



**Prof Tom Ojienda & Associates v City Council of Nairobi
(Miscellaneous Application E022 of 2021) [2024] KEHC 16499 (KLR)
(Constitutional and Human Rights) (31 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E022 OF 2021
LN MUGAMBI, J
DECEMBER 31, 2024**

BETWEEN

PROF TOM OJIENDA & ASSOCIATES ADVOCATE

AND

CITY COUNCIL OF NAIROBI CLIENT

RULING

Introduction

1. By a Chamber Summons application dated 8th August 2023, the Applicant challenges the decision of the Taxing Officer, Hon. Esther W. Mburu in the Ruling dated 25th July 2023, on the Applicant's Bill of Costs dated 22nd July 2021.
2. The Applicant seeks the relief that:
 - i. Spent.
 - ii. Spent.
 - iii. The Court be pleased to set aside the Ruling of Hon. Esther W. Mburu in Misc. No. E022 of 2021; Prof Tom Ojienda & Associates vs City Council of Nairobi dated 25th July 2023 taxing the Applicant's Bill of Cost dated 22nd July 2021 at a mere Ksh. 902,300.
 - iv. The Advocates-Client Bill of Costs dated 22nd July, 2021 be placed before another Deputy Registrar for re-taxation.
 - v. Such further or other relief as this Court may deem just and expedient to grant.



Applicant's case

3. The application is premised on the grounds set out therein and the Applicant's supporting affidavit of even date.
4. The Applicant depones that he filed his Advocate – Client Bill of Costs against the Respondent in this matter, with regard to Constitutional Petition No 129 of 2011, Afrison Export Import Limited & Huelands Limited versus The City Council of Nairobi and Another wherein he represented the Respondent.
5. The Applicant alleges that the Respondent had instructed him to defend its interests in this matter wherein the Petitioners sought a compensation of Ksh.4,000,000,000. In effect, the Applicant prepared all the requisite documentations and attended all the court hearings.
6. The Applicant protests that the Taxing Officer in accessing his Bill of Costs, did not consider the fact that the subject matter of the subject suit was Ksh.4,000,000,000 despite the fact that the Petitioner in the subject suit had deponed in his affidavit that they had incurred loss of use and rental income of Ksh.4,000,000,000 as a Result of the Respondent's action and had sought the same as compensation.
7. The Applicant contends that the Taxing Officer's assessment was erroneously arrived at as the instruction fees was not founded on the subject matter of a suit.
8. That notwithstanding it is averred that the Taxing Officer taxed the Instruction fees at Ksh.500,000 which is not to scale. According to him, the correct instruction fees based on the subject matter as per Schedule 6A(1)(b) of the Advocates Remuneration Order,2014 was Ksh.60,200,000. It is argued that instead of the Taxing Officer being guided by this, she went on to base her reasoning on the duration the matter had been before the Court.
9. It is as well asserted that while the Taxing Officer has discretion to tax a Bill of Costs, the same ought to be done on the basis of the established legal principles.

Respondent's Case

10. The Respondent's response to the Applicant's Application and submissions are not in the Court file or the Court Online Portal (CTS).

Applicant's Submissions

11. The Applicant's submissions in support of his case are not in the Court file or Court Online Platform (CTS).

Respondent's Submissions

12. Although the Respondent did not file a response and submissions to the application, it re-submitted its previous submissions to the Applicant's Bill of Costs.
13. I will summarize its submissions on instruction fees below. These submissions were filed by Rene and Hans, LLP on 9th August 2021.
14. Counsel commenced by noting that the Applicant sought a total of Kshs.105,296,450 in the Bill of Costs with Instruction fees accounting for Kshs.60,200,000 as per the subject matter.



