



Prof Tom Ojienda and Associates v Supeyo & 19 others; County Government of Kajiado & another (Respondent) (Miscellaneous Application 24 of 2019) [2024] KEHC 16201 (KLR) (Constitutional and Human Rights) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION 24 OF 2019**

**EC MWITA, J
DECEMBER 19, 2024**

BETWEEN

PROF TOM OJIENDA AND ASSOCIATES APPLICANT

AND

NAILANTEI SUPEYO & 19 OTHERS & 19 OTHERS & 19 OTHERS & 19 OTHERS & 19 OTHERS CLIENT

AND

COUNTY GOVERNMENT OF KAJIADO RESPONDENT

BOARD OF KAJIADO RESPONDENT

RULING

1. This is a reference from the decision of the taxing officer dated 14th December 2023 on party and party bill of costs. The applicant filed advocate-client bill of costs dated 3rd July 2019 for legal services rendered in HCC Petition. No 283 of 2014- *James Tinai Mutere v County Government of Kajiado & Another; Nailantei Supeyo and 19 others (Interested parties).*
2. The 1st respondent opposed that bill of costs contesting advocate- client relationship. The 1st respondent also filed a notice of motion dated 30th September 2019 on the issue. In a ruling dated 30th November 2021, this court (Ong’undi, J) allowed that notice of motion with costs to the 1st respondent.
3. The 1st respondent then filed its party and party bill of costs dated 24th May 2023 which was taxed at Kshs. 511, 530 in a ruling dated 14th December 2023, prompting this reference.



Reference

4. The applicant was aggrieved and filed this reference dated 31st January 2024 challenging the taxing officer's decision and sought to have that decision set aside and the party and party bill of costs remitted back for taxation a fresh.
5. The applicant argued that the costs allowed are excessive; that the taxing master did not consider their submission that the advocate had at all material times represented the 2nd respondent who is fully funded by the 1st respondent and that the 1st respondent has the legal burden of meeting its legal fees.
6. The applicant further argued that the taxing officer made a fundamental error in principle by taking the bill of costs one from a constitutional petition and/or Judicial Review proceedings. In ascertaining instruction fee rather than applying Schedule 6 of the [Advocates Remuneration \(Amendment\) Order](#) under the part titled 'other matters.'
7. The applicant urged this court to note that the 1st respondent opposed the bill of costs through grounds of opposition and an application dated 10th September 2019, all of which raised the issue of lack of retainer. That application did not contain a novel issue that could attract legal fees of Kshs. 511, 530
8. On whether the reference was properly before the court, the applicant stated that upon delivery of the ruling on the party and party bill of costs, they requested for a copy of the ruling together with reasons for the taxation. They were however unable to get a copy of the ruling before the courts went for Christmas recess. The ruling was received on 22nd January 2024 and the reference was filed on 31st January 2024, thus complied with the statutory timelines under rule 11 since the period between 22nd January 2024 when reasons were received and 31st January 2024 when the reference was filed is 10 days well within the 14 days window prescribed under rule 11 of the Advocates Remuneration Order.
9. The applicant maintained that it had further invoked the court's discretionary jurisdiction to extend time for filing the reference and to reference as properly on record. The applicant urged the court in the spirit of article 159 (4) of the [constitution](#) for a chance to ventilate their grievances. Reliance was also placed on Order 50 rule 6 of the [Civil Procedure Rules](#) and the decision in [Sunsand Dunes Limited v Raiya Construction Limited](#) [2021] eKLR.
10. The applicant further maintained that the taxing officer made fundamental errors in principle by mischaracterising the nature of the party and party bill of costs dated 24th May 2023 as a constitutional/ judicial review matter awarding costs of Kshs. 511,530 and dismissing its submissions dated 6th November 2023.
11. The applicant relied on the decisions in [Kamunyori & Company Advocates v Development Bank of Kenya Limited](#) [2015] KECA 595 (KLR) and [Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board](#) [2005] eKLR for the contention that the taxing officer mischaracterised the proceedings under taxation as one under the general head of judicial review and/or petition rather than the head of "Other matters" in schedule 6 of the Advocates Remuneration Order.
12. According to the applicant, the erroneous categorisation of the proceedings under taxation led to the taxing master inadvertently identifying Kshs. 100,000 as the minimum fee instead of Kshs. 45,000, leading to allowing instruction fee of Kshs. 300,000. The applicant relied on [Arthur v Nyeri Electricity Undertaking](#) [1961] E.A 492 and reiterated that the amount of work undertaken by the 1st respondent is not commensurate to the costs as pleaded in the application.



