



Republic v Town Clerk, Municipal Council of Mombasa; Chogo & 3 others (Exparte Applicants); African University Trust of Kenya (Interested Party) (Miscellaneous Application 103 of 2012) [2023] KEELC 16436 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 103 OF 2012
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

TOWN CLERK, MUNICIPAL COUNCIL OF MOMBASA RESPONDENT

AND

BRONSON HARE CHOGO EXPARTE APPLICANT

ONESMUS MANGARO EXPARTE APPLICANT

PAULINE KANYORA EXPARTE APPLICANT

MAURICE SIMON OCHIENG EXPARTE APPLICANT

AND

AFRICAN UNIVERSITY TRUST OF KENYA INTERESTED PARTY

RULING

1. The application is dated September 26, 2022 and is brought under Rule 11 (1) & (2) of the [Advocates \(Remuneration\) Order](#) seeking the following orders;
 1. That the Taxation Ruling dated 14th of September, 2022 delivered in favour of the Interested Party be set aside and/or varied accordingly
 2. That in the alternative the Interested Party's Party & Party Bill of Costs dated April 20, 2022 be taxed afresh before another Taxing Officer.
 3. That such Orders as to costs be provided for in this application.



2. It is based on the grounds that the Learned Taxing Officer erred and misdirected himself on the nature of proceedings before the Court as the proceedings were in respect of an application for simple and straight forward prerogative orders for quashing of Notices issued by the Respondent. That the Learned Taxing Officer failed to appreciate the proceedings that this matter commenced in the year 2012 and as such the relevant order applicable in relation to Item 1 on instruction fees is the [Advocates Remuneration Order, 2009](#). That the Learned Taxing Officer did not appreciate that the proceedings were not heard on merit and as such no getting up or preparation for hearing was done. That the Learned Taxing Officer failed to apply the correct principles and the [Advocates Remuneration Order, 2009](#) in taxing the Interested Party's Party & Party Bill of Costs dated April 20, 2022.
3. This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:
 - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”
4. Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of *First American Bank of Kenya v Shab and Others* [2002] EA 64 and [Joreth Ltd v Kigano and Associates](#) [2002] 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In *First American Bank of Kenya v Shab and Others* [2002] EALR 64 the court held that;
 - “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”.
5. These principles reiterate the position of the Court of Appeal in [Joreth Ltd vs Kigano & Associates](#) (2002) eKLR, where 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.
6. The Learned Magistrate in his ruling dated June 14, 2012 provided that the taxation of the matter would be based on [Remuneration \(Amendment\) order](#) of 2006, 2009 and 2014, on perusal of the main suit the matter was filed on December 28, 2012 and was concluded in February 2022 the applicable remuneration order at that time was [Remuneration \(Amendment\) order](#) 2006, 2009 and 2014 and the Taxing Master was correct on that aspect. Under Item one the Taxing Master based his calculations on schedule VI Para 1(j) of the 2006 Advocates Remuneration order that provided for the minimum sum



of Kshs 28000/= and he awarded Kshs 105,000/=. He considered that the matter had not gone into full trial when reaching his decision. The Applicant states that the Taxing Master ought to have considered the nature of the proceedings and apply the 2009 Advocates Remuneration Order. The Applicant avers that under Item 2 the Taxing Master charged a getting up fee of Kshs 35,000/= whereas the charge was not applicable in that instance as the matter was not confirmed for hearing. On perusal of the material on record the matter was dismissed for want of prosecution and it was never heard on merit and no preparation was done for the hearing. Under remuneration Order 2006 under schedule II, section 2(ii) it is provided that getting up fees can only be charged when the matter is confirmed for a hearing which was not the case on this instance. I find that the charge of getting up fees by Taxing Master under item 2 was erroneous.

7. It is trite law that VAT is awarded on Advocate – Client Bills only and can only be awarded if the Plaintiff in question tendered evidence for paid VAT and was consequently entitled to be indemnified as provided in Pyramid Motors Limited v Langata Gardens Limited [2015] and Amalo Company Limited v B N Kotecha and Sons Limited & Another [2022] eKLR. On perusal of the material on record, the matter did not meet the conditions set out for grant of VAT as it fell under party to party costs and no evidence was provided for payment of VAT.
8. I find that the Taxing Master used the wrong principles on the issue of VAT and getting up fees. Some of the relevant factors to take into account when taxing a bill include the nature and importance of the case 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. From the discrepancy mentioned above I find that there was an error in principle by the Taxing Master in the assessment. Consequently, I find that the application is merited and I grant the following orders;
 1. The Taxing Master’s decision of taxed bill of costs dated April 20, 2021 and ruling delivered on June 14, 2022 be and is hereby set aside.
 2. The bill of costs dated April 20, 2021 shall be remitted to another Taxing Master for taxation.
 3. Costs to the Ex – Parte Applicants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

