



REPUBLIC OF KENYA



KENYA LAW
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Mwanza v Muslim Association (Mosque Committee Eldoret) (Cause 62 of 2017) [2022] KEELRC 13077 (KLR) (1 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13077 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 62 OF 2017
NJ ABUODHA, J
NOVEMBER 1, 2022

BETWEEN

HUSSEIN MWANZA APPLICANT

AND

MUSLIM ASSOCIATION (MOSQUE COMMITTEE ELDORET) . RESPONDENT

RULING

1. The respondent herein filed a document titled a ‘reference’ on August 24, 2021 in reference to a ruling of Hon D Milimu (the taxing master) in Eldoret ELRC Cause No 62 of 2017 which was based on the following grounds;
 - i. That the learned deputy registrar erred in law and fact in applying the high court scale in the assessment of the claimant’s party and party bill of costs dated May 20, 2021 where the amount in issue of Kshs 156,000 fell within the subordinate court’s jurisdiction.
 - ii. That the learned deputy registrar erred in law and fact in allowing the getting up fees of Kshs 25,000 without regard to the law on the party to party bill of costs and the getting up fees as certification by the trial judge.
 - iii. That the learned deputy registrar erred in law and fact in failing to apply and consider the provisions of schedule 7 of the *Advocates Remuneration (Amendment) Order* hence an erroneous decision.
 - iv. That the learned deputy registrar erred in law and fact in arriving at a decision that is not supported by the law and erroneous in the circumstances.
2. In response, the claimant filed a notice of preliminary objection and simultaneously grounds of opposition on November 5, 2021. The notice of preliminary objection was based on the following grounds;



- i. That the respondent/applicant reference dated on August 18, 2021 offends the provisions of rule 11 of the [Advocates Remuneration Order,2009](#) the same having been filed out of time without leave of court.
 - ii. That the court lacks requisite jurisdiction to handle the reference
 - iii. The application offends the provisions of rule 11 (1) of the [Advocates Remuneration order](#) the respondent / applicant having failed to file the necessary objection as per the requirement of the law.
 - iv. That the application dated August 20, 2021 and the alleged reference dated August 18, 2021 is frivolous & vexatious and thus a perfect material for dismissal.
 - v. That the entire application dated August 20, 2021 and the alleged reference dated August 18, 2021 is opposed for reasons that it is fatally defective , bad in law and an abuse of the court process.
 - vi. That the application dated August 20, 2021 and the alleged reference dated August 18, 2021 is brought under the wrong provisions of the law and unknown provisions of the law.
 - vii. That the alleged reference is filed allegedly pursuant to orders of June 18, 2021 which orders are non existent on record.
 - viii. That there is no reference on record
3. On the November 15, 2021, the court directed parties to incorporate the issue of the preliminary objection in their submissions.
 4. The respondent filed its written submissions on June 10, 2022 whereas the claimant filed his on June 22, 2022.
 5. The applicant/respondent in its submission argued that the taxing master erred in law and fact in applying the high court scale in assessing the claimant's party to party bill of costs. It was submitted that the claimant was awarded Kshs 156,000 which award, according to the respondent falls within the pecuniary jurisdiction of the magistrate's court and as such, that the applicable scale in the circumstances ought to have been schedule 7 as opposed to schedule 6 as applied by the taxing master.
 6. It was also submitted that the taxing master erred in awarding getting up fees since schedule 7 of the [Advocates Remuneration Order](#) does not have a provision for getting up fees and that no certificate was made to warrant the grant of getting up fees.
 7. Accordingly, it was submitted that the taxing master failed to consider schedule 7 of the [Advocates Remuneration Order](#) and arrived at an erroneous decision in its entirety. Counsel cited the case of [Joseph Mumali Wanga v Blessed TC World Class Spares Limited](#) [2021] eKLR to buttress this position where the court held;

“.. Judgment value was Kshs 48, 333.30. Rule 58 of the Advocates Remuneration Order should have applied. Where the amount given at the High Court in the judgment, could have been given within the jurisdiction of the subordinate court, the applicable scale is that which regulates party and party costs, in the subordinate court.

The claimant appears to misapprehend the submission of the respondent, bringing in an unnecessary argument, about the e&lrc being a superior court, and not a subordinate court. The correct position under rule 58 of the [Advocates Remuneration Order](#), is that if a



matter could have been filed at the subordinate court, taxation shall be in accordance with the schedule applicable to the subordinate court, unless the Judge otherwise orders. The position would be the same if the Judgment for the amount of Kshs 48,333.30 originated from the High Court or the Environment and Land Court. The issue is not about the E&LRC being a superior or subordinate court. An assessment of costs thrice the principal sum given on the judgment, is obviously distorted.

