



Kimani ((Suing as an Administrator of the Estate of Henry Kimani Agonye)) v Gachoka (Civil Appeal (Application) 268 of 2018) [2024] KECA 1735 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1735 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 268 OF 2018
FA OCHIENG, JA
DECEMBER 6, 2024**

BETWEEN

**FREDRICK KAGIA KIMANI APPLICANT
(SUING AS AN ADMINISTRATOR OF THE ESTATE OF HENRY KIMANI
AGONYE)**

AND

DAMARIS WANJIKU GACHOKA RESPONDENT

(Being a reference against the ruling of the Taxing Master (Hon. J. N. Wambilyanga, (DR) at the Court of Appeal, Nairobi, made on 19th July 2024 in Civil Appeal No. 268 OF 2018)

RULING

1. By a letter dated 26th July 2024, the respondent filed a reference from the ruling dated 19th July 2024. The ruling was with respect to the party and party bill of costs dated 22nd January 2024. The respondent contended that the amount allowed by the taxing officer in respect of the instruction fees was manifestly inadequate.
2. The application was made pursuant to Rule 117(1), (3) & (4) of the Court of Appeal Rules.
3. The reference was dispensed with by written submissions.
4. In her written submissions in support of the reference dated 18th October 2024, the respondent submitted that there was an error of principle on the instruction fees. She faulted the taxing officer for failing to appreciate the nature, complexity, and importance of the matter the subject of taxation, and thereby taxing the quantum of instruction fees that was inadequately low.
5. The respondent pointed out that the value subject of the appeal was not ascertainable from the pleadings before the court, but the said pleadings showed the care expended, the number and length of papers perused, the nature and importance of the subject litigation, the interests of the



- parties, complexity of the matter, and other material circumstances and factors which were crucial in determining reasonable instruction fees.
6. The respondent submitted that the appellant appealed against the whole judgment, which touched on contract law, conveyancing, administrative law, commercial law, and civil law.
Therefore, her advocates analyzed all the land documents necessary from the 1950s to establish her case.
 7. While citing the case of *Mount Elgon Beach Properties Limited vs Mwanongo & Another* [2023] KECA 277 KLR, the respondent submitted that the taxing officer failed to lay down the minimum applicable fees from which discretion was drawn. She submitted that although the taxing officer stated the factors to be considered in taxation, she did not explain how those factors were relevant to the subject matter to justify her discretion. The respondent submitted that instruction fees be taxed at Kshs. 800,000 as drawn in the bill of costs.
 8. The respondent further submitted that there was an error of principle on getting up fees. She submitted that she was entitled to fees for getting up fees and preparing for the appeal at a minimum of 1/3 of the instruction fees as provided for under Schedule 6 para 2 of the Advocates (Remuneration) (Amendment) Order, 2014.
 9. The respondent relied on the case of *Lucy Waithira & 2 Others vs Edwin Njagi T/A E. K Njagi & Company Advocates* [2017] eKLR in which the parties had appealed against the ruling of the High Court on a reference before that court, and the court held that fees for getting up was justified. She, therefore, faulted the taxing officer for failing to award her getting up fees.
 10. The respondent submitted that there was an error of principle on perusals of items 3, 9 & 15 as the taxing officer failed to award costs on the said items. She submitted that the items were drawn to scale at Kshs.50 and they ought to be taxed as drawn. She prayed that the ruling by the taxing officer be set aside and the reference herein be allowed.
 11. Opposing the reference, the appellant submitted that Rule 117 is categorical in its pronouncement that a reference can only be filed based on matters of principle and cannot solely be based on questions of quantum.
 12. While citing the case of *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited & Others (No. 3)* [1972] E. A 162, the appellant submitted that since no value was attached to the subject matter, the taxing master in paragraph 6 of the ruling rightly considered the principles of taxation in awarding instruction fees at Kshs. 200,000.
 13. The appellant further relied on the case of *Thomas James Arthur vs Nyeri Electricity* [1961] E. A in submitting that the appellate court would not deal with questions that are solely of quantum and it would only interfere where the taxing officer has been found to commit an error of principle. He submitted that the fees for receiving and perusals, drawings, making copies, attendances, service, and disbursements were all drawn to scale.
 14. The appellant urged that this Court uphold the taxing officer's ruling as the respondent's claim was solely based on her discontentment with the quantum of costs awarded.
 15. I have carefully considered the reference, the submissions by the parties, the authorities cited, and the law. The issue for determination is whether or not there was an error of principle in the taxation ruling dated 19th July 2024.
 16. It is common ground that the taxing officer taxed the respondent's bill of costs dated 22nd January 2024 under Rules 113 and 116 of this Court's Rules.



17. In her ruling, the taxing officer upon reviewing the principles of taxation as provided for under Paragraph 9(2) of the Third Schedule, awarded the respondent Kshs.200,000 as instruction fees. She found that the drawn amount of Kshs.800,000 was excessive in the circumstances.
18. Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules provides that:
- “The fees to be allowed for instructions to appeal or 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.”
19. It is common ground that the value of the subject matter of the appeal herein was not discernible and therefore, the taxing officer was obliged to exercise her discretion in awarding instruction fees.
20. In the case of Peter Muthoka & Another vs Ochieng & 3 Others [2019] eKLR this Court held that:
- “It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.”
21. In making her decision, the taxing officer stated thus;
- “The amount proposed by the respondent under this item is Kshs. 800,000/=. The Appellant proposed that the same should be taxed at Kshs. 75,000/=. Both filed submissions which I have considered. As the taxing officer, I will consider the complexity of the matter, importance of the matter/ cause, the interest of the parties and the general conduct of the proceedings, this is because there was no value attached to the subject matter from the Judgment of the Court. In this case, I find that the amount proposed a bit high, I am therefore satisfied that item 1 should be taxed. at Kshs. 200,000/=.”
22. In the case of Mount Elgon Beach Properties Limited vs Mwanongo & Another, (supra), this Court held thus:
- “...He is not expected to just pluck a figure from the air but is expected to exercise discretion judiciously which means he has to do so in accordance with the laid down principles. The only way in which it can be shown that the laid down principles have been taken into account is by setting out not only the general factors to be considered, but also stating how the application of the said factors impacted on the exercise of the said discretion...”
23. In the circumstances, I find that the taxing officer followed the laid down principles and therefore, she exercised her discretion judiciously in taxing the instruction fees.



- 24. The taxing officer did not award the respondent getting up fees as she noted that the award was discretionary and was only awarded in the High Court. The taxing officer held that the Third Schedule does not expressly provide for getting up fees, and the same is an element of instruction fees. I find that the appellant misled the court by relying on this authority as getting up fees in that case were awarded before the High Court and not by this Court. I therefore, uphold the taxing officer’s decision on the same.
 - 25. In taxing off items 3, 9 and 15, the taxing officer relied on the provisions of paragraph 9(3) and held that receiving and perusals were works in connection to the appeal. The taxing officer also outlined the provisions of the law she relied upon in taxing items on drawings and making copies, attendances, service, and disbursements. The respondent has not shown how the taxing officer fell into an error of principle by taxing these items in the manner in which the bill of costs was taxed.
 - 26. Furthermore, the respondent has not demonstrated that the taxing officer failed to apply the correct principles or that she applied the wrong principles in her ruling.
 - 27. In the result, I find that the reference herein lacks merit. It is dismissed with costs to the appellant.
- Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

