



REPUBLIC OF KENYA



**Kitheka & Company Advocates v Mathenge (Miscellaneous Application
E182 of 2021) [2024] KEHC 8047 (KLR) (Family) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E182 OF 2021
PM NYAUNDI, J
JUNE 28, 2024**

BETWEEN

KITHEKA & COMPANY ADVOCATES APPLICANT

AND

FRANCIS MATHENGE RESPONDENT

RULING

1. The Notice of Motion subject of this ruling emanates from the decision of the of the Learned Taxing Officer dated 16th December 2022, in which she taxed the Advocate/Applicant's costs in the total sum of Kshs.213,395/=.
2. Aggrieved by the said decision, the Respondent lodged this reference vide Notice of Motion dated 17th January 2023 seeking the following orders;
 1. That the decision of the taxing officer as evidenced in the ruling delivered on 14th December, 2022 be set aside and taxed afresh by this Honourable Court.
 2. That in the alternative this Honourable Court be pleased to order that the Respondent's Bill of Costs with (sic) will be taxed afresh by another taxing master.
3. It is the Applicants case that the taxing master erred in principle as she did not give the basis of the taxed amount. It is contended that the bill as taxed is excessive and no justification was given for the same. It is further alleged that some of the items taxed were not on the bill of coasts and some of the dates on the bill of costs the matter was not in court and finally some of the dates taxed the advocate was not on record.



4. It is the Applicants submission that the applicable schedule is Schedule VI , paragraph (g) sub paragraph (iv) which provides for an instruction fee of not less than 10000 and that therefore the figure granted by the taxing master of Kshs 200000 was inordinately high and excessive.
5. It is submitted that the learned taxing master erred in pegging the instruction fee on the value of the property and that in any event the Counsel did not conclude the matter.
6. It is further submitted that the items referred to as 2(a, b, d, e) are not in the bill of costs and further the advocate did not spell out the number of folios. The same applies to the item 6(a-c).
7. It is therefore submitted that on account of this, the bill should be re taxed. Reliance was placed on the decision in *Kipkorir, Tio & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR.

Analysis And Determination

8. I have considered the ruling delivered on 31st March 2023, alongside the pleadings herein, submissions filed, authorities cited and the relevant law and discern the following as the issues for determination

1. Whether the taxing master erred in law and in principle in the assessment of Bill of Costs

9. The principles of setting aside the decisions of Taxing Master were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya v Shah and Others* [2002] EA 64 and *Joreth Ltd v Kigano and Associates* [2002] 1 EA 92. These include;
 - a. That there was an error of principle.
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy.
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred.
 - d. That so far as practicable there should be consistency in the award.
10. The court will not normally interfere with the taxing master’s ruling simply because it thinks it would have awarded a different figure had it been the one taxing the bill. The court can interfere if it is proved that the amount taxed was manifestly excessive or low; and the court can interfere if there is proof that the taxing officer followed a wrong principle in reaching his decision.
11. I am alive to the fact that the discretion of the Taxing Officer should not be interfered with unless it appears that the Taxing Officer is wrong in principle or has not exercised his/her discretion judicially and has exercised it improperly (see *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR).
12. In the case of *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, Odunga J (as he then was) emphasized that the circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise 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 manifested 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 importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;
 - 1) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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."
13. The Applicant challenges the ruling of the Court on the basis that the Instruction fee as assessed is inordinately high.
14. At paragraph 6 the Taxing Master assessed this as Kshs 200000 having framed the issue for determination as What is the quantum of costs on the Advocate/ Client bill of costs dated 6th March 2021 for the services rendered by the Applicant in Matrimonial Cause No. 10 of 2019 *Winfred Rose Kanini versus Francis Mathenge*?
15. In the preceding paragraphs the Court correctly identified the applicable schedule of the *Remuneration Order* as Schedule VI, paragraph (g) sub paragraph (iv). In arriving at the instruction fee of Kshs 200000, the Court made reference to the decision on *Joreth Ltd v Kigano and Associates* [2002] EA 92 and pegged the court fees on the value of the assets that were the subject matter of the pleadings.
16. The court also correctly found that the Counsel was entitled to full instruction fee notwithstanding that he did not finalise the matter. This principle is well established by judicial precedent and was reiterated in the case of *DK Law Advocates v Zhong Gang Building Material Co. Ltd & another* [2021] eKLR where Odunga J (as he then was) stated

[27].....In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached....
17. Having regard to the foregoing I find no basis for me to interfere with the Taxing Master's discretion as relates to assessment of the instruction fee.
18. The Applicant also contends that the Taxing Master erred in the taxation of items 2 and 6. This assertion is not supported by the record. I can see that the Bill did not subdivide the items into (a, b, c...) however it is clear what items the Court was considering in its ruling.
19. For these reasons the reference is dismissed in its entirety with costs to the respondent assessed at Kshs 25000

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 28TH DAY OF JUNE, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the Presence of:



Fardosa- Court Assistant

Ms. Muhanda for Respondent

Mr. Kitheka for Applicant

