



REPUBLIC OF KENYA



Mwangi & 20 others v Barclays Bank of Kenya Limited & another (Petition 25 of 2016) [2022] KEELRC 13099 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 25 OF 2016
MA ONYANGO, J
NOVEMBER 3, 2022**

BETWEEN

GLADYS MUTHONI MWANGI & 20 OTHERS PETITIONER

AND

BARCLAYS BANK OF KENYA LIMITED 1ST RESPONDENT

BARCLAYS AFRICA GROUP LIMITED 2ND RESPONDENT

RULING

1. Before me, for determination is the Petitioner's Chamber Summon Application dated November 11, 2021. It seeks the following orders:
 - a. That the Honourable Court be pleased to set aside the Deputy Registrar's Ruling on the taxation of the Party to Party Bill of Costs dated April 12, 2021 at Kshs 484,100.00 delivered on October 29, 2021.
 - b. That this Honourable Court be pleased to tax or refer the Party and Party Bill of Costs dated April 12, 2021 before another Deputy Registrar to Tax in accordance with the law.
 - c. That the costs of the referenced be awarded to the Applicant.
2. This Application is premised on the grounds that:-
 - a. The Deputy Registrar erred on taxation of the Party to Party Costs for the Applicant since she relied on schedule 6(1)(j)(ii) instead of Schedule 6(1)(b)
 - b. The Taxing master having committed errors in principle, the Honourable Court has jurisdiction to interfere with its Ruling on assessment of the Party to Party Costs.
 - c. The Taxing Master awarded costs which are manifestly low which amount is 0.2% of the award given to the Petitioners.



- d. The Deputy Registrar erred in not applying the principles set out in the *Truth Justice & Reconciliation Commission v Chief Justice of the Republic of Kenya & Another* (2014) eKLR
 - i. That a Taxing Master should consider the value of the subject matter and,
 - ii. That a Taxing Master should not award costs that is manifestly excessive.
3. The application is further supported by the affidavit of Rachel Gitau, the 5th Petitioner herein sworn on November 11, 2021.
4. In response to the application the Respondent filed a Replying Affidavit deponed by Vaslas Odhiambo, in-house counsel for the 1st Respondent, on December 15, 2021 in which he avers that the Petitioners' reference Application lacks merit as the Deputy Registrar properly exercised her judicial discretion in taxing the Bill of Costs.
5. The Affiant avers that this Court is barred from hearing the instant Application by the doctrine of functus officio following its Orders issued on November 17, 2021.
6. Mr Odhiambo depones that this Court lacks jurisdiction to hear and determine the Reference Application given that Petitioners failed to lodge a notice of objection to the taxation of the Bill of Costs in the Ruling on Taxation as required under Rule 11(1) of the *Advocates (Remuneration) Order, 1962* (the "1962 Order").
7. He further depones that the Reference Application is vague and ambiguous as to which taxed items the Petitioners dispute as it seeks a blanket order to set aside the entire ruling on taxation.
8. Mr Odhiambo depones that there was no error on the part of the Learned Deputy Registrar as alleged by the Petitioners/Applicants and that proper provisions of the law were applied in arriving at a legally sound determination. That the allegation that the Petitioners were awarded party and party costs that were manifestly low is misplaced and untenable.
9. It is the Respondent's position that the instant application has been overtaken by events, the Respondents having paid the entire taxed amount. The Respondents urged this Court to find the instant Application devoid of merit and to dismiss it with costs to the Respondents.
10. The application was disposed of by way of written submissions.

