Agevia alias Catherine Muranditsi Muteshi v Mulandi Kisabit & Associates Advocates (Miscellaneous Civil Application E027 of 2023) [2024] KEELC 13351 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13351 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E027 OF 2023

EO OBAGA, J

NOVEMBER 21, 2024

BETWEEN

CATHERINE AGEVIA ALIAS CATHERINE MURANDITSI MUTESHI ..... APPLICANT

AND

MULANDI KISABIT & ASSOCIATES ADVOCATES ..... RESPONDENT

RULING

1. Through the Chamber Summons Application dated 3rd July, 2024 the Applicant seeks the following orders:

    a. That the ruling of Hon. B.K. Kiptoo taxing master, dated 21st June, 2024 pursuant to the Advocate/Client Bill of Costs taxing the Bill in the sum of KShs. 379,900/- be set aside and/or vacated.

    b. That the Advocate/Client Bill of Costs dated 8th September, 2023 be remitted back for taxation before any other taxing master other than B.K. Kiptoo.

    c. That in the alternative the learned judge be at liberty to tax the bill.

    d. That costs be provided for.

2. The Application is premised on the grounds on the face of it and is grounded on the Applicant's Supporting Affidavit sworn on the same date. She deponed that the ruling on the Advocate - Client Bill of Costs dated 8th September, 2023 was delivered on 21st June, 2024. She deponed that they issued a Notice of Objection vide their letter dated 25th June, 2024 together with a request for a certified copy of the ruling, which was obtained virtually on 2nd July, 2024. The Applicant however, objected to the ruling on grounds that, the taxing officer erred in principle in taxing the Bill of Costs; the taxing master

failed to consider the issues raised by the Applicant in her responding affidavit, annexures thereto and submissions; the taxing master erred in awarding the costs to the Respondent since the Applicant had already paid KShs.2,400,000/-; the taxing master failed to order a refund of some of the money overpaid by the Applicant; and that the taxed costs are unwarranted in view of the sum already paid by the Applicant to the Respondent. She deponed that they had filed the Reference in the absence of the Response to their letter seeking reasons for the Ruling.

3. The Chamber Summons was opposed vide the Affidavit of Ambrose M. Mulandi, the Managing Partner at the Respondent firm. He admitted that they had indeed acted for the Applicant in ELC No. 1018 of 2012. He averred that the taxing master did not err in any way in reaching his decision on the value of the subject matter. That in fact, the taxing master considered the rival submissions before taxing the bill. He denied the alleged payment of KShs. 2,400,000/- stating that it is unfounded as there is no receipt tendered nor a copy of the cheque to show the Applicant paid the sum to the law firm. Having established that no money was paid, the allegation that the Applicant is entitled to a refund is too remote and unsustainable.

4. He deponed that the taxing master applied the correct principles of taxation and that no ground has been adduced for interfering with his decision. Further, that the taxing master applied the correct schedule of the Remuneration Order; there is no agreement on legal fees or a contract executed under Section 45 of the *Advocates Act*; that instruction fees is a static item assessed on the value of the subject matter and that the fees already received by the Advocate are deducted from the Certificate of Costs as the role of the deputy registrar is only to assess the fees payable. Mr. Mulandi prayed therefore that the Reference be dismissed with costs and for a finding that the Applicant ought to pay the costs awarded.

Submissions

Applicant's Submissions

5. The reference was canvassed by way of written submissions. In the Applicant's submissions, Counsel admitted that the Respondent represented her in ELC Case No. 1018 of 2012 (Formerly 173 of 2012). Counsel reiterated that the Applicant had paid KShs. 2,400,000/- through one of its Advocates, Mr. Michael Mutinda, who asked for payments to be made through a line he provided. The Respondent has not disputed that the said Michael Mutinda works for their firm. Despite this evidence and an Mpesa Statement produced at the time, the Deputy Registrar failed to consider the said payments made by Mpesa and proceeded as if she had not paid legal fees, taxing the costs at KShs 379,900/-.