15. According to Counsel, instruction fees should not be based on a figure quoted in the pleadings without corresponding proof of the value of the subject matter of the suit. Counsel relied on *Otieno Ragot & Company Advocates v Kenya Airports Authority* (2021) eKLR where the Court of Appeal held that:

“20. The mere mention, without more, of a figure in a pleading cannot, per se, determine the value of the subject matter for purposes of taxation. The mere mention of a figure in the pleadings should not prevent a taxing officer from exercising judicial discretion and inquiring whether such figure is indeed representative of the value of the subject matter for purposes of taxation.

Consequently, I consider that the taxing officer and the learned Judge were right in concluding that the value of the subject matter was not ascertainable from the pleadings, in which case, the taxing officer, rightly used her discretion based on other relevant consideration to assess the instruction fee. As held in *Joreth Limited vs. Kigano Ochieng & 3 others* [2019] eKLR (supra) and also *Peter Muthoka & another vs.*, here the subject matter is not ascertainable from the pleadings, the taxing officer is at liberty to use his discretion to assess instruction fees.”

16. On this premise the Court was urged not to rely on the alleged figure of Ksh.4,000,000,000 as no evidence in form of a valuation report was adduced by the Petitioners in the subject suit to justify the claim. Consequently, Counsel argued that the value of the subject matter as a result was not ascertainable in the subject suit. As such the Taxing Officer ought to have exercised her discretion in line with the set principles to arrive at a reasonable sum.

17. Reliance was placed in *Kyalo Mbobu T/A Kyalo & Associates Advocates v Jacob Juma* [2015] eKLR where the principles were reiterated as follows:

“The Court of Appeal in *Joreth Ltd vs Kigano & Associates* (2002 1 EA 92 was categorical that the judge sitting on a reference against the assessment of instructions fee by the taxing officer ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

The *Joreth* case also gave some guidelines or principles to be applied by a taxing officer in exercise of his discretion to increase the instructions fees. That the taxing officer must demonstrate in his ruling the reasons for increase of fees: -

- i. Care and labour required by the advocate.
- ii. Specify the number and length of the papers to be perused,
- iii. The nature and importance of the matter,
- iv. The value (where ascertainable) of the subject matter
- v. Interest of the parties
- vi. Novelty of the matter.”

18. In conclusion, Counsel submitted that the dispute in Petition 129 of 2011 was straight forward and an ordinary suit. This is because it dealt with the alleged unlawful allocation by the Respondent of land parcel LR No.7879/4. In his view, the suit did not constitute a complex neither novel issue.



Analysis and Determination

19. It is my considered view that the issue that arises for determination is:

Whether the Taxing Officer erred in law and principle in making her finding on Instruction Fees in the Ruling dated 25th July 2023.

20. The jurisdiction on taxation of costs and discretion to do so by the Taxing Officer is provided under Rule 10 and Rule 16 of the Advocates Remuneration Order, 2009 respectively. This Rules states as follows:

Rule 10: The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

Rule 16 : Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.’

21. The principles upon which a Court can interfere with the Taxing Officer’s decision on taxation well established. These principles were underscored in the case of Nyangito & Co. Advocates Vs. Doinyo Lessos Creameries Ltd [2014] eKLR as follows:

“ 19. The circumstances under which a Judge of the High Court interferes with the taxing officer’s exercise of 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 manifestly 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 the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise 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, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is



irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64.

20. Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.”

22. The Taxing Officer must however be exclusively guided by the relevant principles of taxation when making decisions on taxation as held in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd Africa Ltd* [1972] EA 162 that:

- “(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.
- (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- (d) so far as practicable there should be consistency in the award made.
- (e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”



23. Furthermore, in assessing whether the Taxing Officer exercised the discretion correctly, the Court of Appeal in the case of *Otieno, Ragot & Company Advocates (supra)* quoting with approval the *Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92* explained thus:

“The beginning point is whether the taxing officer properly exercised her discretion to determine the Advocate and client bill of costs.

