



REPUBLIC OF KENYA



KENYA LAW
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**Chege & another v Nyangwansa (Miscellaneous Civil Application
E177 of 2023) [2024] KEHC 293 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E177 OF 2023
RE ABURILI, J
JANUARY 24, 2024**

BETWEEN

DAVID KAMAU CHEGE 1ST APPLICANT

MUSA OWILI 2ND APPLICANT

AND

DENNIS GICHANA NYANGWANSA RESPONDENT

RULING

1. On 22nd November 2023, this court granted the Applicants herein leave to file a Reference from the Ruling on taxation of the lower court in Winam SPMCC No. 190 of 2022. The Ruling on taxation was delivered on 29th August 2023.
2. This court ordered that the Reference be filed within 14 days of 22nd November 2023 which Reference was filed and is dated 28th November 2023.
3. The Applicants seek that the decision of the Taxing officer delivered on 29th August 2023 be set aside and assessed costs be subjected to 30% liability or contribution by the court for reasons that the award is excessive in the circumstances, that there is no legal basis for the award; the award is punitive in nature and not compensatory; that the taxing officer misdirected herself by failing to subject the taxed costs to 30% liability.
4. The Reference is supported by an affidavit sworn by Theldred Wesonga Advocate on 28th November 2023 wherein she deposes that the Respondent's Bill of Costs dated 5th July 2023 was opposed by the Applicant but that the same was taxed at Kshs 79,900 without subjecting it to 30% liability as prescribed under Schedule 7 of the Advocates Remuneration Order as per the Judgment hence the taxation was irregular.



5. The Reference was argued orally yesterday on 23rd January 2024 with counsel for the Applicant reiterating the grounds and depositions while the Respondents' counsel relied on the affidavit filed earlier in opposing the application for extension of time for filing of a Reference to this court.
6. Counsel maintained that the taxation was faultless as the trial court already subjected the general damages of Kshs 500,000 to 30% contribution bringing it down to Kshs 350,000 and that therefore the taxed costs were already subjected to 30% contribution.
7. I have considered the Reference as filed and argued by both parties' counsel. The issue I find for determination is whether the Reference has merit.
8. The Applicant's main complaint against the Ruling on taxation of 29th August 2023 is that the trial court did not subject the taxed costs of Kshs 79,900 to 30% contribution.
9. There is no other specific item in the Bill of Costs as taxed which has been challenged hence I shall determine that sole issue.
10. In *First American Bank of Kenya vs Shah & Others* 92002) 1 EA 64, at 69, Ringera J (as he then was) stated 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 so manifestly excessive as to justify an inference that it was based on an error of principle. Thus, it is not the duty of this court in a reference to tax bills of costs.
11. The issue which I am about to determine is not new. The question of whether or not taxed costs should be subjected to contributory negligence ratio as per the judgment in this case, which is 30% is an issue that I have determined before and is an issue of law which is now well settled.
12. The Ruling on taxation is silent on the 30% contribution. It is therefore not correct as submitted by the Respondent's counsel that the taxing master already subjected the taxed bill to 30% liability.
13. The Bill of Costs which was Party and Party dated 5th July 2023 had 12 items and the total was Kshs 115,800. The Plaintiff did not subject that total amount in the bill to 30% contribution and neither did the taxing master subject the same to 30% contribution.
14. The Respondent's counsel does not deny that the trial court should have subjected the taxed costs to 30% contribution. Counsel in fact submitted that the taxation was subjected to 30% contribution because the awarded sum in the judgment was Kshs 500,000 less 30% leaving Kshs 350,000 which the taxation was based on in terms of instructions fees.
15. To the extent that the taxation on Item 1 was based on Kshs 350,000 and not Kshs 500,000, I fully agree. I however do not agree with the interpretation by Ms. Oloo counsel for the respondent that the taxed costs were subjected to 30% contribution.
16. What then does the law say? Although the Applicant's letter dated 20th September 2023 to the Executive Officer complained of the excessiveness of the taxed costs and not subjecting it to 50% contribution, no item was objected to on the basis of excessiveness and the contribution ratio is 30% and not 50%.
17. I will therefore not touch on any specific item in the bill as taxed. What I will consider is the complaint on non-subjecting of the taxed costs to 30% contribution and not 50% contribution.



18. On the legal position, Schedule 7 of the *Advocates Remuneration Order* under Party and Party costs, the Note (3) thereof provides as follows:-

“3. Where success in a suit is divided, the scale may be distributed having regard to partial success on either side.”

19. In this case, there was partial success of the Plaintiff/Respondents suit against the Defendant/Applicants herein to the extent of 70%.

20. It follows that the Respondent could and can only be entitled to costs equivalent to 70% which is the success rate of her suit and not 100%. The fact that the taxed costs were based on Kshs 350,000 which was the 70% of the awarded quantum of damages does not absolve her from another reduction in costs at 30% contributory negligence.

21. For the above obvious reason, I find and hold that the assessed costs of Kshs 79,900 ought to have been subjected to 30% contribution which I hereby order that the taxed Party and Party Bill of Costs are subject to 30% contribution.

22. Accordingly, I find the Reference dated 28th November 2023 to be meritorious. It is allowed to the extent that the Ruling of 29th August 2023 on Party and Party costs in Winam SPMCC No. 190 of 2022 is hereby set aside and substituted with an order allowing the taxed costs to be Kshs 79,900 less 30% leaving Kshs 55,930 which is 70% of 79,900.

23. A certificate of costs shall issue for the sum of Kshs 55,930.

24. As the failure to subject the taxed costs to 30% contribution was occasioned by the trial court and is a matter of law which the trial court should have taken judicial notice of, I shall not penalise the Respondent in costs albeit this was a simple matter for concession to avoid protracted litigation and unnecessary interpretation.

25. Ruling to be typed and order extracted and the lower court file to be returned to Winam SPM's Court forthwith.

26. File closed.

27. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2024

R. E. ABURILI

JUDGE

