



Muigai & 2 others (Suing as the administrators of the Estate of Susan Watetu Muriithi) v Wachira & another (Miscellaneous Civil Application E297 of 2023) [2024] KEHC 513 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E297 OF 2023

DAS MAJANJA, J

JANUARY 31, 2024

BETWEEN

ROSALID NJOKI MUGA 1ST APPLICANT

JOSIAH MURIITHI MUGA 2ND APPLICANT

CHRISTOPHER MUCORA MUGA 3RD APPLICANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF SUSAN WATETU
MURIITHI**

AND

MUNDIA WACHIRA 1ST RESPONDENT

AGA KHAN HEALTH SERVICES T/A THE AGA KHAN UNIVERSITY

HOSPITAL 2ND RESPONDENT

RULING

1. The Applicants have filed the chamber summons dated April 11, 2023 (“the Reference”) under Paragraph 11 (2) of the *Advocates Remuneration Order, 2014* (“the Order”) challenging the decision of the Deputy Registrar dated 28.03.2023 (“the Ruling”) in respect of the Respondents’ Party and Party Bill of Costs dated 28.10.2022 (“the Bill of Costs”) arising out of *Muiga & 2 others (Suing as the Administrators of the estate of the late Susan Wateru Muriithi) v Kagia & 3 others* (Civil Case 284 of 2018) [2022] KEHC 9840 (KLR) (Civ) (“the suit”). The reference is supported by the grounds on its face and the supporting affidavit and supplementary affidavit of Rosalid Njoki Muiga, one of the Administrators/Applicants, sworn on 11.04.2023 and 27.09.2023. It is opposed by the Respondents through the Notice of Preliminary Objection dated 28.08.2023 and the replying affidavit of Bernard



Busiku Chenge, an advocate seized of this matter on the Respondents behalf, sworn on 05.09.2023. The Applicants have also filed written submissions in support of their respective positions.

2. The facts giving rise to the Reference are common cause. On 06.12.2015, the Applicants filed suit based on the tort of negligence against the 1st and 2nd defendants in that suit. The Applicants then sought and were granted leave to join the Respondents as defendants to the suit. However, the Respondents filed an application seeking to be struck out as parties to the suit on the ground that they were wrongly joined. In the alternative they sought that the suit against them be dismissed for being statute barred. By a ruling dated 22.07.2022, the court (Njagi J.) held that the suit against the Respondents was time barred under the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) and that they were improperly joined to the suit. The court therefore struck out the suit whereupon the Respondents filed the Bill of Costs claiming Kshs. 1,200,271.90 as their costs.
3. In the Ruling, the Deputy Registrar identified three issues for determination. First, whether the Respondents were entitled to separate instructions fees. Second, whether the value of the subject matter could be discerned from the pleadings/ruling of the court and last, what was the instructions fees payable to the Respondents?
4. On the first issue of separate instruction fees, the Deputy Registrar found that the Respondents' advocate appeared for them at the same time and did not file any separate pleadings. That attendances at the Registry and before the Judge were for the Respondents at the same time and the Respondents, having filed a joint defence, are deemed in law to have given instructions to the Advocate at the same time and therefore they could not each claim separate and individual instruction fees.
5. On whether the value of the subject matter could be determined from the pleadings and ruling of the court, the Deputy Registrar stated that the suit is yet to be determined and thus, the value of the general damages to be awarded was not known and therefore the value of the subject matter could not be discerned from the ruling and pleadings. The Deputy Registrar thus invoked her discretion to enhance instructions fees in line with the principles set out in *Joreth Limited v Kigano & another* [2002] E.A.92. The Deputy Registrar stated that she perused the proceedings of the suit which involved considerable documentation and perusal of a wide range of pleadings and exhibits and some high level of research to enable the Respondents present a strong defence. In the Deputy Registrar's view, the responsibility entrusted to counsel in the proceedings was quite difficult, and called for nothing but extra diligence, that the application raised pertinent issues touching on the limitation of actions and amendment of pleadings and substantial amount of time was spent to research and prepare for the matter by the Respondents. However, the Deputy Registrar found that the amount sought by the Respondents was excessive and thus, she cited the fee of Kshs. 75,000.00 provided for under schedule 6A (1) of the Order under "other matters" and increased it to Kshs. 600,000.00 which she stated was the reasonable instruction fees in the circumstances. She thus taxed off Kshs. 495,346.90 from the Bill of Costs. On the other items in the Bill of Costs, she stated that the same related to perusals, drawings, attendances and disbursements which are supported by receipts and that they are reasonably drawn to scale and she thus taxed them as drawn.
6. In sum, the Deputy Registrar certified and taxed the entire Bill of Costs at Kshs. 704,925.00 with the sum of Kshs. 495,346.90 being taxed off. It is this decision by the Deputy Registrar that has precipitated the reference.

Analysis and Determination

7. I have gone through the parties' submissions alongside the Reference and depositions. I do not intend to rehash the submissions save to refer to them in my analysis.



