



REPUBLIC OF KENYA



**Inchwara v APA Insurance Limited (Civil Application 17 of 2018)
[2024] KECA 1207 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1207 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 17 OF 2018
JM NGUGI, JA
SEPTEMBER 20, 2024**

BETWEEN

YUNES MORAA INCHWARA APPLICANT

AND

APA INSURANCE LIMITED RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu, (Cherere, J.) dated 23rd November, 2017 in HCCA No. 47 of 2011))

RULING

1. This is a reference against the taxation ruling dated 10th November, 2022 respecting the applicant’s bill of costs dated 28th July, 2022. The bill of costs was for a total of Ksh. 4,700,436. The Taxing Master, upon considering arguments by both sides, taxed it to a final figure of Ksh. 175,911. The applicant is aggrieved. She finds the amount too low and has enumerated seven grounds as follows:
 1. That the taxing master did not tax the applicant bill of costs dated 28th July, 2022 at all.
 2. That the amount awarded is extremely low to amount to an error in principle.
 3. That The award in taxed costs is not commensurate with work done.
 4. That the taxing master misapplied the law and principles of taxation.
 5. That the honourable taxing master failed to appreciate the complexity of the matter, industry put, the research involved, time taken and work done as submitted under item 3 & 4 of the bill of costs.
 6. 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.



7. That the taxing master misdirected herself in taxing instruction fees of Kshs 100,000/- in view of the weight of the subject matter.
2. It is readily obvious that all these grounds are really attacking the amount awarded for instructions fees, which, consequentially also affects the amount awarded for getting up fees. The applicant had proposed Ksh. 3,000,000 as instruction fees and Ksh.1,000,000 as getting up fees; the Taxing Master awarded Ksh.100,000 as instruction fees and Ksh. 33,333 as getting up fees.
3. Before me, the applicant has relied on the detailed supporting affidavit filed by the advocate and the written submissions dated 12th April, 2024. Both make it clear that the applicant is specifically aggrieved by the awards in items 3 and 4 in the bill of costs. These are the awards in instruction and getting up fees. The respondent did not file any submissions although I was persuaded that it was duly served with both the reference and the hearing notice.
4. As I understand it, the applicant's complaint is two-fold. First, he complains that the Taxing Master did not justify awarding the amount that she did. The applicant concedes that the Taxing Master found the amount proposed as instruction fees as too high; and the claimed complexity un-explained – but the applicant complains that the Taxing Master did not say why the figure of Ksh. 100,000 which is what the respondent had suggested was the correct amount to award.
5. Second, the applicant submits that she had placed before the Taxing Master sufficient material to explain the complexity of the case. In particular, the applicant submits that it was a misdirection for the learned Taxing Master to consider the damages payable to the applicant – Ksh. 123,000 – as an appropriate yardstick to determining the complexity and importance of the subject matter. This is because, the applicant submits, this was a declaratory suit in which the complex question of the legal relationship between Pan African Insurance Company Limited and APA Insurance Limited – and, in particular, whether the latter took over the liabilities of the former was an issue.
6. The applicant argues that this defining question required much research because of its complexity. The research required counsel to delve into the complex subjects of mergers, acquisitions and corporate liabilities in merger contexts. These legal questions, the applicant submits, had to be answered in order to present the Court with material to arrive at the findings that the Court did. The applicant complains that the Taxing Master ignored this complexity on which she had submitted. To demonstrate the complexity of the appeal, the applicant cites the lead decision by Tuiyott, JA where he describes the issue as “vexed” and as one that required the Court to determine whether the respondent was the successor of Pan Africa Insurance Company Limited.
7. The applicant relied on the celebrated *Joreth Ltd v Kigano & [2002] E.A. 92 Associates Civil Appeal No. 66 of 1999*, and a persuasive authority from the High Court to wit, *Seth Panyako v IEBC [2020] eKLR (Musyoka, J.)*.
8. The starting point for determining the issue is Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules, 2010. It 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 interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to be the costs and all other relevant circumstances.”



9. This paragraph, in essence, codifies the judicially developed principle enunciated in *Joreth Ltd Case* (supra). In that case, this Court stated:

“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 ascertained, 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 of matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

10. The question is whether in the instant case the learned Taxing Master, in awarding the instruction fee, misapprehended this prime directive to such an extent that one can objectively say that the award was so grossly inadequate as to attract interference by this Court. In making that determination, this Court must recall the exhortation in the famous *Premchand Raischand Limited & Another v Quarry Services of East Africa Limited & Another* [1972] EA 162, which was re-affirmed in the *Joreth Ltd Case* (supra) thus:

“The taxation of costs is not a mathematical exercise: it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”

11. Differently put, this Court can only interfere with the award by the learned Taxing Master if it can be shown that her decision was based on an error in principle or the fee awarded was manifestly excessive or inadequate to justify an inference that it was based on an error of principle.
12. Was that the case in the present case? With respect, I do not think so. I begin by noting that contrary to the applicant’s arguments, the learned Taxing Master justified her decision to award Ksh. 100,000. In doing so, it is not true that she solely based it on the fact that the amount at stake in the declaratory suit was only Ksh. 123,000. She definitely took that in to consideration – and rightly so – but it did not form the sole reason for her award. Indeed, if she had taken that (liquidated) award as dispositive factor in determining instruction fees, the amount awarded would have been much less than she actually awarded.
13. It is true that the appeal before the Court was not a run-of-the-mill declaratory suit. This one involved the knotted question of whether the respondent had taken over the liabilities of Pan African Insurance Company Limited, which was the insurer that had actually issued the policy over which the applicant was suing. This assuredly added a layer of complexity not present in a plain vanilla declaratory suit or appeal. However, at the end of the day, the instruction fees payable must be related back to the importance of the subject matter – and here, the subject matter’s value was objectively verifiable as the actual damages awarded to the applicant. That is not to say that the amount should have been treated as the liquidated subject matter; it is merely to say that at the end of the day there has to be a relationship between the value of the subject matter and the instruction fees awarded in a suit or appeal. To rule otherwise would provide perverse incentives for parties regarding the efforts they devote to legal causes as well as the choice of litigation.
14. In short, I am not persuaded that the Taxing Master committed any error that warrants a judge’s interference in her ruling dated 10th November, 2022. Consequently, the reference herein is dismissed. No costs will be awarded since the respondent did not participate in the proceedings.



15. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