6. Counsel submitted that in filing the Bill of Costs, the Respondent did not indicate under which schedule he was filing it. Further, that the Respondent did not tender any evidence showing the alleged complexity of the case. He added that the matter was not complex, thus there was no reason to increase the basic instruction fee, and in doing so, the Deputy Registrar misdirected himself. Counsel submitted that judicial discretion was not properly exercised. Counsel urged that taxing attendance fees at KShs. 30,000/- was a misdirection. He urged the court to review, set aside or remit the decision of the taxing master and remit the Bill of Costs before another Deputy Registrar.

7. Counsel relied on Jiwan Singh Uttam Singh, Arin Singh and Balwant Singh (Carrying of business under the firm name or style of Nyanza Engineering Works, Respondent (Original plaintiffs), Civil Appeal 20 of 1994, Nanyuki Esso Service vs Touring And Sports Cars limited EACA (1972) EA pg 50, Joreth Limited vs Kigano & Associates (C.A.) Civil Appeal No. 66 of 1999 and Still Construction & Petroleum Engineering (E.A.) Ltd vs Uganda Sugar Factory Limited.

Respondent's Submissions;

8. In the Respondent's submissions, Counsel argued that the allegation that the taxing master delivered his ruling without considering the Applicant's Replying Affidavit and submissions is not enough reason to interfere with discretion. Counsel submitted that the taxing master is equipped with knowledge to use the material placed before him and arrive at an objective decision without persuasion from either party. Counsel relied on Daniel Toroitich Arap Moi vs Stephen Mwangi Muriithi & Another (2014) eKLR. It was submitted that a judge will not normally interfere with the decision of a taxing officer merely because he should have allowed a higher or lower amount. That neither will a court interfere with the ruling merely because a taxing master erred in principle, as alleged by the Applicant. Counsel relied on Bank of Uganda vs Banco Arabe Espanol (Civil Application No. 23 of 2019) UGSC 3 (19 April 2000) and SC Petition-Application No. 16 of 2019, NGO Co-ordination Board vs Erick Gitari & Others.

9. Counsel submitted that the Applicant has failed to demonstrate that the amount is so manifestly excessive to infer an error of principle. Counsel added that courts will not unnecessarily interfere in questions of quantum unless there is some misdirection (Ouma vs Warega (1982) KLR 288). It was further submitted that the Applicant had not shown how the amount taxed substantially affected her so as to case her an injustice and he cited Alice Yano t/a Yano & Co. Advocates vs Rebecca Nadupoi Supeyo & Another (2021) eKLR. On the allegation that the Applicant had paid KShs. 2,400,000/-, Counsel submitted that it was not upon the taxing master to determine whether the Applicant had paid as alleged. Counsel relied on the case of Koskei Monda & Co. Advocates vs David Some Barno & 2 Others, where a court dismissed a similar argument and held that it was not the duty of the taxing master to determine during taxation if any payment had been made by the Applicants, and that this was not a ground for challenging a taxation. The court was urged to dismiss the application with costs.

Analysis and Determination;

10. Having carefully considered the pleadings herein, the only issue for determination is whether this Court should interfere with the ruling of the taxing master delivered on 21st June, 2024.

11. I have read the Ruling of the taxing master and the bill of costs attached. In matters of taxation and a reference such as this, a court hearing the reference must warn itself that the decision of the taxing master can only be interfered with where there is a principle error in the taxation giving rise to the reference. In the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund (2005) eKLR it was stated by the court that:-

> " On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur vs Nyeri Electricity Undertaking (1961) EA 497, the predecessor of this Court said at page 492 paragraph I:
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> > " '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 interfere only in exceptional cases'."

12. This position was reiterated in the case of Nyangito Co. Advocates vs Ndoinyo Lessos Creameries Ltd (2014) eKLR, where it was held that:

> The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya vs Shah and Others (2002) 1 EA 64.

13. Having so warned myself, I proceed to determine the reference before me. The Applicant's first ground of objection as appears from the Application herein and supporting Affidavit is that the taxing master did not consider his Replying Affidavit and Submission in his ruling delivered on 21st June, 2024. I have seen the Applicant's Affidavit filed in response to the Bill of costs deponed on 26th March, 2024. The Applicant has not demonstrated in what way his replying affidavit was not considered. The taxing master is not required to engage on a word for word analysis of the pleadings in his ruling, it is enough that he takes the issues raised in those pleadings while making his determination. Indeed, at paragraph 1 of the said ruling, the taxing master clearly indicates that he considered the Affidavits on both sides.