In the case of *Joreth Ltd vs Kigano & Associates [2002] 1 E.A. 92*, this Court addressed the issue thus;

“We would at this stage point out that the value of the subject matter of a suit for the purposes 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

24. Correspondingly, the Taxing Officer in taxing a Bill of Costs is required to be guided by the relevant Schedule in the Advocates (Remuneration) Order to make a determination. The Court of Appeal of Uganda in *Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11* as cited with approval in *Truth Justice & Reconciliation Commission v Chief Justice of the Republic of Kenya & another [2014] eKLR* pronounced itself as follows:

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

25. The Court in the case of *Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W’njuguna 2005] KEHC 2079 (KLR)* laid down following principle in regard to arriving at a decision on the instruction fees:

“... the taxation of advocates’ instruction fees is to seek no more and no less than

- (ii) reasonable compensation for professional work done;
- (iii) the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;and
- (iv) so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees...”

26. In the instant case, the Taxing Officer in evaluating the Applicant’s Bill of Costs stated that she was guided by Schedule 6 (1)(j) of the Advocate Remuneration Order, 2014 and the principles set out in *Premchand Raichand Ltd (supra)* in taxation of a Bill of Costs.



27. Prior to arriving at her determination, the Taxing Officer examined the subject suit file and made a finding that the matter had been in Court for a few days before being transferred to the Environmental and Land Court (ELC). She acknowledged that the suit raised a significant issue but substantial enough to attract an Instruction Fees of Ksh.60,200,000. In her discretion, she increased the instruction fees from the stipulated minimum of Ksh.100,000 to Ksh.500,000.

28. The Advocates (Remuneration) (Amendment) Order, 2014 under Schedule 6 (1)(j) (ii) provides:

Constitutional petitions and prerogative orders

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

- i.
- ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000
- iii.

29. A perusal of the subject suit Petition shows that the Petition was instituted to challenge the Respondent's allocation of the parcel of land registered as LR No.7879/4 belonging to the Petitioners herein to Third Parties. It was argued that the Respondent's forceful acquisition had no legal basis and was a violation of their constitutional rights under Article 40 of *the Constitution*. In addition to the sought declarations, the Petitioners sought a compensation of Kshs 4,000,000,000 in view of the loss of use and rental income of the property.

30. Having regard to the above factual background, it is my considered opinion the subject matter was land L.R. No. 7879/4 which was the subject of compulsory acquisition and not loss of user. The actual value of the land was never actually ascertained yet it was the central issue. It is this value of land that was never ascertained that was key in the determination of the instruction fees as the other losses were related to it.

31. It is my humble view therefore that the Applicant was in error in to attach the value of the subject matter in the suit to the compensation for loss of user and rental income instead of the actual subject matter of the suit, being the disputed land parcel.

32. Considering that the value of the subject matter was not ascertainable, the Taxing Officer was obliged to consider the relevant guiding principles set out under Schedule 6 (1)(j) and guiding authorities. In her view as observed above, the matter although it raised a substantial issue, the same, being an issue of determining whether compulsory acquisition was merited or not, was not difficult or novel and further that the time expended in the matter was equally short. These considerations in my opinion were in line with the set principles in taxation.

33. Furthermore, what is clear is that despite making weighty assertions concerning the value of the subject matter, the value of the parcel of land which was critical was not established and the Applicant failed to establish the same before the Taxing Officer and this Court.



34. I am guided by the case of Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR which is relevant in this circumstance:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Bristone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

35. In view of the guiding principles highlighted above, an examination of the parties’ cases and the Taxing Officer’s decision, my inescapable conclusion is that the Taxing Officer properly addressed her mind to the relevant Schedule of the Advocates Remuneration Order and her reasons for taxation of the Instruction fees were sound and jurisprudentially unimpeachable.

36. I uphold the Ruling of the Taxing Officer dated 25th July 2023 with the consequence that this Taxation Reference collapses and is hereby dismissed.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.

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L N MUGAMBI

JUDGE