8. The Respondents object to the court’s jurisdiction to determine the Reference on the ground that it ought to have been filed in the suit parent file wherein the ruling on taxation emanated and the Reference could not be filed as a miscellaneous cause in a separate cause as done in the instant case.
9. Without belabouring on the Respondents’ Objection, I agree with the Applicants’ submission that by an order of the court dated 27.07.2023, the matter was transferred to the Chief Magistrate’s Court, which has no jurisdiction to determine a reference as the taxation in this matter was done by the Deputy Registrar of the High Court. Thus, the Reference could not be filed before the Subordinate Court where the original matter has been transferred to. The Reference is properly before this court.
10. Turning to the merits of the Reference, it is trite law that the Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal affirmed that taxation is a matter wholly within the discretion of the taxing officer and the judge on reference will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. The same principle was reiterated in *Republic v Ministry of Agriculture and 2 others; ex-parte Muchiri W’Njuguna & others* [2006] eKLR where Ojwang’ J.,(as he was then) held as follows:

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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

11. The Applicants challenge the Ruling in respect of the instruction fees awarded and the items numbered as 5, 33, 39, 45, and 48 in the Bill of Costs. The Respondents have conceded that they had already agreed in their submissions before the Deputy Registrar that the Items Nos 33, 39, 45 and 48 should be taxed off. A perusal of the same indicates that the Respondents did not include Item No. 5 as one of the items conceded to be taxed off. The Deputy Registrar found that this item was drawn to scale and a reading of the Order confirms as much hence there is no error of principle in this respect. The only issue left for determination is whether the Deputy Registrar erred in computing the instruction fees as she did.
12. The Applicants have contended that the Deputy Registrar erred by applying Schedule 6A(1) of the Order under “other matters” as opposed to schedule 6 A (1)(b). Further, that in applying schedule 6A(1) of the Order aforementioned, there was no basis to enhance Kshs. 75,000.00 instruction fees to Kshs. 600,000.00. Schedule 6A(1) of the Order under “other matters” provides as follows:

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than—

 - (i) If undefended 45,000
 - (ii) If defended 75,000
13. Schedule 6 A (1)(b) of the Order provides that “To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall



be 75% of the fees chargeable under item 1(b)". The said para. 1(b) referred to above provides in part as follows:

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—.....

14. A reading of Schedule 6A (1)(b) above, shows that it only applies where the value of the subject matter cannot be ascertained from the pleadings, judgment or any settlement between the parties. The Applicants contention is that the value could be determined from the pleadings as there was a claim for special damages for Kshs. 3,178,230.00 and that this ought to be the basis for charging costs as this is the only amount that was ascertainable from the pleadings. In the Ruling, the Deputy Registrar found that the Applicants in the suit had sought both general and special damages but that the matter was yet to be determined and the value of general damages to be awarded is not known and therefore the value of the subject matter could not be ascertained from the court's ruling and the pleadings.
15. I agree with the position taken by the Deputy Registrar because in determining whether the value of the subject matter can be ascertained, the Deputy Registrar ought to look at the pleadings as a whole and not in part or selectively as urged by the Applicants. The value of the subject matter could not be ascertained by just taking the special damages pleaded therein because it would be an unfair representation of the value of the subject matter which would definitely increase should the trial court award the general damages. The Deputy Registrar was right to conclude that after considering both the general damages and special damages sought, the value of the subject matter could not be ascertained from the pleadings. This then means that Schedule 6A (1)(b) above was inapplicable to the Bill of Costs and I cannot fault the Deputy Registrar for applying Schedule 6A(1) of the Order under "other matters".
16. I also do not find merit in the Applicants' contention that the Deputy Registrar had no basis or provided no reasons for enhancing the basic fee of Kshs. 75,000.00 provided in Schedule 6A(1) of the Order under "other matters" to Kshs. 600,000.00. As stated, the Deputy Registrar was guided by Court of Appeal decisions among them Joreth Limited v Kigano & Another (Supra) which affirm that the Deputy Registrar has discretion to enhance the basic instruction fee after considering various factors including complexity of the matter, responsibility by counsel, time spent and skill deployed by counsel. The Deputy Registrar duly considered these factors in arriving at the decision to raise the basic fee from Kshs. 75,000.00 to Kshs. 600,000.00 hence I do not consider any error of principle in the factors applied that informed her discretion. This ground by the Applicants also fails.

Disposition

17. On the whole, I find that the Deputy Registrar's Ruling dated 28.03.2023 was based on the correct principles of law and taxation hence there is no basis to interfere. The Applicants' reference dated 11.04.2023 lacks merit and is dismissed. The Applicants shall pay the Respondents costs assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

.....

JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court Assistant: Mr M. Onyango.

Ms Muigai instructed by E. Muigai and Company Advocates for the Applicants.

Mr Chenge instructed by Chenge Busiku and Company Advocates for the Respondents.

