



REPUBLIC OF KENYA



KENYA LAW
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Ndugu v DW (Suing as Next Friend and Father of WW - Minor) (Miscellaneous Reference Application E050 of 2023) [2024] KEHC 680 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS REFERENCE APPLICATION E050 OF 2023**

**DK KEMEL, J
JANUARY 31, 2024**

BETWEEN

CHRIS MBUGUA NDUGU APPLICANT

AND

**DW (SUING AS NEXT FRIEND AND FATHER OF WW -
MINOR) RESPONDENT**

RULING

1. Before me are two applications for determination. The first application (reference) is by the Applicant dated 8.8.2023 seeking for an order to set aside the decision of the taxing master issued on 28.7.2023 for failing to subject the bill of costs dated 27.4.2023 to 50% contributory negligence and be taxed a fresh by this court as well as costs of the application. The second application by the Respondent is a cross reference dated 2.11.2023 seeking for the setting aside of the decision of the taxing master dated 28.7.2023 regarding the Respondent's bill of costs dated 27/4/2023 and be substituted with an enhanced figure as well as costs of the application.
2. The Applicant's gravamen in the application dated 8.8.2023 is inter alia; that the costs awarded were excessive; that there is no legal basis for the awards; that the award is punitive in nature and not compensatory; that the court failed to subject the assessed costs to 50% contributory negligent by the Respondent.
3. The Respondent's gravamen in the cross reference dated 2/11/23 is inter alia; that the taxing master erred in awarding Kshs. 1,400/- for services to Nakuru and Nairobi respectively under items 2-6 of the bill of costs dated 27/4/23; that the award was inordinately low and not in line with schedule 7 of the Advocates Remuneration Order 2014 especially considering that services were physically effected and proven by affidavits of service duly filed; that the ruling dated 28.7.2023 was based on error of principle and hence the cross refence; that the Respondent's bill of costs dated 27/4/2023 be retaxed or assessed as drawn as the same was drawn to scale.



4. The two applications were canvassed by way of written submissions. Both parties duly filed and exchanged submissions which were a reiteration of their rival affidavits.
5. I have considered affidavits in the two applications plus the submissions presented. It is not in dispute that the point of disagreement between the parties is in regard to the issue of 50% contributory negligence and process server's fees on service of bill of costs. The issue for determination is whether there was an error of principle in the taxation/ assessment of the bill of costs by the taxing master/ mistress.
6. As regard the reference dated 8.8.2023, the applicant has taken issue with the failure by the taxing master/ mistress to subject the assessed costs to 50% contributory negligence as held by the trial court in its judgement on liability. It is noted that the trial court put the liability at 50% during determination of liability between the parties. A perusal of the trial courts judgment reveals that liability was held at 50% to 50% and that the court awarded costs to the Respondent. The Judgment is silent as to whether the costs so awarded were to be subjected to 50% contribution. There was nothing which prevented the trial magistrate from subjecting the same to contributory negligence. As the issue of costs are always at the discretion of the trial court and which is exercised judiciously and which is pegged on the maxim "costs follow the event" and by dint of section 27 of the *Civil Procedure Act*. As the learned taxing master/ mistress exercised her discretion, i have no reason to interfere with the same. In any event, the applicant failed to lodge an appeal against the trial courts judgement aforesaid. It is obvious that the costs awarded were to be worked on the net award after the award had been subjected to 50% contributory negligence. Further, it is noted that the instruction fees of Kshs. 40,000/- under schedule 7 of the Advocates Remuneration Order has not been objected to by the Applicant during the taxation/ assessment of the bill and in this application. That being the position, I find the applicant's objection on this limb of costs is without any merit whatsoever and hence the applicants reference dated 8.8.2023 must be rejected.
7. As regards the Respondent's cross reference dated 2.11.2023, the Respondent's concerns related to items 2,3,4,5 and 6 of the bill of costs dated 27/4/2023 in which the taxing master /mistress awarded Kshs. 1400/- being service fees. Indeed, the taxing officer did not give reasons for her decision to award 1400/- on each of those items to cater for fees instead of considering the affidavit of service filed by the process server. A taxing officer is always obliged to give reasons for orders made in taxation. Even though no reasons were furnished, i find that no prejudice will be suffered by the Applicant who has approached this court with a reference and response to the cross – refence. The Respondent has claimed that the service of the bill of costs was affected both in Nakuru and Nairobi and that the distance should be calculated from Bungoma to those destinations. The Applicant has vociferously objected to a fresh taxation of these items sought by the Respondent on the ground that the affidavit of service by the process server is defective as they were sworn and commissioned in different places. Matters relating to affidavits are quite serious since the deponents making oath are required to be truthful. Section 5 of the *Oaths and Statutory Declarations Act* Cap 15 laws of Kenya Provides as follows:-

“Every Commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at which place and on what date the oath or affidavit is taken or made”.

The Process server one Masinde Mukosi Justus claimed that he effected service of the bill of costs and notices. The affidavits show that the same were sworn in the presence of Paul Mwibanda Milimo Advocate at Mumias while the stamp of the Advocate indicates Bungoma. It is therefore clear that the affidavits were sworn and commissioned at two



different places. Since section 5 of the Act aforesaid is couched in mandatory terms by use of the word "shall" then the defective affidavit will not pass muster as suggested by the Respondent. The affidavits appear to have been sworn at Mumias and then commissioned in Bungoma and which does not confirm to the provisions of section 5 of Cap 15 as it affects the veracity and probative value of the averments. To that extent, I find that the said affidavits being defective were properly rejected by the taxing master / mistress. Further, the said affidavits were not accompanied with supporting documents such as receipts for the process server to the bill of costs to justify the expenses incurred. In the absence of documents, the conclusion one makes is that the process server did not travel to the places claimed. In the absence of bus fare receipts, the process server could as well have furnished fuel receipts if he used a private car to travel. That was not availed as well. Due to the foregoing, the taxing master/mistress relied on the option provided by schedule 7 of the Advocates Remuneration Order 2014 paragraph 10 which provides as follows:-

"10 service –

1. Within three kilometers of subordinate court or district registry of the subordinate court Kshs..... 1,400/-
2. For travelling and substance expenses incurred by the Process Server..... Charge the actual expense incurred
3. Where service by post or any other mode of substituted Service..... Charge the actual expense incurred.

It is noted that the Respondent did not avail documents to support the expenses incurred by the process server. The taxing officer had no option but to rely on clause 10(1) of the Schedule 7 *Advocates Remuneration Order* 2014. Even though the sums provided therein are limited to a distance of three kilometers, I see no reason to interfere with the same as it was by exercise of discretion by the taxing master. In any case, I have found that the affidavits by the process server are defective as they violated the provisions of section 5 of the *Oaths and Statutory Declarations Act*. I will sustain the sums arrived at by the taxing officer as that is the least I can do in the circumstances of this case. The sum total of the above findings is that the Respondent's cross reference lacks merit.

8. In view of the foregoing observations, it is my finding that both the applicant's reference dated 8.8.2023 and the Respondent's cross reference dated 2.11.2023 lack merit. The same are ordered dismissed with no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY, 2024

D.KEMEI

JUDGE

In the Presence of :-

No appearance for lesot for Applicant

Simiyu for Mukisu for Respondent

Kizito Court Assistant