1st respondent's response

13. The 1st respondent opposed the reference through grounds of opposition. The 1st respondent contended that the application was commenced irregularly as the applicant did not comply with section 11(1) and (2) of the [Advocates \(Remuneration\) Order](#). Hence this court lacks the jurisdiction to determine it.
14. The 1st respondent further contended that the reference is time barred by virtue of section 11(1) and (2) of the [Advocates \(Remuneration\) Order](#) as it was filed out of time without leave of court. Reliance was placed on [Nicholas Kiptoo Arap Korir Salat v IEBC & Others](#) [2014] eKLR and [Multiline Motors \(Kenya\) Ltd v Migori County Government](#) [2021] eKLR.
15. The 1st respondent again relied on rule 11(1) of the [Advocates \(Remuneration\) \(Amendment\) Order 2014](#) and the decisions in [Machira & Co. advocates v Arthur K. Magugu & another](#) [2012] eKLR and [Kisia v Lubulella and Associates Advocates](#) [2022] KEHC 550 (KLR) for the position that the applicant did not file a Notice of Objection and notify the Deputy Registrar of the items he intended to contest in the ruling of 14th December 2023. The application is thus, premature, misconceived and legally untenable.
16. The 1st respondent maintained that the applicant had not demonstrated that the taxing officer's decision violated the principles of taxation stated in [Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd](#) [1972] EA 162.
17. The 1st respondent argued that the amount allowed by the taxing officer in the impugned ruling is commensurate with the proceedings before court.

Determination

18. This is a reference filed against the ruling of the taxing officer dated 14th December 2023 on a party and party bill of costs filed by the 1st respondent. The party and party bill of costs arose from the ruling of this court (Ong'undi J) which allowed a notice of motion with costs to the 1st respondent.
19. The applicant faulted the taxing officer for taxing the bill of costs as though it was from a petition and used the wrong paragraph of the Schedule in the [Advocates Remuneration \(Amendment\) Order](#).
20. The law is settled that this court will not interfere with the discretion of a taxing officer unless it is shown that the taxing officer considered wrong factors or failed to take into account relevant factors and as a result, arrived at an erroneous decision or the decision causes injustice to one of the parties.
21. In other words, 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)).
22. I agree with the position espoused in [KANU National Elections Board & 2 others v Salah Yakub Farah](#) [2018] eKLR, where the court observed that:

[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.

23. I have considered the arguments by parties, read the ruling of the taxing officer and perused the party and party bill of costs dated 24th May 2023 that was before the taxing officer. In that bill of costs, the 1st respondent sought Kshs. 1,300,000 as instruction fee for defending the 1st respondent in the suit in which the advocate had filed advocate-client bill of costs demanding Kshs. 25,615, 525.
24. From the ruling, the taxing officer considered item 1 where the 1st respondent had sought Kshs. 1,300,000 on the basis of that the value of the subject matter was Kshs. 25,615,525. The taxing officer then applied Schedule 6 1 (j) of the *Remuneration Order* which provides for a minimum of Kshs. 100,000 to “present and oppose judicial Review or constitutional petition” and allowed Kshs. 300,000 on item 1. The taxing officer then allowed Kshs. 100,000 on getting up fee being 1/3 of instruction fee.
25. There can be no argument that from the taxing officer’s ruling and costs allowed on instruction fee, that the taxing officer applied Schedule 6 1(j) which is on instruction fee for “presenting and opposing judicial Review or constitutional petition.”
26. The taxing officer was not dealing with a party and party bill of costs arising from presenting or defending judicial review or constitutional petition. The petition (No 238 of 2014) was dismissed with no order as to costs on 17th September 2015. What was before the taxing officer was a party and party bill of costs arising from an application and not petition and, therefore, the taxing officer could not apply the paragraph dealing with costs arising from defending a constitutional petition.
27. It is clear to me, that the taxing officer made a fundamental error, an error of principle, thereby arrived at an erroneous decision which caused an injustice to one of the parties.
28. There was this argument by the 1st respondent that the reference was filed out of time. The applicant contended that they applied for the ruling but only got it on 22nd January 2024 and filed the reference on 31st January 2024. The 1st respondent did not contest this fact that the ruling was only supplied on 22nd January 2024.
29. The 1st respondent again argued that the applicant did not issue notice to the taxing officer identifying the items they were opposed to. I note from the taxing officer’s ruling that it contained reasons and, therefore, as reasons were in the ruling there was no need to serve notice identifying items contested. Furthermore, failure to serve such a notice is a procedural issue that should not cloud jurisdiction of the court.
30. More fundamentally, where the court is satisfied that the taxing officer erred in law, the court must summon its jurisdiction and discretion to correct the error and obviate an injustice rather than allow such an injustice to prevail since an error of law goes to the soundness and legality of the decision.
31. In the circumstances, having considered the reference and arguments by parties, I am satisfied that the reference is merited and is for allowing.
32. Consequently, and for the above reasons, the taxing officer’s decision dated 14th December 2023 with respect to items 1 (instruction fee) and 2 (getting up fee) only, is hereby set aside. The 1st respondent’s party and party bill of costs dated 24th May 2024 is hereby remitted to the taxing officer for taxation afresh with regard to instruction fee and getting up fee, with the instructions that;
 - i. The taxing officer do proceed to tax in items 1 and 2 on the basis that costs were awarded in respect to an application and not petition and



- ii. identify the correct paragraph of the Advocates Remuneration Order applicable in such a case.
33. As the error was occasioned by the court, each party will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

E C MWITA

JUDGE

