



REPUBLIC OF KENYA



**KENYA LAW**

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**Majanja Luseno & Company Advocates v Jamii Bora Bank (Now known as Kingdom Bank Limited) (Miscellaneous Civil Application E393 of 2022) [2023] KEHC 1421 (KLR) (Commercial and Tax) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1421 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**MISCELLANEOUS CIVIL APPLICATION E393 OF 2022**  
**JWW MONG'ARE, J**  
**FEBRUARY 23, 2023**

**BETWEEN**

**MAJANJA LUSENO & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**JAMII BORA BANK (NOW KNOWN AS KINGDOM BANK LIMITED) ..... RESPONDENT**

**RULING**

1. Before the court is a Chamber Summons Application dated May 20, 2022 brought under Rule 11(2) of the [Advocates \(Remuneration\) Order 2009](#) and Section 51 (2) of the [Advocates Act](#) Cap I6.
2. The Applicant sought the following orders from the court:-
  1. THAT this Honourable Court be pleased to set aside the decision respecting the assessment of fees under item number 1 of the Advocate/Client bill of costs dated October 15, 2021 and the consequential Certificate of Taxation dated April 28, 2022;
  2. THAT this Honourable Court be pleased to remit the Advocate/Client bill of costs dated October 15, 2021 to another Taxing officer other than the Honourable EM Nyakundi for taxation.
  3. THAT in the alternative, this Honourable Court be pleased to exercise its inherent jurisdiction and re tax item number 1 relating to instruction fees of the Applicant's Advocate/Client bill of costs dated October 15, 2021.
  4. THAT costs of The Reference be awarded to the Applicant.



5. THAT this Honourable Court does issue such other orders as if may deem fit and just.'
3. It is the Applicants case that the Taxing officer's decision of April 12, 2022 in Taxation Number E767/2021 and the subsequent Certificate of Taxation dated April 28, 2022 as it relates to the taxation of item 1 on the Applicant's Bill of Costs is based its decision on the wrong schedule in that the Taxing officer relied on Schedule 7 paragraph 2 for a taxation 'in any suit or appeal by the nature of which no specific sum is sued, claimed for , or awarded in the Judgment'.
4. The Applicant's argument is that although the suit subject matter of the Taxation was seeking injunctive relief, the value of the suit property was discernable from the pleadings and therefore the taxing officer ought to have based the assessment of the Bill under the Schedule 7 Paragraph 1 of the Advocates Order, 2014.
5. The Applicant further alleged that the taxing officer acted in error in not holding that the value of the subject matter was ascertainable and that the Applicant would be prejudiced as a result of the award on instruction fees which was manifestly low.
6. The Applicant urged the court to remit the Bill back for taxation of item 1 or in the alternative exercise its judicial authority over the taxing officer and re tax the item.
7. The Respondent opposed the application. It is their position that from a perusal of the suit subject matter of the taxation, there was no claim for any pecuniary or liquidated award and that the prayers sought in the suit were purely declaratory in nature and hence the taxation under paragraph 2 of Schedule 7 of the Advocates (Remuneration) (Amendment) Order 2014, was a correct.
8. The Respondent urged the court to sustain the assessment of item 1 on instruction fees Kshs 50,000/=, as taxed.

### **Analysis and Determination**

9. Upon reading the Applicant and Respondent respective bundles and taking into account their cited authorities and the oral submission the court has identified one issue for determination as follows
  - i. Whether the taxing officer erred in principle in its assessment of item 1 in the Advocates /Client Bill Costs under Paragraph 2 of Schedule 7 instead of Paragraph 2(b) of Schedule 7 of the Advocates (Remuneration) (Amendment) Order 14
10. In arriving at a decisions I note that Paragraph 2 schedule 7 states as follows:-
 

' In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs 20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs 50,000.'
11. While paragraph 1 of Schedule 7 provides as follows:-
 

'Where the sum found due (in the case of a wholly or partially successful plaintiff) or the sum sued for (in the case of a wholly successful defendant). Subject as provided in this Schedule, the fees for instructions shall be as follows—



(b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).'

12. I note that the taxing officer relied on paragraph 2 of schedule 7 the above provision in taxing the Applicant's instruction fees at Kshs 50,000/-.

13. I also note that although the sum was for a declaratory relief and not for a liquidated sum the value of the property was particularly pleaded in pleadings in the suit subject matter of the taxation being CMCC No 2611/2017 .

14. A perusal of the pleadings in the above civil dispute reveals that indeed that the subject matter was the loan of Kshs 3, 455,600.20 and that the same was never controverted or disputed in the said suit.

15. In the Court of Appeal case of *Peter Muthoka & another v Ochieng & 3 others 2019 eKLR*, it was held:-

' It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.'

16. Further, Section 2 of the *Civil Procedure Act*, under definitions, defines Pleadings as follows:-

a. 'Pleading' includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant'

17. Guided by the above authority, the court is of the opinion that the subject matter of the suit was ascertainable from the pleadings. I find therefore that the taxing officer ought to have considered this figure while taxing the instruction fees instead of exercising its discretion to determine the same.

18. I therefore hold and find that application before me is merited. The court therefore directs that the Advocates/ Client Bill of Costs being Miscellaneous Cause No E767/2021 dated October 15, 2021 be remitted back to the taxation officer for reassessment in accordance with Advocates Remuneration Act, 2014.

19. In view of the fact that the act complained of in the present application before me was occasioned by a misinterpretation the law by the court, I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

.....

**J. W. W. MONGARE**

**JUDGE**



In the presence of:-

Miss Mercy Musau for the applicant

Mr. Obam holding brief for Mr. Kuria for the respondent

