



**Osamba Otieno & Co. Advocates v Kabete Dam Limited & 3
others (Commercial Miscellaneous Application E486 of 2023)
[2024] KEHC 9513 (KLR) (Commercial and Tax) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E486 OF 2023**

MN MWANGI, J

JULY 30, 2024

BETWEEN

OSAMBA OTIENO & CO. ADVOCATES APPLICANT

AND

KABETE DAM LIMITED 1ST RESPONDENT

WINLOUKE PROPERTIES LIMITED 2ND RESPONDENT

WIDNES HOLDINGS LIMITED 3RD RESPONDENT

PINNACLE PROJECTS LIMITED 4TH RESPONDENT

RULING

1. On 7th May, 2024, the respondents/applicants filed an amended Notice of Motion, with leave of the Court granted on 24th April, 2024. The amended application is anchored on the provisions of paragraph (11)(1) of the *Advocates Remuneration Order*, 2014 and all other enabling provisions of law. In the said application, the applicants pray for orders –
 - a. That the applicants be granted leave to file an objection and a Taxation Reference to this Honourable Court against the Ruling of Hon. Kyanya (DR) delivered on 22nd December, 2023 in which the respondent’s bill of costs was taxed at Kshs.6,720,953.00;
 - b. That there be a stay of execution of the decree and certificate of costs emanating from the decision of the Court in (a) above pending the outcome of this Motion;



- c. That the ruling of Hon. Noelle Kyanya (DR) delivered on 22nd December, 2023 and reviewed on 8th February, 2024 be set aside and the original bill of costs be referred for taxation afresh before a different Taxing Master.
 - d. That the costs of this application be provided for.
2. The application is based on the grounds in support of it. This Court notes that after amending the application, the applicants did not file a further affidavit, but instead filed a supporting affidavit sworn on 6th May, 2024 in support of the said amended application. .
 3. The application was opposed vide a replying affidavit sworn on 7th May, 2024 by Mr. Richard Osamba Otieno Advocate. The applicants' Counsel filed written submissions dated 30th May, 2024, whereas the respondent's Counsel filed theirs dated 19th June, 2024.
 4. In highlighting the written submissions, Mr. Sichangi, learned Counsel for the applicants stated that Hon. Kyanya on 8th February, 2024 reviewed an earlier decision that she had delivered on 22nd December, 2023 wherein she enhanced the taxed costs from Kshs.5,592,925.00 to Kshs.6,720,953.00. Counsel indicated that the amount awarded was more than what was contained in the bill of costs that the respondent had presented for taxation, which was for an amount of Kshs.6,676,050.00.
 5. Mr. Sichangi contended that the Taxing Officer, and in so doing, that she erred in principle by awarding the wrong value of the subject matter of the suit. He submitted that the primary suit was HCCOMM E063 OF 2019 and the agreement in issue was a joint venture agreement and from a reading of the agreement, the claim is not more than Kshs.80 Million as per the affidavit of David Kuria attached to the supporting affidavit in this matter.
 6. Counsel stated that the issue of an erroneous amount having been awarded in taxed amount has been conceded to in the replying affidavit by the respondent.
 7. Mr. Sichangi also stated that in an application dated 21st August, 2023, the applicants had raised the issue of whether or not there was a retainer between the parties herein, but the same was not dealt with by the Taxing Officer.
 8. Although at first Mr. Osamba was not agreeable to the proposition that was being made by Mr. Sichangi for the bill of costs to be taxed afresh in so far as instruction fees is concerned, as the two seemed to suggest different figures as being the value of the subject matter, he eventually had a change of heart and agreed to have the bill of costs retaxed afresh in so far as the instruction fees is concerned. He however expressed the view that there was no need of the Taxing Officer addressing the issue of whether or not there was a retainer as by taxing the bill of costs, it was apparent that she was of the view that there was a retainer between the parties herein.

Determination

9. The issue for determination is whether the bill of costs should be referred to another Taxing Officer for taxation. The contentious issues are the value of subject matter of taxation as the same will determine the instruction fees, and whether the Taxing Officer addressed the issue of the retainer in her ruling of 22nd December, 2023.



10. In the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited*, [2015] Civil Appeal No. 206 of 2006, the Court underscored the need for Taxing Officers to establish the correct value of the subject matter in taxation of bills of costs. The Court stated thus-

“..... Failure to ascertain the correct value of the subject matter in a suit of the purpose of taxation is an error in principle. So too, failure to ascribe the correct value to the subject matter is an error in principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fees is arrived at on the wrong principles, it will be set aside”.

11. In addition, in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, the Court of Appeal held as follows on the issue of the value of the subject matter for purposes of arriving at the correct instruction fees –

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where judgment, it is the pleadings that form the basis for determining subject value.”

12. In this matter, it is clear that both Advocates are in agreement that the Taxing Officer did not establish the correct value of the subject matter. That being the case, the item on instruction fees will have to be retaxed afresh.

13. On the 2nd issue of whether there was a retainer between the parties hereto, I have gone through the ruling of the Taxing Officer dated 22nd December, 2024 and it is apparent that she did not address her mind to the application dated 21st August, 2023 that had been filed by the applicants raising the issue of retainer.

14. For the reasons given, the amended application dated 6th May, 2024 is hereby allowed to the extent that the Reference herein is deemed as being properly on record. Further, the bill of costs dated 11th June, 2023 is hereby referred to another Taxing Officer other than Hon. N. Kyanya for re-taxation, but only to the extent of the instruction fees. The Taxing Officer will also determine the issue of whether or not there was a retainer as per the application dated 21st August, 2023.

15. Each party shall bear its costs of the amended application dated 6th May, 2024.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Sichangi for the clients/applicants

Mr. Samba for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