Petitioners'/Applicants' Submissions

11. The Petitioners submitted that this Court is clothed with the jurisdiction to hear and determine the reference filed by dint of the provisions of Rule 11(2) of the *Advocates Remuneration Order* and thus the reference is properly before this Court for determination.
12. On the issue of instruction fees, the Petitioner submitted that the Learned Deputy Registrar erred by relying on the wrong rule as she ought to have used Schedule 6(1)(b) thus she arrived at a wrong figure under the head.
13. The Petitioner further submitted that the Learned Taxing Master failed to exercise her discretion judiciously in taxing the instruction fees. To buttress this argument the Petitioners relied on the Court findings in the cases of *Republic v Minister of Agriculture, Ex Parte Samuel Muchiri W'Njuguna* (2006) eKLR, *Ramesh Naran Patel v Attorney General & Another* (2012) eKLR and *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* (2014) eKLR.



14. The Petitioners further submitted that the Learned Deputy Registrar failed to consider the complexity of this matter, the voluminous proceedings and documents that required extensive research and skill on the part of the Petitioners to be able to bring out the issues appropriately.
15. On getting up fees the Petitioners/Applicants urged this Court to be guided by the provisions of Paragraph 2 of Schedule 6 of the [Advocates Remuneration \(Amendment\) Order 2014](#) and enhance the same from Kshs 100,000/- to Kshs 1,333,333/-.
16. On the Respondent's argument that the application has been overtaken by events, the Petitioners maintain that the receipt of Kshs 484,100/- does not abrogate their right to seek remedy for an injustice that has been visited upon them. To buttress this argument the Petitioners relied on the case of [DK Law Advocates v Zhong Gang Building Material Co Ltd & Another](#) (2021) eKLR and the Ugandan Supreme Court decision in the case of [Rukidi v Iguru & Another](#) (1995 – 1998) 2 EA 318.
17. The Petitioners maintain that their application is properly before this Court and urged the Court to find merit in the same and allow the same as prayed. For emphasis the Petitioner relied on the case of [Ngatia & Associates v Interactive Gaming & Lotteries Limited](#) (2017) eKLR.

Respondents' Submissions

18. The Respondents submitted that the instant application is incompetent as the Petitioners/Applicants failed to adhere to the mandatory provisions as provided under Rule 11 of the [Advocates Remuneration Rules, 2009](#). To fortify this argument the Respondents relied on the case of [Macharia & Co Advocates v Arthur K Magugu & Another](#) (2012) eKLR where the Court in dismissing a similar application held that an application for referencing must specifically indicate the items objected to and reasons for taxation failing which it is defective.
19. The Respondents further submitted that this Court's jurisdiction is invoked by filing a competent Notice of Objection and in its absence as in this case, this Court lacks the requisite jurisdiction to hear and determine the instant Application. To buttress this argument the Respondents relied on the cases of [Machira & Co Advocates v Arthur K Magugu](#) (*supra*) and [Independent Electoral and Boundaries Commission v John Omollo Nyakongo T/A HR Ganijee & Sons](#) (2020) eKLR.
20. The Respondents further submitted that the reference application is devoid of merit as it fails to meet the principles as established in the case of [KANU National Elections Board & 2 Others v Salah Yakub Farah](#) (2018) eKLR for the review of a taxing master's decision.
21. On whether the assessment of Kshs 300,000/- for instructions fees was correctly done, the Respondent submitted that there is no justifiable reason given for this Court to interfere with the decision of the taxing master.
22. It is further submitted that the taxing master exercised her discretion judiciously and correctly applied the provisions of Schedule 6(1)(j)(ii) of the [Advocates Remuneration Order](#) since the petition herein sought prerogative orders. To buttress this argument the Respondents relied on the case of [Maina Njuguna v Westbuild Contractors Limited](#) (2014) eKLR where the Court held that where a party seeks prerogative orders taxation of costs must be on the basis of schedule VI(1)(j) of the [Advocates Remuneration Order](#) and not under Schedule VI(1)(b) which requires that costs be taxed on the basis of the subject matter.
23. The Respondent further referred this Court to the case of [Joreth Limited v Kigano & Associates](#) (2002) eKLR where it was held that the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement and if the same is



not ascertainable the Taxing Master is entitled to use his discretion to assess such instruction fees as he considers just.

