



**Hamilton Harrison & Mathews v Jaribu Credit Traders Ltd (Miscellaneous Application E084 of 2022) [2023] KEHC 1366 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1366 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**MISCELLANEOUS APPLICATION E084 OF 2022**  
**JK SERGON, J**  
**FEBRUARY 24, 2023**  
**IN THE MATTER OF THE ADVOCATES ACT**  
**AND**  
**IN THE MATTER OF TAXATION OF COSTS AS BETWEEN ADVOCATE AND CLIENT**  
**BETWEEN**  
**HAMILTON HARRISON & MATHEWS ..... ADVOCATE**  
**AND**  
**JARIBU CREDIT TRADERS LTD ..... PLAINTIFF**

**RULING**

1. The advocate/applicant herein has filed the Chamber Summons Reference (“the Reference”) dated September 1, 2022. The Summons is supported by the grounds set out on its face and the facts stated in the affidavit of advocate Wambugu Gitonga and sought for the following orders:
  - i. The court be pleased to review and/or set aside the assessment of the taxing officer on instruction fees (item number 1) with respect to the applicant’s Bill of Costs dated February 17, 2022.
  - ii. The court be pleased to assess instruction fees due to the applicant at Kshs 1,500,000/= or at such sum as it deems reasonable and just.
  - iii. The taxing officer erred in law and principle by assessing the advocate –client fees using the party and party costs as a result of which she arrived at the wrong instructions fees, wrong getting up fees and in the end, a wrong quantum of total fees.



- iv. The taxing officer erred in law and principle by failing to make provisions for and consider the undisputed drawings, attendances, services and copies (items number 37-106,109-167,169-344,346-350 and 353-397.
  - v. In alternative to the above prayers, this Honourable Court be pleased to remit the applicant's Bill of Costs dated February 17, 2022 to the Taxing Officer for the Bill of costs to be taxed afresh.
  - vi. The costs of this application be provided for.
2. It is premised on the grounds set out on the face of the Application and the depositions of Ezra Makori in the Supporting Affidavit dated and sworn on September 5, 2022. It is stated that the taxing officer erred in law and principle in;
- i. That the assessment of instruction fees for the advocates –client costs is different from the assessment of party and party costs in High Court Civil Case no 1590 of 2002.
  - ii. The importance of the matter, matter value and the interests of the parties. The applicant prosecuted an urgent and critical matter where the respondent's property had been sized by the Commissioner of Customs and Excise. The respondent business was placed at risk and risk and its reputation damaged. This would have in turn caused irreparable damage to the respondent's business.
  - iii. The nature of the case. The amended plaint dated January 31, 2013 and as drawn by the applicant sought for the following prayers.
    - a. Kshs 45,729,970/=
    - b. General damages for unlawful seizure of goods.
    - c. Economic loss and/or loss of profits resulting from the unlawful seizure.
    - d. Loss of re-investment income and profit on the same
    - e. Cost of the suit
    - f. Interest on a, b, c and d above until payment in full
    - g. Any other of further relief this court may deem fit to grant.
  - iv. This matter was labour intensive as the parties had filed voluminous documents that required to be perused before commenting the matter. The applicant prepared the case for trial, prosecuted the matter during the hearing and judgment was entered in favour of the respondent.
  - v. The general level of remuneration of advocates must be such as to attract worthy recruits to the legal profession.
  - vi. The level of awards should be consistent where possible.
  - c) The taxing officer failed to determine on the merits each and every item on the Bill of costs.
  - d) The taxing officer therefore exercised her discretion on the matter in judiciously contrary to paragraph 7 of the ARO.
  - e) The assessment of the Taxing Officer is grossly unjust and goes against the legal principle that a successful litigant is entitled to reasonable costs.



