



REPUBLIC OF KENYA



Mulekyo and Company Advocates v Mavoko Water and Sewerage Co Ltd (Environment and Land Miscellaneous Application E008 of 2023) [2025] KEELC 2914 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023
NA MATHEKA, J
MARCH 25, 2025**

BETWEEN

MULEKYO AND COMPANY ADVOCATES APPLICANT

AND

MAVOKO WATER AND SEWERAGE CO LTD RESPONDENT

RULING

1. The application is dated 20th December 2023 and is brought under paragraph 11 (1) and (2) of the Advocates Remuneration Order seeking the following orders
 1. That this Honourable Court be pleased to set aside the Ruling of the learned Taxing Officer Hon. M.A. Otindo delivered on 11th December, 2023 herein and any resultant Certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to Taxation of Item 1 to 4 in the Advocate-Client Bill of Costs dated 18th July, 2023.
 2. That this Honourable Court be pleased to reinstate the Bill of Costs dated 18th July, 2023 and to assess the fees due to the Advocates in respect to the Items 1 to 4 above and make a finding on the same.
 3. That in the alternative to prayer 2 above, this Honourable Court does remit the Items of the Bills of Costs dated 18th July, 2023 set out in 1 above to another Taxing Officer for Taxation with direction on the Taxation.
 4. That the Applicants be awarded costs for this Application.
2. It is founded by the following grounds that that the learned Taxing Officer erred in law and misdirected herself in principle in taxing Item 1 and 2 in relating to instruction fees in taxing off the instructions fees to Kshs. 300,000 taking into consideration the nature and importance of the suit, the value of the subject matter (i.e. Kshs. 700,000,000), the complexity of the matter, the time expended by the



advocate and the minimum instruction fees for party and party costs prescribed under paragraph 1(j) of Schedule 6(A) the Advocate Remuneration (Amendment) Order of 2014. The learned Taxing Officer misdirected herself by disregarding the Judgment of Angote J in ELC Case No. 35 of 2010 on the value of the subject matter being Kshs. 700,000,000 which was confirmed by her colleague Honourable B.J. Bartoo in Misc. Application 19 of 2020 where the court affirmed the finding of Angote J in regard to the subject matter being Kshs. 700,000,000.

3. The learned Taxing Officer was led by the wrong principle and reached a faulty finding which was contradicting the findings in Misc. Application No. 19 of 2020. The learned Taxing Officer erred in law and misdirect herself in principle by finding the matter not complex and taxing off Item 3. On Item 4 the learned Taxing Officer wrongly calculated the amount due and reached at a wrong finding that the Item would be taxed at Kshs. 200 only given her finding on Items 1 and 2 which have amounted to Kshs. 200,000.
4. The learned Taxing Officer erred in law and misdirected herself in principle in taxing Item 4 relating to getting up fees taxing off the same taking into consideration the provisions of paragraph 2 of Schedule 6A of the Advocates Remuneration (Amendment) Order of 2014. The learned Taxing Officer erred in principle by failing to exercise her discretion properly and made manifest in principle resulting in the grant of grossly low award of Kshs. 1,868,079.60. It is in the interest of justice that the learned Taxing Officer's Ruling of 11th December, 2023 be set aside and that this Honourable Court be pleased to tax the Bill of Costs or remit it to another Taxing Officer for Taxation.
5. 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.”

5. 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 Shah 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 Shah and Others* (2002) E.A.L.R 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”.



6. In *Republic v Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna* [2006] eKLR Ojwang, J (as he then was) expressed himself as follows:

“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 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

7. In *First American Bank of Kenya v Shah and Others* [2002] E.A.L.R. 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”.

8. In *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, it was held that:

“The principles applicable to a review of a taxing master’s decision



The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in the case of *Visser v Gubb* 1981 (3) SA 753 (C) 754H – 755C as follows:-

The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

9. Differently put, before the court interferes with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. (See *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) and *Legal and General Insurance Society Ltd v Lieberum No and Another* 1968 (1) SA 473 (A) at 478G.)
10. It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision. (*Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111).
11. The Taxing Master is required to take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant. The ultimate question raised by the applicant for review/setting aside the taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.
12. The scope of this application requires this court be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The quantum of such costs is to be what was reasonable to prosecute or defend the proceedings and must be within the remuneration order. The determination of such quantum is determined by the Taxing Master and is an exercise of judicial power guided by the applicable principles.
13. It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with 'unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.' (Per SMIT AJP in *Preller v S Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.)



14. Guidance can also be obtained from the Canadian case of *Reese v. Alberta* {1993} 5 A.L.R. (3rd) 40 in which McDonald J. sets out the general principles applicable to awarding costs, at page 44:-

“While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. ... The costs recoverable are those fees fixed for the steps in the proceeding by a schedule of feesplus reasonable disbursements....”

15. In principle, costs are awarded, having regard to such factors as:- (a) the difficulty and complexity of the issues; (b) the length of the trial; (c) value of the subject matter and (d) other factors which may affect the fairness of an award of costs. The law obligates the taxing master to take into account the above principles.

16. Restating the principles of taxation of costs, the Ugandan Supreme court in *Bank of Uganda v. Banco Arabe Espanol SC Civil Application No. 23 of 1999 (Mulenga JSC)*.stated:-

“Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”

...The principles guiding the review of taxation in this court were settled in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*:

“a. Costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

- b. A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.
- c. The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.
- d. An overall balance between the interests of the parties should be maintained.
- e. The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.
- f. And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master’s view differs so materially from its own that it should be held to vitiate the ruling.”



17. The applicant stated that they were instructed to represent the respondent as the 2nd defendant in ELC No. 35 of 2010 against prayers for an injunction, general damages where the value of the property is Khs. 700,000,000/= and equally receiving instructions to raise a counterclaim against the 1st defendant in the said suit. The applicant argued that this was a novel and complex matter and special fees ought to have been awarded. That the award was excessively low. The Taxing Master in her ruling dated 11th December 2023 provided that the taxation of the matter would be based on Remuneration (Amendment) Order of 2014. Under Item one the Taxing Master based her calculations on Schedule 6 of the 2014 Advocates Remuneration order under titled other matters and taxed it at Kshs 1,868,079.60. it provides that other matters to sue or defend in any case not provided for above; such sums as maybe reasonable but not less than – (i) If undefended kshs 45,000 (ii) if defended kshs 75,000. In her ruling she acknowledged the value of the subject matter is 700,000,000 and taxed item 1 and 2 at kshs.300,000 for each item. She taxed off item 3 as the matter was not certified complex by the Judge. Item on getting up was taxed at kshs 200 being 1/3 of items 1 and 2. The applicants had submitted on the getting up fees, that was taxed, stating that it was erroneous, as the basis for its taxation was replete with errors in principle.
18. Schedule 6 paragraph 2 of the Advocates Remuneration (Amendment) Order, 2014 provides as follows:
- “2. Fees for getting up or preparing for trial
19. In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:
- Provided that—
- (i) this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
 - (ii) no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
 - (iii) in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”
20. I concur with the applicant’s submissions and I find that there is a mathematical error on this item. I find an error in principle and in the circumstances the fees awarded are not correct. I find that there is an error by the Taxing Master in the assessment as well. Consequently, I find that the application is merited and make the following orders;
1. That the Ruling of the Taxing Officer delivered on 11th December, 2023 in the ELC Misc. Application No. 08 of 2023 be set aside/vacated.
 2. That the bill of costs is to be taxed by a different Taxing Officer.
 3. There will be no order as to costs.
- It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2025.



N.A. MATHEKA
JUDGE

