



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Tribe Hotel Limited (Civil Appeal (Application)
282 of 2017) [2024] KECA 1749 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1749 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 282 OF 2017
FA OCHIENG, JA
DECEMBER 6, 2024**

BETWEEN

JOSPHAT COSMAS ONYANGO APPLICANT

AND

TRIBE HOTEL LIMITED RESPONDENT

(Being a reference against the ruling of the Taxing Master (Hon. L. D. Ogombe, (DR) at the Court of Appeal, Nairobi, made on 9th November 2022 in Civil Appeal No. 282 OF 2017)

RULING

1. By a notice of motion dated 8th June 2023, the applicant sought leave of this Court to make a reference against the ruling of the taxing master of this Court dated 9th November 2022. By its ruling dated 5th July 2024, this Court allowed the application. The court directed the applicant to lodge a reference against the ruling within seven days, from the date of the ruling.
2. The applicant then filed the application herein dated 12th July 2024. The application is brought pursuant to Rules 44, 45 and 117 of the Court of Appeal Rules, the Third Schedule of the Court of Appeal Rules, Section 3 of the *Court of Appeal (Organization and Administration) Act*, and Article 159(2)(d) of the *Constitution*.
3. The applicant prays for the following orders:
 - a) That the decision of the Taxing Officer as evidenced in the Taxation Ruling delivered by Hon. L.D. Ogombe (DR) in Nairobi Court of Appeal Number 282 of 2017 with respect to items 1, 6, 12, 19, 23, and 25 in the bill of costs dated 28th June 2022 be set aside and the same be taxed afresh by this Honourable Court.



- b. That in the alternative, the Honourable court be pleased to order that the respondent's bill of costs dated 28th June 2022 with respect to items 1, 6, 12, 19, 23, and 25 be taxed afresh by another Taxing Officer.
 - c. That the costs of this application be provided for."
4. The application was based on the following grounds:
1. A Ruling on taxation of the Party to party Cost dated 28th June 2022 was delivered by Hon. Ogombe on 9th November 2022 over an interlocutory appeal involving an employer and an employee dispute; where the interlocutory appeal was with respect to the Employment and Labour relations Court holding the Directors of the respondent in contempt of court Orders.
 5. That in rendering the ruling, the taxing master was misguided to take the amount involved in the appeal as Kshs. 18,657,924- albeit the fact that the appeal was not with respect to the substantive suit which at the time was pending adjudication in the Employment and Labour relations Court and which Judgement was delivered by Justice Stella Rutto on 17th May 2024 in favour of the Claimant for the sum of Kshs. 2,291,301- and which Judgement is once again subject to appeal by the respondent.
 6. The learned Taxing Officer erred in law by failing to take note that the Advocate's instructions were to appeal against the Ruling of the Hon. Lady Justice Monica Mbaru of 6th April 2017, in finding the respondent's directors in contempt of Court, which was an interlocutory appeal of a non-monetary nature.
 7. Instead, the Taxing Officer allowed instruction fees at Kshs. 400,000=, basing the same on the value of the subject matter of the main suit ELRC No. 417 of 2016 between the parties herein, being Kshs. 18,657,924=; and not on the issue concerning the interlocutory appeal; that was contempt of court.
 8. That unfortunately, albeit the applicant filed submissions dated 26th October 2022 in opposition to the Party-to-party Bill of costs, the same was not considered by the taxing master in her rendition where in paragraph 6 of her ruling she states that; "The Bill of Costs is unopposed".
 9. Further, the Learned Taxing Officer erred in law and fact by failing to assess the instruction fees accordingly, especially in light of the fact that the applicant herein never participated in the appeal.
 10. Since the applicant never participated in the appeal, the complexity, nature of the appeal, and responsibility and skill of counsel were greatly reduced; in addition to the appeal not having any specific importance to the general public, it raised no novel issue. This therefore ought to have been reflected in the assessment of the instruction fees allowed; but did not.
 11. In the circumstance, the Learned Taxing Officer overestimated the work done by the Advocate on behalf of the respondent thus arriving at a manifestly high award of Kshs. 400,000= under Item 1- instruction fees.
 12. Thus, the award contradicts the spirit and principle of the Advocates Remuneration Order with regard to fair and reasonable remuneration of advocates, in addition to the Third Schedule of the Court of Appeal Rules, 2022.
 13. In addition, there was an error in principle on the part of the Learned Taxing Officer in allowing items numbers 6, 12, 19, 23, and 25; where the respondent never indicated any number of folios, and thus it is surprising as to how that calculation was done without the taxing master indicating the number of folios.