24. The Respondents maintain that this Court can only interfere with the taxation where an applicant has demonstrated an error of principle, which is not the case in the instant Application. To fortify this argument the Respondents relied on the decision in *Republic v Ministry of Agriculture & 2 Others ex-parte Muchiri W’Njuguna & 6 Others* (2006) eKLR.
25. It is further submitted that the Petitioner did not demonstrate specific elements of complexity or novelty that would necessitate an increase of their instruction fees. It is on this basis that the Respondents maintained that the petition as filed was not complex to warrant any additional fees. To buttress this argument the Respondents cited the case of *Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna* (*supra*).
26. The Respondent further submitted that should this Court be convinced to review the taxing master’s ruling on getting up fees it should only award an additional Kshs 100,000/- noting the voluminous pleadings filed in this matter.
27. In conclusion the respondents urged this Court to find the reference application without merit and to dismiss it with costs to the Respondents.

Analysis and Determination

28. Having considered the Application dated November 11, 2021, the affidavits, the rival submissions and authorities relied upon by the parties, the issue for determination is whether or not there was an error on the taxing of the bill of costs herein to justify this Court’s interference with the decision of the Taxing Master.
29. As a general rule the Court will not interfere with the decision of a Taxing Master unless there exists an error in law or in principle in the assessment of costs. This was the holding in *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board* (2005) eKLR, where the Court of Appeal held that: -

“On reference to a Judge from the taxation by the Taxing Office,
the Judge will not normally interfere with the exercise of discretion by the Taxing Master unless the Taxing Master erred in principle in assessing the costs.”

Whether Instructions Fees were manifestly low

30. The Petitioner/Applicant claims that the costs as taxed by the Taxing Master under this head were manifestly low and that the Taxing Master erred by relying on Schedule 6(1)(b) and thus arrived at a wrong figure.
31. The Petitioners maintained that the learned Taxing Master failed to exercise her discretion judiciously in taxing the instructions fees as she clearly failed to take into account the complexity of the matter, the voluminous proceedings and documents that required excessive research and skills to clearly bring out the issues for consideration by the trial court.
32. In *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (1972) EA 162 the Court outlined the principles of taxation as follows: -
 - a. That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy
 - b. That a successful litigant ought to be fairly reimbursed for the cost he has had to incur



- c. That the general level of remuneration of Advocates must be such as to attract recruits to the profession.
 - d. So far as practicable there should be consistency in the award made and
 - e. The Court will only interfere when the award of the Taxing Master is so high or so low as to amount to an injustice to one party.”
33. Further, in the case of *Joreth Limited v Kigano and Associates* (2002) EA 92 the Court set out various factors that are to be considered in determining the instructions fees. These factors include the importance of the matter, general conduct of the case, nature of the case, time taken for its dispatch and the impact of the case to the parties.
40. I have considered the above authorities, the reasons for taxation as cited by the Taxing Master as well as the petition filed and the reliefs sought therein. It is clear from the pleadings that the Petitioners sought not only prerogative orders but also compensatory damages for the alleged unlawful and unfair redundancies.
41. The Taxing Master obviously by considering only the prerogative orders, and not the compensatory damages on the amounts awarded in the judgment. The taxing master misapprehended the nature of the suit which was the subject of the taxation thereby misdirected herself in determining the intrinsic value of the subject matter that is evident from the judgment and thus erred in assessing the fees payable to Counsel as instructions fees by relying on Schedule 6(1)(j)(ii).
42. It is further my finding that the learned Taxing Master failed to consider the complexity of this matter and the voluminous pleadings filed in assessing both the instruction fees and the getting up fees.
43. For these reasons I find that there is valid reason to interfere with the decision of the Taxing Master. I therefore set aside the ruling of the taxing master dated October 29, 2021 and direct that the Bill of Costs be remitted to the Deputy Registrar to be taxed afresh by a different Taxing Master.
44. The Applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

