



**Katunga Mbuvi & Co Advocates v County Government of Kajiado
(Miscellaneous Application 09 of 2023) [2024] KEHC 15169 (KLR)
(Constitutional and Human Rights) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION 09 OF 2023**

**EC MWITA, J
NOVEMBER 29, 2024**

BETWEEN

KATUNGA MBUVI & CO ADVOCATES ADVOCATE

AND

COUNTY GOVERNMENT OF KAJIADO CLIENT

RULING

Background

1. The applicant, (the Advocate) represented the respondent, (the Client) in Constitutional Petition No. 94 of 2018; *Wanjiru Gikonyo v Attorney General & another Kajiado County Governor & 4 other (Interested Parties)* [2021] eKLR. In a judgment issued on 22nd September 2021 the petition was dismissed.
2. The Advocate, then filed an advocate-client bill of costs dated 3rd August 2023 against the Client for the sum of Kshs. 12,342, 545 for professional work done. In a ruling dated 30th January 2024, the bill of costs was taxed and allowed in the sum of Kshs. 974,142

Reference

3. The Advocate was aggrieved and filed this reference dated 16th February 2024 challenging the taxing officer's decision. The Advocate sought to set aside the taxing officer's decision and have the bill of costs remitted back for taxation a fresh. In the alternative, the Advocate asked this court to re-assess the costs.
4. The reference is predicted on the ground that in taxing the bill, of costs the taxing officer failed to consider the complexity of the matter and that the taxing officer misdirected herself on the instruction fees payable to the advocate by awarding only Kshs. 500,000 for instruction fees.



5. It is the Advocate's case, that the taxing officer wrongly exercised her discretion and took into account irrelevant factors when taxing instruction fees where the value of the subject matter could not be ascertained from the pleadings as was the case here. In the advocate's view, the amount of instruction allowed was manifestly low and justifies this court's interference.
6. The Advocate asserted that the taxing officer committed an error in principle, took into account irrelevant factors; wrongly exercised her discretion while taxing the bill of costs and taxed off Kshs. 11,368,783 out of the Kshs. 12,342,545 that had been sought in the bill of costs. The taxing officer also failed to consider the nature, importance of the cause, interest of the parties, the general conduct of the proceedings, the labour, care and expertise and all other relevant circumstances. The taxing officer failed to consider the labour care and legal expertise employed in the case.
7. The Advocate cited the decision in *Mereka & Company Advocates v Zakhem Construction* [2014] KEHC 1257 (KLR) for the argument that the bill of costs was drawn to scale and should have been allowed as drawn.
8. Regarding item 1 (instruction fee), the Advocate cited section B of Schedule 6 of the *Advocates (Remuneration) (Amendment) Order*, 2014, that the Kshs. 7,500,000 sought was commensurate with the professional work done and should be allowed.
9. The Advocate asserted that this being an Advocate- Client Bill of costs, warranted instruction fees to be raised by 50% as provided in Schedule 6 Part B of the *Advocates (Remuneration) (Amendment) Order* 2014. The 50% Advocate-Client Costs should therefore be taxed as drawn.
10. The Advocate again argued that items 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 18 and 19 which related to various documents were charged a total of Kshs. 42,074 and should be taxed as drawn. Items 2, 4, 11, 15, 16, 17 and 20 related to documents received and perused on behalf of the client in Constitutional Petition No. 94 of 2018 Nairobi. They were charged at a total of Kshs. 21,800 and should be taxed as drawn.
11. Items 21-27 related to the mentions and hearing attended by the advocate on behalf of the client in Constitutional Petition No. 94 of 2018, Nairobi. The advocate cited section 7, Schedule 6 of the *Advocates Remuneration (Amendment) Order* 2014 that a total of Kshs. 55,500 was charged and the should be allowed as drawn.
12. Item 28 related to the drawing and filing of the bill of costs, drawing affidavit of service, attending court for taxation, drawing certificate of taxation and attending court registry to collect the certificate of taxation. The items were charged a total amount of Kshs. 20,750 and should be allowed as drawn.
13. Disbursements related to the fees paid by the advocate in filing a notice of appointment, submissions and grounds of opposition as provided in the fees charged by the court. The same were charged at Kshs 380 and should be taxed as drawn and allowed.
14. Thought served, the client did not file a response or submissions to the reference and did not attend during the hearing.

Determination

15. I have considered the reference and the advocate's arguments. The issue for determination is whether this court should interfere with the taxing officer's decision on the advocate-client bill of costs made on 30th January 2024.



16. The principle underlying award of costs was well explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya* ILR (1921) 48 Cal. 427 as follows:

We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.

