. The applicant then appealed to this Court, as the judgment which had a very huge impact on the liabilities arising from the



acquisition of business between Pan African Insurance Company Limited and the applicant through her counsel pursued the appeal which succeeded, with costs being awarded to the applicant.

3. Thereafter, her advocate filed a party and party bill of costs dated 28th July 2022, for Kshs.8,037,443.58/-. The taxing master in her ruling dated 10th November 2022, taxed the applicant's bill of costs at Kshs.247,465.20/-. After going through the ruling on the bill of costs, the applicant's advocate lamented that:- the taxing master did not actually tax the applicant's bill of costs; that even if one was to assume the amount shown to be taxed on the applicants itemized bill of costs on instructions fees as an example was extremely low to amount to an error in principle; that the taxing master misapplied the law on the principles of taxation, and failed to appreciate the complexity of the matter, industry put, time taken and work done.
4. It is the applicant's contention that the award contradicts the spirit and principle of the Advocates Remuneration Order and Third Schedule of the *Court of Appeal Rules*, rule No. 111(1) and (2) with regard to fair and reasonable remuneration of the counsel in this matter; that the taxing master misdirected herself in taxing instruction fees of Kshs.150,000/- in view of the weight of the subject matter.
5. On 16th November 2022, the applicant's counsel wrote to the taxing master of this Court raising objections to the taxations; and seeking reasons for taxation of the applicants bill of costs to this effect:

“The above matter and ruling delivered on 10th November 2022 refers.

Kindly, favour us with the reasons for the taxation of item No. (3) in the appellant's bill of costs dated 8th July 2022”.

On 17th November 2022, the taxing officer sent a letter, indicating that the reasons for the decision on the bill of costs was contained in the ruling as a consequence.

6. Aggrieved by the response, the applicant's counsel filed the instant application for reference, saying this is a good case for the Court to interfere and set aside the taxation of the taxation master, particularly on the instruction and getting up fees; and re-tax it or remit the same for taxation on the court's guidelines.
7. There is no response filed by the respondent; and when the matter came up for hearing, neither the applicant nor the respondent had filed written submissions, although the hearing notice shows both parties were served, so I will just consider what has been filed.
8. The appellant filed a bill of costs dated 28th July, 2022 coming up for the amount in the bill is Kshs.8,037,443.58/- listing 19 taxable items. This taxation that stemmed the Judgment of this Court delivered on 27th May, 2022, where the appeal was allowed and costs awarded to the appellant.
9. The Taxing Officer identified the undisputed items as Items Nos. 1, 2, 5, 6, 7, 8, 12, 13, 15 and 16 which were taxed as drawn at a total of Kshs.10,633/=. I must point out that the schedule in the bill of costs, itemizing each service claimed has not been availed to me. The item that drew the greatest contestation was the instruction fees to lodge an appeal, which the appellant had proposed at Kshs.5,000,000/-, while the respondent proposed Kshs.100,000/=. The Taxing Officer guided by the provisions of Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules, 2022, indicated he would consider the nature of the appeal, the amount involved and the works involved, she also drew from the case of *Joreth Limited vs. Kigano & Another* [2002] E.A.92, which set out various factors to be considered in determining the instruction fee held thus:

“... From the Judgment what was upheld such that the judgment of the lower court was upheld (sic). The instruction fees as quoted is not justified and has not been properly



explained. The complexity has not been explained. I am satisfied that Item No. 3 should be taxed at Kshs.150,000/-”

10. In addressing getting up fees, the taxing officer drew from Paragraph 9(4) of the Third Schedule which states that:

Other costs shall subject to the provisions of paragraphs 10, 11 and be awarded in accordance with the scale set out below or, in respect of any matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.

Based on the foregoing; and also referring to provisions in the Advocates Remuneration Order, schedule 6 Paragraph 3 to the effect that the amount should be a third (1/3) of the instruction fees; she proceeded to tax getting up fees at Kshs.50,000/=.

