



Simon Kitalei Kachapin & 2 others v Joel P. Arumonyang & another (Civil Application 64 of 2016) [2021] KECA 36 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 36 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 64 OF 2016
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

SIMON KITALEI KACHAPIN & 2 OTHERS APPELLANT

AND

JOEL P. ARUMONYANG & ANOTHER RESPONDENT

RULING

1. Before this Court is an application dated 30th October 2020 brought by the firm of Gitonga Mureithi & Company Advocates, the applicant herein, under rules 42 and 112 of the *Court of Appeal Rules*. The applicant seeks orders that: the ruling and orders of J. Wambiliyanga, Deputy Registrar, delivered on 26th October 2020 be set aside; the bill of costs dated 1st October 2019 in Kisumu Court of Appeal Civil Appeal No. 65 of 2016 be remitted back for taxation before a different taxing officer, or in the alternative it be taxed in the sum of Kshs.913,500/= and a certificate of taxation be issued, and costs to be provided for.
2. The contested ruling relates to an advocate/client bill of cost filed by the firm of Gitonga Mureithi & Company Advocates who represented the appellants in an appeal, Civil Appeal No. 64 of 2016, filed at the Court of Appeal at Eldoret. By an order of the Court, the appeal was withdrawn by consent under rule 96(5) of the Rules for reason that the same had been overtaken by events, necessitating the filing of an advocate/client bill of costs by the firm in the central registry of the Court.
3. The bill was taxed resulting in the impugned ruling of the taxing officer, J. Wambiliyanga, in which she struck out the bill because the applicant had also represented the appellants in a related case, Civil Appeal No. 65 of 2016 and a similar advocate/client bill of costs was taxed. Therefore, taxing the same would amount to duplication, she held.
4. Aggrieved by the ruling, the applicant has lodged a reference to this Court. The affidavit in support of the application is sworn by Stephen Gitonga, an advocate practicing as such in the applicant's



firm. The grounds upon which the application is based can be summarized as follows: Firstly; that the Deputy Registrar misdirected herself in consolidating the two cases at taxation stage yet the same were distinct as the pleadings prepared were different and, there was no order of consolidation by this Court. Secondly, that allowing a similar bill of costs in Civil Appeal No. 65 of 2016 in the sum of Kshs.913,500/= and disallowing one in Civil Appeal 64 of 2019, a separate matter, on grounds that the two were related has no legal underpinning. Lastly, that the taxing officer had no jurisdiction to consolidate the two matters and allow a bill of costs on one for both cases.

5. In the applicant's submissions dated 29th April 2021, the applicant reiterates the grounds as set forth in the application and argues that the taxing officer has a duty to interrogate each bill separately notwithstanding any similarities between the two matters. Therefore, the applicant submits that it is in the interest of judicial time that the amount taxed in Kisumu Miscellaneous Appeal No. 65 of 2019, Kshs.913,500/=, be adopted for this matter but without prejudice to an alternative order that the bill be remitted back for taxation.
6. I have carefully considered the reference, the affidavit in support, the submissions filed as well as the law. The reference is unopposed as the respondent has not filed a response to it.
7. In the instant application, the applicant in seeking my intervention has invoked rule 112 of the Rules of the Court which provides:

“(1) Any person who is dissatisfied with a decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require.”
8. In making the impugned ruling the Deputy Registrar as the taxing officer was exercising an unfettered discretion, nevertheless she was enjoined to exercise it judicially. On a reference to a judge from the taxing by the taxation officer, it is trite law that a judge ought not to interfere with such discretion of the officer unless the taxing officer misdirectedhimself/herself on a matter of principle. See. *Joreth Limited v Kigano & Associates*; and *Kipkorir, Too & Kiara Advocates v Deposit Protection Fund Board*.
9. In her ruling, the taxing officer struck out the applicant's bill of costs since the firm had represented the appellants in a similar case, Civil Appeal No. 65 of 2016, and the same advocate/client bill of costs was taxed. Hence, taxing the same would amount to duplication. The applicant does not contest quantum as the same was not awarded and this would automatically offend the provisions of rule 112 (2). However, he challenges the way the taxing officer pronounced herself in the matter before her.
10. In *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited*, this Court held that:

“The issue whether an advocate-client relationship exists in taxation of a bill of costs between an advocate and his/her client is core. The jurisdiction is conferred on the taxing officer by law. It is derived from the Advocate Act and the Advocate Remuneration Order.

The taxing officer sits in taxation as a judicial officer. His or her task is to determine legal fees payable for legal services rendered.” See also *Taparn v Roitei*.
11. I agree with the applicant that the taxing officer went outside her scope of jurisdiction to consolidate the two matters: Civil Appeal No. 64 of 2016 and Civil Appeal No. 65 of 2016 at the point of taxation. There were two separate matters, and the advocate was entitled to raise two separate advocate/client bills of costs, considering that the two appeals were filed separately and on different instructions. The taxing officer should have dealt with each matter distinctively and with no reference to the other. Once she established that there existed advocate/client relationship between the parties in each of the matters, then her core mandate was to tax the bill of costs and no more.



12. I shall not deal with the ruling regarding taxation of the bill of costs in Civil Appeal No. 65 of 2016 as the same is not contested. It is also not the subject matter of the reference before me.
13. In the foregoing, I find that the taxing officer exercised her discretion improperly. Consequently, I set aside the impugned ruling and order that the advocate/client bill of costs, the subject of this ruling, be remitted back for taxation before any taxing officer of this Court apart from J. Wambilyanga, DeputyRegistrar.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