(See also *Vinod Seth v Devinder Bajaj & another* (CA No. 481 of 2010))

17. As parties engage in court they often incur costs as they instruct advocates to represent them. A party is thus, entitled to recoup the costs necessarily incurred in the proceedings. In other words, the successful party is entitled to fair and adequate compensation for what has been incurred in the course of the litigation but not as a way of enrichment.
18. The converse is also true that an advocate is to be sufficiently remunerated for the professional work done on behalf of the client. This is done through taxation of advocate-client bill of costs where parties have not agreed. Remuneration Orders fix the amount a party or advocate is to charge based on the subject matter of the dispute or other factors and considerations.
19. Instruction fee is the amount a party pays to the advocate during instructions. For that reason, the principle is that costs recompense and indemnify an advocate for what appears to the court to be the legal expenses incurred by the advocate in prosecuting the client's case. In that respect, taxation of a bill of costs (advocate -client or even party and party) is an exercise of discretion by the taxing officer.
20. In that respect, the law is settled that this court will not interfere with exercise of the taxing officer's discretion unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162); *Rogan-Kemper v Lord Grosvenor (No.3)* [1977] KLR 303; [1977] eKLR: *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019)).
21. I agree with the position espoused in *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, where the court observed thus:

[T]he court will not interfere with the exercise of the taxing master's discretion unless it appears that such discretion has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.

Instruction fee

22. The advocate has challenged the taxing officer's decision on grounds that she erred in principle; failed to take into account relevant factors thus, arrived at an award that was inordinately low, calling for this



- court's interference. In that advocate-client bill of costs, the advocate sought instruction fee of Kshs 7,000,000 but the taxing officer allowed instruction fee of Kshs 500,000.
23. According to the advocate, the taxing officer applied a wrong principle in assessing instruction fee. The advocate's grievance is that in allowing instruction fee of Kshs. 500,000, the taxing officer failed to take into account the complexity of the matter, the time it took to complete the matter and other factors where the subject matter could not be ascertained from the pleadings or judgment.
24. I have perused the decision of the taxing officer. On instruction fee, the taxing officer was alive to Schedule 6 I (j) of the *Remuneration Order* 2014 which provides for a minimum of instruction fee of Kshs. 100,000 for filing or opposing petitions, which the taxing officer can increase or reduce depending on complexity; nature and importance of the matter; amount of the subject matter and interest of the parties among other factors.
25. The taxing officer then proceeded:
- I have perused the parent file, the amount requested is too much on the higher side and not justified. I have considered the period the matter was in court, the voluminous documents among others, I will enhance the amount to Kshs. 500,000.
26. There is no dispute as to the remuneration order applicable given that the petition was filed in 2018. The applicable remuneration on instruction fee is the *Advocates Remuneration Order* of 214. From the impugned decision, there can be no doubt that the taxing officer considered the matter generally as well as the guiding principles to be considered such as nature; complexity, importance of the matter and interest of the parties. The taxing officer then exercised her discretion and allowed instruction fee of Kshs. 500,000. In the circumstances I do not find any error on the part of the taxing officer in allowing instruction fee of Kshs. 500,000 having increased it from the minimum of Kshs. 100,000 allowed by the Remuneration Order. The taxing officer exercised her discretion and I see no reason to interfere with that aspect of the decision of the taxing office on instruction fee.
27. The advocate seems to argue that instruction fee should be increased by half. A perusal of the taxing officer's decision shows that indeed the amount of 500,000 was increased by half to Kshs. 750,000. In that regard, I find no error here. In the circumstances, I am unable to fault the taxing officer on her finding on instruction fee.

Other items.

28. The advocate faulted the taxing officer on other items in the bill of costs. According to the advocate, items 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 18 and 19 related to various documents, were charged a total of Kshs. 42,074 and should be taxed as drawn. According to the advocate, items 2, 4, 11, 15, 16, 17 and 20 related to documents received and perused on behalf of the client when they were representing the client in Constitutional Petition No. 94 of 2018 Nairobi. They were charged at a total of Kshs. 21,800 and should be taxed as drawn. Items 21-27 related to the mentions and hearing attended by the advocate on behalf of the client in Constitutional Petition No. 94 of 2018, Nairobi.
29. I have perused the bill of costs and the taxing officer's decision on these items. They are on matters of fact which the taxing officer considered in her decision. For instance, items 2-7, 8-10 and 20 were allowed as drawn; items 2g, 8, 19a, 28c, d, g, 29c, were taxed at Kshs. 500, each as provided for by the order. Items 21, 24, 25 and 26 on attendance, were allowed at Kshs. 1000 each as the the taxing officer pointed out that the attendance did not take more than an hour. This is an issue of fact which the taxing officer considered and exercised her discretion on. There is no evidence before this court that the attendance took more than 1 hour thus, to fault the taxing officer.



30. Items 43, 47 57 and 68 were allowed as drawn. Regarding items 22 and 23, they relate to a question of fact and the taxing officer stated that on perusing the file, there was no attendance on those dates. Items 26, 28e and g were found to have been drawn to scale and were allowed as drawn.

Conclusion

31. Having considered the reference and perused the taxing officer's decision, the conclusion I come to, is that the taxing officer properly considered the items of instruction fee, applied the principle of law and properly exercised her discretion in arriving at the amount allowed on this item. Regarding the other items, I find no fault on the part to the taxing officer since the items were on matters of fact and were considered and determined by the taxing officer.
32. Consequently, and for the above reasons, the reference is declined and dismissed. Since the client did not participate in these proceedings and costs being discretionary, each party will bear their own costs of this reference.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2024

E C MWITA

JUDGE