- f) It is fair and just that the assessment of the Taxing Officer on the Bill of Costs dated February 17, 2022 is disturbed and substituted with such sum that this court deems reasonable.
3. The Application is opposed. The Respondent filed a Replying Affidavit dated October 4, 2022 sworn by Suresh Nanalal Kantara.
  4. It is stated in the Replying Affidavit that the applicant requests instruction fees of Kshs 1,500,000/=, which amount is excessive, has no basis, and is without justification, noting that there is also to be a 50% increment, and that judgment was entered on 23/7/2020 for the Plaintiff)the respondent against the defendant in the amount of Kshs 3,000,000/=.
  5. It is further stated that any agreement for fees was in place, the particular and specified amount would have been enforced through a different schedule however in this bill of costs is pleaded under Schedule 6 of the *Advocates Remuneration Order*.
  6. It is contended that The respondent believes that the law should be applied to all equally, without favor or discrimination, in regard to the value of the suit, and that the goalposts should not be moved as between the respondent and the applicant to adopt Kshs 45,792,970/= as the value of the suit as alleged. The value of the judgment sum of Kshs 3,000,000/= was applied in party to party costs.
  7. It is stated that the Deputy Registrar had clearly indicated in her ruling that she had perused the suit file in HCC 1590/2002 and therefore had understood the extend of the itemized costs and made awards accordingly.
  8. It was further stated that there was no need for litigation in that situation because the total fee requested in the Bill of Costs was Kshs 3,954,094/=, which is over and above the judgment amount of Kshs 3,000,000/=. The applicant now owns the judgment sum in addition to the Kshs 904,669/= that the respondent has already paid.
  9. By consent of parties, this application was canvassed by way of written submissions which I have read and considered.
  10. The decision of a taxing officer is discretionary and this power can only be interfered with if the reference meets the conditions set out in *Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd* [2014] eKLR, where Odunga J laid out the principles as follows:-

“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 manifested excessive as to justify an inference that it was based on an error of principle;

- a. 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 importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge;
- b. 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 and the court is not entitled to upset a taxation because in its opinion.”



11. Similarly in *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court observed;

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

12. It is the applicants contention that the taxing officer erred by taxing off Kshs 663,304/= from the Kshs 1,500,000/= sought and assessing instruction fee at Kshs 836,695/=and that it was erroneous for the officer to use party and party costs to determine the advocate-client costs should be.

13. On the other hand the applicant submitted that once the judgment is given, there should be no ambiguity on the value of the suit and in this regard the taxing master cannot revert back to the plaint or any other sums pleaded.

14. I rely on the Court of Appeal in Civil Appeal No 328 of 2017 *Peter Muthoka & Joseph Mumo Kivai v Ochieng, Onyango, Kibet & Ohaga Advocates* held as follows:

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.”

15. I am in agreement with the respondent that once judgment is given, there should be no ambiguity on the value of the suit and in this regard the taxing master cannot revert back to the plaint or any other sums pleaded.

16. It is also clear that this application is unprocedural and offends Rule 11 of the *Advocates Remuneration Order* as there was no reference or request for the reasoning to the taxing master and none was served upon the respondent therefore the Chamber Summons dated 1/9/2022 was filed a month after ruling without leave and is therefore out of time and is struck out.

17. In the case of *Macharia & Co Advocate VArthur K. Magugu & Another* [2012]eKLR, where the Court of Appeal held as follows:-

“... If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items the items objected to and sought reasons for their taxation, the respondents notice of August 1, 2001 was fatally defective. It follows that the respondent’s reference based on it was incompetent and we agree with the counsel for the Appellant that it should have been struck out.”

18. The second case is the case of *Matiri Mburu & Chepkemboi Advocates Vs Occidental Insurance Company Limited* [2017] eKLR, the court expressed itself as follows:-

“... the provisions of Paragraph 11 of the *Remuneration Order* serve several purposes. Firstly, the requirement that a party seeking reasons gives a notice of items objected to, serves to narrow down the issues, and secondly, give notice to the adverse party and the taxing master



of his objection. Thus the taxing master, adverse party and ultimately the reference court in their respective roles can focus on the specific matter objected to rather than entire bills of costs, which often run into several pages. .. The objective is obvious: the expeditious disposal of taxation disputes. Thus compliances with the requirements of paragraph 11 of the Remuneration Order is not a mere technicality that can be pushed aside peremptorily as the Applicant appears to suggest. The provisions of Article 159 (2) (d) of the Constitution were not intended to overthrow procedural or technical requirements, but to guard against “undue regard” to procedural technicalities in the administration of justice.

19. Upon considering the above, I am convinced that the learned taxing master applied the correct principles and arrived at a well-reasoned finding and I see no reason to interfere with her decision.
20. Consequently, I find that the Chamber Summons dated September 1, 2022 lacks merit and the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Advocate/Applicant

..... for the Plaintiff/Respondent

