



**Tom Ojienda & Associates v Music Copyright Society of Kenya (Miscellaneous Application E1039 of 2020) [2023] KEHC 2603 (KLR) (Commercial and Tax) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2603 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E1039 OF 2020**

**JWW MONG'ARE, J**

**MARCH 29, 2023**

**BETWEEN**

**PROF TOM OJIENDA & ASSOCIATES ..... APPLICANT**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... RESPONDENT**

**RULING**

1. Before the court is the chamber summons application dated July 22, 2021 brought under paragraph 11 of the *Advocates Remuneration Order* and section 3A of the *Civil Procedure Act*, by which the applicant sought to have the ruling of that taxed the applicant's bill of costs at Ksh 1,144,167.58 varied or set aside in relation to item No 1 which relates to instructions fees on the advocates bill of costs. The applicant further seeks for an order to have the court interrogate the applicant's bill of costs in light of actual work done and adopt the applicant's proposal on taxation of the costs and an order to have the applicant's bill of costs taxed afresh *inter partes* and/or the court proceeds to make a finding.
2. The application is grounded on the fact that the applicant filed a bill of costs arising from its representation of the respondent (as plaintiff) in civil case No 138 of 2018; Music Copyright Society of Kenya v Music Publishers Association of Kenya Limited & another and urges the court to hold that that the value of the subject matter in the said suit was Ksh 1,000,000,000/= which, according to the applicant, is derived from the registration, income, assets and expenses of Music Copyright Society of Kenya.
3. In the said bill of costs dated September 9, 2020 the applicant sought to be awarded as instructions fees under item 1 the sum of Ksh 62,474,495.60/- from the respondent. The taxing master after hearing the matter taxed it off and awarded to the applicant the sum of Ksh 1, 144,167.58;



4. The applicant filed a supplementary affidavit sworn on October 27, 2021 by its managing partner through which he averred that the respondent reached an out of court settlement with the opposing party in case No 138 of 2018 Music Copyright Society of Kenya v Music Publishers Association of Kenya Limited & another without the knowledge of the applicant which led the applicant to approach this court to claim the amounts owing; that the subject matter of the suit, in his view, was Ksh 1,000,000,000/= and was calculated based on the monies that were receivable by the respondent in the year 2018; that this amount would be received precisely through money/royalties from copyrighted musical work of its 13,961 members, the respective 13,916 deeds of assignment and 86 reciprocal agreements executed by sister Collective Management Organizations around the world evident from the respondent's catalogue; that the monies were the subject of the suit as that is what the applicants were retained to defend.
5. The applicant reiterated that they calculated the instruction fees based on the subject matter above and the complexity and urgency of the matter and prayed to have the reference allowed.
6. This is a reference application challenging the instruction fees awarded to the applicant by the deputy registrar in her ruling dated July 22, 2021.
7. The applicant is aggrieved by the decision of the deputy registrar. It is the applicant's contention that the amount awarded under item 1 as instruction fees was extremely low and could not be quantified by any law and that the fees awarded was not commensurate with the nature, importance of the matter and the time taken in handling the matter and the pleadings filed thereto.
8. The applicant further asserted that the taxing master did not consider the value of the subject matter which was Ksh 1,000,000,000.
9. The application is opposed and the respondent filed a replying affidavit sworn on September 27, 2021 by its legal officer. In the said affidavit, the respondent averred that the taxing master correctly arrived at fees under item 1 on instruction fees and assessed the same at Kshs 1, 144,167.58. He further argued that the taxing master took into account all the relevant factors on the work actually done in the matter and particularly the value of the subject matter which involved fees agreed to by the parties found the claims made by the advocate to be exaggerated noting that case subject matter of the bill of costs was withdrawn without going into full trial which meant that the applicant was not justified in claiming the amount of fees as he did.
10. The respondent stated that in charging fees as drawn in the bill under item 1 at Kshs 35,000,000/- as instruction fees and purporting to base the same on the alleged music catalogue worth Kshs 1 billion purportedly owned by the company and in the absence of evidential material to support the same, the same was mere allegations and not true or possible and could not be sustained. The respondent agreed with the taxing master and stated that the assessment was correct and that the taxing master correctly exercised her discretion on the same and while basing the taxation on the applicable scale and in light of the amount of work actually done by the applicant in the matter.
11. In arriving at a decision in this matter the court must consider whether or not the taxing master correctly interpreted the law as contained in the *Advocates Remuneration Order* to assess the item 1 on instructions fees under the bill of costs subject matter of this application.
12. Paragraph 2 of schedule 7 of the *Advocates (Remuneration) (Amendment) Order* 14 states:

“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.”

13. The Court of Appeal in case of *Peter Muthoka & another v Ochieng & 3 others* 2019 eKLR, in expanding the application of the above paragraph 11 of the 7<sup>th</sup> schedule of the *Advocates Remuneration Order* has given the following guidelines to be followed in a matter for taxation of the bill of costs when it held that:-

“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.”

14. The court has noted that the applicant alleges that the subject matter of the suit was Ksh 1,000,000,000, I find that the applicant has not provided any evidence to prove this allegation, through pleadings, a judgement or a settlement. It is not enough for the applicant to make such an allegation without evidence of the same. I see no reason in the record before me to assume that the subject matter of the suit was Ksh 1,000,000,000. Further, a upon perusing the plaint as filed in the matter subject of the bill of costs, I note that the prayers sought were declaratory and injunctive reliefs and nowhere in the suit papers has the sum of Ksh 1,000,000,000 been specifically pleaded nor prayed for. The matter having concluded before a full trial, no judgement of the court exists from whence we can deduce the sum of Kshs 1,000,000,000.
15. I am persuaded that despite the fact that the suit was settled before going into full trial, it is not true, as alleged by the applicant that the taxing master did not consider the gravity of suit before taxing the instruction fees noting the amount awarded is way above that recommended by the *Advocates Remuneration Order* under the 7<sup>th</sup> schedule.
16. In conclusion, having considered all the pleadings filed by the parties and the oral highlights by counsels before me in court, I find that the application before me is not merited. I therefore find no reason to interfere with the taxing officer’s decision of July 22, 2021.
17. The application is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH 2023**

**J. W. W. MONGARE**

**JUDGE**

In the presence of:-

Ms Musando holding brief Professor Tom Ojienda for the Applicant

Mr. Rombo for the Respondent



Sylvia- court Assistant