11. Although the appellant laments that the bill of costs was not taxed at all, I note that other items in the bill are shown as taxed in the following manner: making 3 copies of the Notice of Appeal taxed at Kshs.60/- per paragraph 13 of the scale of costs; making 3 copies (188 folios), taxed at Kshs.11,280/- per paragraph 13 of the scale of costs; making 3 copies (36 folios) was taxed at Kshs.2,160/= per paragraph 13 of the scale of costs; for attending Court for Hearing, the taxing officer referred to Paragraph 18 of the scale of costs of the third schedule and taxed the same at Kshs.1,500/-; for attending Court for taxation, the Taxing Officer referred to Paragraph 15 of the scale of costs of the third schedule and to tax the same at Kshs.500/-; for disbursements, the Taxing Officer referred to paragraph 4(2) of the third schedule which states that:

“Receipts for all disbursements shall be produced to the taxing officer at the time of taxation”.

Consequently, she allowed the two items as per the receipts and taxed at a total of Kshs.9,550/-

12. The Taxing Officer also recognised the place of fees in connection with taxation costs as provided under Part 5 of the 2nd Schedule of the Court of Appeal Rule 20, acknowledging the provision for applying for the certificate of the result of taxation, at a fee of Kshs.500/- and Kshs.5 for each Kshs.100/- or part of the amount allowed excluding the fee. She thus stated:

“ This means that an amount equivalent to 5% of the total sum allowed upon taxation shall be added to the final sum. Thus 5% of Kshs.235,683/- is Kshs.11,784.20/-

Grand Total is Kshs.247,467,20/-.”

13. By a letter dated 16th November, 2022, the appellant requested for the reasons for the taxation of item No. (3) i.e. the instruction fee in the appellant’s bill of costs dated 8th July 2022. The taxing officer in a letter dated 17th November 2022, informed the appellant that that reasons for the Court’s decision were contained in the ruling.

14. The main bone of contention revolves around the instruction fees and the getting up fees. Did the taxing officer fail to tax the two items? Did she fail to adhere to the principles set out to guide courts in taxation of costs. In Kipkorir, Titoo & Kiara vs. Deposit Protection Fund Board [2005] eKLR, this Court held:

“ 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. In *Arthur vs. Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

“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”.

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur vs. Nyeri Electricity Undertaking* (supra) or where the taxing officer has overemphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji vs. Kanji Naran Patel* (No. 2), [1978] KLR 243. 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 particularly the matters specified in proviso (1) of schedule via (1), that would be an error in principle. And if a judge on reference from a 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 (see - *D’Souza vs. Ferrao* [1960] EA 602). The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji vs. Kanji Naran Patel* (No. 2) (supra).”

15. Paragraph 9(2) of the Third Schedule of the [Court of Appeal Rules](#) 2022 provides that:

“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 the person to bear the costs and all other relevant circumstances”.

What was the subject matter of the appeal? Unfortunately, the appellants did not avail to me the record of appeal to help me appreciate whether the appeal was more complex than the taxing officer perceived. In the absence of such vital information, then I can only glean from the ruling, that the taxing officer did in fact invoke this provision; and also drew from decided cases in applying the relevant principles and exercising her discretion.

16. As a matter of fact, the cases cited in the ruling also emphasize the principle that the taxing officer is endowed with discretion to increase or decrease instruction fees; and that in exercising such discretion, the taxing officer must act judiciously by taking into account relevant factors including importance of the case, the amount involved, the interest of the parties, the general conduct of the proceedings. On the face of the documents availed, I do not detect any error in law or any misapprehension of the principles applicable to warrant my interference with the discretion of the taxing officer.

17. Ultimately I find that the applicant has not presented any compelling material to justify my interfering with the discretion of the Taxing Officer. I hold that the taxing officer adopted the correct approach and applied the proper principles in reaching her findings. This reference dated November 22nd, 2023 lacks merit and is dismissed. I make no orders on costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