- 14 Therefore, the Learned Taxing Officer misdirected herself by allowing items 6, 12, 19, 23, and 25 as indicated under paragraph 8 above since there was no basis or documentation in support of the awards.
- 15 Consequently, it is in the interest of fairness and indeed justice that this application is allowed as prayed.”
- 16 The application was further supported by the applicant’s affidavit sworn on 12th July 2024 in which he reiterated the grounds on the face of the application.
- 17 There was no response from the respondent.
- 18 The Court directed that the application would be dispensed with by written submissions. The parties were served with the hearing notice with these instructions on 25th October 2024, at 11:08 a.m. The respondent did not file their written submissions.
- 19 In his written submissions dated 14th October 2024, the applicant submitted that the award of Kshs. 400,000 as instruction fees was erroneous, since the appeal did not have any monetary value. He referred the Court to paragraph 9(2) of the Third Schedule of this Court’s Rules, on the principles to be considered by the taxing officer to include the nature of the appeal, importance and difficulty, interests of the parties, and the conduct of the parties.
- 20 The applicant pointed out that the nature of the appeal being, contempt of court, and the fact that the applicant did not participate in the appeal, thus because it was undefended, the same could not warrant such an excessive amount as instruction fees.
- 21 While citing the case of Otieno, Ragot & Company Advocates vs Kenya Airports Authority [2021] eKLR, the applicant submitted that since the value of the appeal was not ascertainable, the taxing officer ought to have exercised discretion in assessing the instruction fees, by taking into account, the work done by counsel, the nature and importance of the matter, and the general conduct of the proceedings.
22. The applicant further relied on the case of First American Bank of Kenya vs Shah & Others [2002] 1 E.A, in submitting that there was an error of principle in the taxation of instruction fees and the same should be set aside, and taxed afresh by another taxing officer.
- 23 As regards items 6, 12, 19, 23 and 25, the applicant submitted that there was an error in principle as the taxing officer allowed the same as drawn yet the respondent did not indicate the number of folios that informed the basis of the award. The applicant further pointed out that the respondent did not comply with paragraph 3(2) (c) of the Third Schedule of this Court’s Rules which mandates that a certificate be filed, stating that the number of folios is correct. He urged that the application be allowed as prayed.
24. I have carefully considered the application, the affidavit in support thereof, the applicant’s submissions, the authorities cited, and the law. The issue for determination is whether or not the application is merited.
- 25 It is common ground that the reference herein emanated from the judgment dated 23rd February 2018 in which the respondent had appealed against the ruling of the trial court dated 6th April 2017. In the ruling, the directors of the respondent were held in contempt of court. On appeal, the orders of the trial court were set aside with costs. This is what prompted the respondent to file a party and party bill of costs for taxation.



26 It is evident from the application that the instruction fees sought in the bill of costs was based on the subject matter in the main suit before the trial court. However, the matter before this Court on appeal was on the contempt of court ruling, not the subject

matter of the main suit. The learned taxing officer in her ruling dated 9th November 2022 held thus;

“I have considered the authorities, Judgment of the Court, and amount in dispute. This Bill of Costs is not opposed. The Respondent who shall bear these costs is an individual. Under the circumstances, I am satisfied that Kshs.400,00000 is sufficient as instructions fees. Balance is taxed off.”

27 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.”

28 In this case, the appeal was not based on any specific amount of money and it was not opposed. The taxing officer ought to have exercised her discretion in awarding the instruction fees, and not relied on the amount in the main suit.

29 By failing to identify the correct subject matter in the taxation, the taxing officer fell into an error of principle. Similarly, assigning an incorrect value to the subject matter also represented an error of principle. In the case of *Arthur vs Nyeri Electricity* [1961] EA 492 the court held that:

“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 intervene only in exceptional cases.”

30 I find that this is an exceptional case as the taxing officer considered the substantive issue in the main suit rather than the interlocutory appeal against a ruling on contempt of court. Therefore, the basis of the award was wrong. In the case of *Kamunyori & Company Advocates vs Development Bank of Kenya Limited* [2015] KECA 595 KLR, this Court held that:

“It is now an accepted principle that a Judge will normally remit the matter to the Taxing Officer for reconsideration where there is an error of principle. *Spry, Ag. P. held in Nanyuki Esso Service vs. Touring Cars Ltd* [1972] EA 500 that an error of principle can be inferred where an award is manifestly excessive unless, in the opinion of the Judge, it has not materially affected the assessment.”

31 The Supreme Court in the case of *Non-Governmental Organizations Coordination Board vs EG & 5 Others* [2023] KESC 102 KLR stated that:

“A certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer’s decision on taxation if:

a. There was an error of principle committed by the taxing officer.



- b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy;(and conversely, if the award was so manifestly deficient as to amount to an injustice to one party).
- c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and 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).
- d. The award proposed was so far as practicable, consistent with previous awards in similar cases.
- e. There was 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.
- f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically.
- g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes.”

32 In the circumstances, I find that the taxing officer erred in principle in her decision as to what the subject matter of the appeal was and the value of the subject matter thereof. In the event, that calls for this Court's interference. Therefore, I set aside the taxation and remit the Bill of Costs for taxation afresh. I further direct that the fresh taxation be conducted by a taxing officer other than Hon. L. D. Ogombe.

33 As costs follow the event, the respondent shall bear the costs of this reference.

Orders accordingly.

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

F. OCHIENG

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JUDGE OF APPEAL

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

Signed DEPUTY REGISTRAR.

