



Erastus Orina p/a. E.M Orina & Co Advocates v Kiptachich Tea Estate (Miscellaneous Application 5 of 2022) [2023] KEELC 16709 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS APPLICATION 5 OF 2022**

**A OMBWAYO, J
MARCH 23, 2023**

**BETWEEN
ERASTUS ORINA P/A. E.M ORINA & CO ADVOCATES APPLICANT
AND
KIPTACHICH TEA ESTATE RESPONDENT**

RULING

Brief Facts

- 1 The applicant herein filed the application dated January 20, 2020 under rule 11(2) of the [Advocates \(Remuneration\) Order](#) which seeks the following prayers:
 1. Spent.
 2. Spent.
 3. That upon the leave being granted the ruling of the Honourable Makau, the taxing master dated December 17, 2020 be set aside and or struck out and that the advocates/client bill of costs dated July 9, 2020 be taxed a fresh and or the court do proceed to make a finding on that taxation.
 4. That costs of the reference be provided for.
- 2 The grounds on the face of the application are that the deputy registrar failed to take into account the relevant factors in the assessment of the instruction fees which arise from the value of the subject property, the complexity of the matter and strain in preparing for hearing.
- 3 The application was supported by the affidavit of Erastus Orina who stated that he filed an advocate/client bill of costs dated July 9, 2020 for taxation and annexed a valuation report dated August 17, 2019.



- 4 He averred that the matter came up for taxation on October 13, 2020 when the respondent requested for more time to file a response which it never filed and the matter proceeded for taxation unopposed.
- 5 It was further averred that on December 17, 2020 the taxing master rendered her ruling and allowed a sum of Kshs 701,835.
- 6 He averred that being aggrieved by the said ruling it lodged a notice of objection to the ruling on the ground that it failed to take into account the relevant factors before arriving at the said ruling.
- 7 He also averred that the bill was grossly under taxed and the award is legally unjustifiable. He averred that the decision did not take into account that both the amended plaint and defence and counter claim were dealing with a title to land together with improvements thereon whose value was placed at Kshs 158,550,000.
- 8 In conclusion he urged the court to set aside the ruling dated December 17, 2020 and have it taxed afresh.
- 9 The application was canvassed by way of written submissions. The applicant filed its submissions dated October 29, 2021 on December 2, 2021 while the respondent did not file any submissions.
- 10 The applicant submitted on two issues. One, whether the reference was filed out of time and whether the reference is merited.
- 11 On the first issue, the applicant relied on rule 11 of the *Advocates Remuneration Order* and the Court of Appeal case in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* (2005) 1 KLR 528. It submitted that the taxing officer upon receipt of the notice of objection was legally required to forward to the objector the reasons for her decision.
- 12 It further submitted that time for filing of the reference would have started running from the date of receipt of the taxing officer's response to the objection. It added that since a response was not given, the fourteen days for filing of the objections could not be ascertained.
- 13 The applicant submitted that the reference was filed within time and the prayer for enlargement of time was made for the abundance of caution.
- 14 On the second issue of whether the reference is merited, it submitted that the taxing master in her ruling erroneously stated that the value of the subject matter could not be ascertained from the judgment and that the value of the land was not in question.
- 15 It submitted that the value of the property was squarely in issue and the instructions fees ought to have been pegged on the value of the land and the improvements thereon. The applicant relied on the court of appeal case of *Joreth Ltd v Kigano & Associates* Nrb CA civil appeal No 66 of 1999 (2002) eKLR and submitted that the taxing master ought to have ascertained the value of the subject matter from the pleadings.
- 16 It further submitted that although the factors to be considered in ascertaining the value of the subject matter, the taxing officer is not only limited to pleadings but can call for more evidence. The applicant argued that it had filed a valuation report which the taxing officer had the discretion to consider and or summon and examine witnesses as per the said provision.
- 17 The applicant concluded its submissions by seeking that its application be allowed as prayed.



Analysis and Determination

- 18 The applicant in this matter is seeking that the court sets aside the taxing officers ruling with regard to the instructions fees in the bill of costs dated July 9, 2020.
- 19 The applicant submits that the value of the subject matter could be ascertained from the pleadings and therefore the taxing master ought to have taxed the amount on Items 1 and 2 as sought in its bill of costs dated July 9, 2020.
- 20 The respondent did not file any response in opposition to the instant application.
- 21 The taxing officer in her ruling delivered on December 17, 2020 indicated under item No 1 that the value of the subject matter could not be ascertained from the judgment and was therefore guided by the prayers sought in the amended plaint which did not provide for the value of the land in question. She applied the provision under schedule 6 of the *Advocates Remuneration Order, 2014* and ordered that a fee of not less than Kshs 75,000/= should be awarded, she held that a fee of Kshs 200,000/= would be fair under that item. The taxing officer added ½ taxed at Kshs 200,000/= and 16% VAT at Kshs 64,000/=.
- 22 The Court of Appeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* Nrb CA civil appeal No 220 of 2004 [2005] held as follows:
- 23 On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
- 24 The court also in the case of *Republic v Kenya Medical Supplies Authority & another; Medox Pharmaceuticals Limited (interested party); ex parte Nairobi Enterprises Limited* [2019] eKLR, considered various decisions on the applicable principles as regards setting aside or varying a taxation of a bill of costs and stated as follows:
- 25 The principle is that a court cannot interfere with the taxing officer’s decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference.
- 26 These legal parameters were laid down in *First American Bank of Kenya v Shah and others* [2002] 1 EA 64 at 69 by Ringera J (as he then was) who delivered himself thus; “First, I find that on the authorities, this 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”.
- 27 These principles reiterate the position of the Court of Appeal in *Joreth Ltd v Kigano & Associates* (2002) 1 EA 92, wherein the said court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion, and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.”
- 28 Item No 1 that the applicant is challenging is on instruction fees. It is now trite law that the court can only interfere with the decision of a taxing officer where there is a demonstration that there was an error of principle. The court in the case of *Republic v Ministry of Agriculture & 20 others ex-parte Muchiri W’ Njuguna* [2006] eKLR held as follows:



- 29 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 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.”
- 30 The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates* Nrb CA civil appeal No 66 of 1999 [2002] eKLR held as follows in determining the issue of instruction fees:
We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”
- 31 As pointed out before, the taxing master in her ruling indicated that the value of the subject matter could not be ascertained and she therefore exercised her discretion and awarded the sum of Kshs 200,000/=.
- 32 The applicant also challenged the taxation of item No 2 of the bill of costs dated July 9, 2020 which is on the counter claim. The taxing master in her ruling delivered on December 17, 2020 held that the value of the subject matter could not be ascertained and taxed it at Kshs 200,000.
- 33 I have perused the pleadings and I am in agreement with the taxing master that the value of the subject matter of the suit property could not be ascertained from the pleadings or judgment of the court. The taxing officer proceeded and assessed instruction fees on that basis
- 34 It is my view that the taxing master in her ruling correctly exercised her discretion in awarding the instruction fees of Kshs 200,000/= and that she did not proceed on any error of principle. I therefore find that the applicant has not established any basis upon which this court should interfere with the discretion of the taxing officer.
- 35 In conclusion, I do find that the applicant's application dated January 20, 2020 lacks merit and is thereby dismissed with no orders as to costs.

JUDGMENT DATED SIGNED AND DELIVERED VIA EMAIL THIS 23RD MARCH 2023.

A O OMBWAYO

JUDGE