The correct schedule should have been schedule 7, which regulates taxation of party and party costs, in the subordinate courts. The judge did not allow application of schedule 6....”

8. Based on the above authority, the court was urged to review and set aside the decision of the taxing master and sought for an order directing fresh taxation based on the correct applicable scale considering the amount awarded.
9. The claimant in his submissions has argued that the *Advocates Remuneration Order* paragraph 11 requires one to file a chamber summons application(reference) in the event of dissatisfaction with the ruling on a party & party bill of costs and that the document filed in court as a reference is defective and should by and large be struck out with costs as such document is not recognized in law.
10. The claimant submitted further that there was inordinate delay in the filing of the reference by the applicant. Counsel for the claimant averred that the taxing master delivered her ruling on August 6, 2021 and the reference was filed on August 24, 2021 and that as such the said reference is incompetent as it was filed outside the 14 days period as stipulated under paragraph 11(1) and (2) of the *Advocate Remuneration Order*.
11. As regards the award on instruction fees, counsel for the claimant submitted that the claimant was awarded Kshs 188,160 upon taxing off Kshs 141,090 from the bill and that the reasons for the award are contained in the ruling.
12. On the issue of getting up fees, it was submitted that the claimant is entitled to this award since the applicant contested the suit from the onset and filed responses thereto, filed written submissions and attended hearings.
13. It was thus argued that the taxing master assessed the subject items solely based on the provisions of schedule 6 of the *Advocates Remuneration Order, 2014*.
14. The court was urged to dismiss the reference with costs as there was no error in principle in regard to the quantum as taxed by the taxing master.

Determination

15. After considering the issues raised in the reference , the preliminary objection and the grounds of opposition, and the submissions thereto, I find that the main issues for determination are:
 - a. Whether the “reference” is properly before court?
 - b. Whether there are sufficient grounds for interfering with the taxing officer’s ruling.
16. On the first issue, rule 11 of the *Advocates Remuneration Order* provides;
 11. Objection to decision on taxation and appeal to court of appeal
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

17. In the instance case, the ruling on taxation was delivered by the taxing master on August 18, 2021. It is interesting to note that the applicant wrote to the taxing officer vide a letter dated August 9, 2021 and filed in court on July 10, 2017 requesting for reasons for her decision before even the ruling was delivered. Flowing from the above, I am not able to tell why there was that discrepancy in dates and whether the said reasons were ever given. The respondent then proceeded to file a document titled "reference". Ideally, a reading of rule 11 of the [Advocates Remuneration Order](#) reveals that the proper approach should have been filing an application by way of chamber summons.
18. Article 50 (1) of the [Constitution of Kenya](#) provide for fair hearing and article 159 (2)(d) of the [Constitution](#) directs this Court to tend to the substance of the case and its attendant justice. in my view, the failure by the respondent to file chamber summons is not fatal to its case in view of the above constitutional provision taking into account that article 159 (b) requires justice not to be delayed. As such this court will proceed to address the issue on whether the taxing master's finding should be disturbed.
19. It is now trite law that the court will only interfere with the decision of a taxing officer in cases where there is demonstration of an error of principle. In [Republic vs Ministry Of Agriculture & 20 others ex-parte Muchiri W' Njuguna](#)[2006] eKLR, Ojwang J (Retired) stated

“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, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.”
20. The applicant has alleged that the taxing officer did not properly exercise her judicial discretion in taxing the claimant's bill of costs under schedule 7 of the [Advocates \(Remuneration\) \(Amendment\) Order 2014](#) as opposed to schedule 6 of the [Advocates \(Remuneration\) \(Amendment\) Order 2014](#) rendering the taxation faulty.



21. According to the respondent, the award of Kshs 156,000 awarded by the court falls within the pecuniary jurisdiction of the magistrate's court and as such, schedule 7 should have applied in view of rule 58 of the *Advocates Remuneration Order*.
22. I have perused the impugned ruling of the taxing master at length. From the said ruling, it is evident that schedule 6 was applied in assessing costs payable to the claimant.
23. Schedule 6 of the *Advocates Remuneration Order* is applicable for proceedings in the High Court and this includes courts of equal status. I find no justification in applying rule 58 of the *Advocates Remuneration order* as the use of the word may does not impose a mandatory obligation on the taxing officer to apply the said rule. I thus find that The taxing officer was correct in finding that the applicable remuneration order in respect of instruction fees was the schedule 6 of the 2014 *Advocates Remuneration Order*.
24. The taxing officer thus correctly applied the above provision in the assessment of fees payable and this court therefore finds the findings of the taxing officer were founded on a proper exercise of judicial discretion.
25. This court will therefore not interfere with the said decision and the application before court is therefore dismissed with costs to the claimant.
26. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