14. The second objection is that the taxing master did not take into consideration that the Applicant herein had already paid a sum of KShs. 2,400,000/- to the Advocate. Flowing from this, the Applicant seeks a finding that the amount taxed was unwarranted and further, for an order directing refund of some of the money he claims to have overpaid. A perusal of the Replying Affidavit to the Bill of Costs placed before the taxing master reveals that the Applicant herein had deponed that she had paid a total of KShs. 2,267,250/- by Mpesa and not the KShs. 2,400,000/- she alleges to have paid in this reference. In her said Replying Affidavit, she did not indicate who she had paid this sum to, although annexed a copy of her Mpesa Transactions. She has in this reference mentioned a Mr. Michael Mutinda who she alleges is one of the Advocates working for the firm, and the Mpesa statements do indicate that some monies were paid to the said individual.

15. Counsel for the Applicant submitted that the fact that the said Michael Mutinda works for the Respondent has not been disputed. It is true that the Respondent did not in its Further Affidavit in the taxation, nor in this reference, dispute that the said Michael Mutinda worked for the said firm. However, the Respondent deponed therein that there was no indication that the monies transferred to Michael Mutinda, made through different transactions, were for legal fees. I agree with the Respondent that there is no proof that the money paid was transferred to the firm. The Applicant herein has not produced any receipts acknowledging receipt of the money as legal fees or at all.

16. It is trite that he who alleges must prove, meaning that the burden of proof is on the party making allegations. This is set out in Section 107-109 of the *Evidence Act* as follows:-

> " 107.
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

17. The Applicant failed in this regard, she did not present sufficient evidence to demonstrate that she paid any part of the amounts alleged to the Respondent or at all, not before the taxing master and definitely not before this court. It is unfathomable that a party would pay such a significant amount of money over several transactions to an advocate and never once demand for a receipt as proof in acknowledgment of such payment. This court cannot therefore fault the taxing master for disregarding that particular allegation.

18. The Applicant in her submissions faulted the Respondent for not indicating what schedule he filed the Bill of Costs under. I do not see how this is relevant enough to disturb the decision of the taxing master, especially since the taxing master was clear in his ruling that he taxed the Bill pursuant to the ARO, 2014 at Schedule VI. It would have been concerning if the taxing master had not indicated what law he relied on, that in my opinion would have been grounds for interference, however the failure on the part of the Respondent in this case is not.

19. The Applicant did not contradict the amount taxed as instruction fee, but had an issue with the fact that the instruction fee was raised by half. It was argued that there was no explanation why the matter was considered sensitive and complicated by the deputy registrar. It was further submitted that the Respondent did not tender evidence of the complexity of the matter, so there was no reason to increase the instruction fee on that basis. In his ruling, the taxing master indicated:

> " This is an Advocate client bill of costs therefore KShs. 200,000/- is increased by ½ as per Schedule VI paragraph B of the 2014 Advocates Remuneration Order which amounts to Kshs. 100,000/-."

20. Nowhere in that finding was it said that the increment was done due to the complexity of the matter. Earlier On in his ruling, the taxing master explained that he exercised his discretion as allowed in the ARO to award a reasonable sum which he taxed at KShs. 200,000/-. He then increased it by half pursuant to Schedule VI paragraph B of the ARO 2014, which reads as follows:

> " As between advocate and client the minimum fee shall be—
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> (a) the fees prescribed in A above, increased by 50%; or
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> (b) the fees ordered by the court, increased by 50%; or
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> (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."

21. In any event, the said provision does not place a pre-condition that for the fee to be increased by half, the matter must be complex or a reason must be given as the Applicant would like this court to believe.

22. From the above analysis, I do not discern any error in principle by the taxing master in the matter before me to form a basis for interfering with the taxation. He did not take into account any extraneous matter and treated each item on the bill as he ought to. I therefore find no merit in the Applicant's Chamber Summons application before me and I dismiss it with costs to the Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 21ST day of NOVEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mulandi for Respondent.

M/s Marucha for Applicant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

21ST NOVEMBER, 2024