



Kithi & Company Advocates v Synresins Limited (Commercial Miscellaneous Application 1291 of 2020) [2023] KEHC 17607 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17607 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 1291 OF 2020
DO CHEPKWONY, J
APRIL 28, 2023
IN THE MATTER OF: THE ADVOCATES ACT, CAP 16
AND
IN THE MATTER OF: THE ADVOCATE-CLIENT BILL OF COSTS ARISING OUT
OF NAIROBI HIGH COURT, CIVIL CASE NO.765 OF 2008

BETWEEN

KITHI & COMPANY ADVOCATES ADVOCATE

AND

SYNRESINS LIMITED CLIENT

RULING

1. This is a ruling in respect of the applicant's application for reference dated October 4, 2021 and filed in court on the even date. It is brought pursuant to rule 11(2) of the *Advocates Remuneration Order*, order 51 rule 1 of the *Civil Procedure Rules* and sections 1A, 1B and 3A all of the *Civil Procedure Act*. The applicant is mainly seeking the following orders:-
 - a. Spent;
 - b. That the decision of the taxing officer dated June 24, 2021 be set aside in its entirety and the respondent's bill of costs dated December 11, 2020 be set down for taxation before a different taxing officer.
 - c. That the costs of this application be provided for.



Facts

2. It is the applicant's case that the respondent herein filed its advocate/client bill of costs dated December 1, 2020 arising from Nairobi HCCC No 765 of 2020 in which Judgment was delivered on June 21, 2012 dismissing both the main suit and the counter-claim. In the said bill of costs, the respondent herein sought for a total sum of Kshs 16,264,737.94 including instruction fees of Kshs 167,623.25 for the main suit, Kshs 6,732,500.00 for the counter-claim and getting up fees Kshs 2,299,707.75.
3. The said bill of costs was canvassed by way of written submissions and by a ruling delivered on June 24, 2021 the bill was taxed at Kshs 5,922,748.80.
4. It is the applicant's case that it is aggrieved by the decision of the taxing officer particularly as regards his findings on instruction fees, getting up fees and the total amounts awarded.
5. The applicant avers that the taxing officer contradicted himself by finding that there being a judgment, he could not resort to the pleadings as a source of the value of the subject matter but later upheld the instruction fees pleaded by the respondent premised on the pleadings on the basis that had the advocate abandoned the suit, they would have been entitled to the amount, resulting in an unjust and unfair decision.
6. The applicant further avers that the awards on instruction and getting up fees issued in respect of the plaintiff/applicant's notice of motion dated June 25, 2019 and filed in court on the even date. It is brought pursuant to order 40 rule 1, 2 and 3 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure act](#).
7. On the other hand, it is the respondent's case that the applicant's issue of whether the execution of the certificate of costs should be stayed, the same has already been spent as steps towards execution of the taxed costs have already commenced following a letter dated July 1, 2021 by the advocate/respondent requesting for the issuance of a certificate of costs with the intention of proceedings with execution of taxed costs.
8. Also, it is the respondent's case that on the issue of whether the decision of the taxing officer dated June 24, 2021 should be set aside before the court interferes with the decision of the taxing master, must be satisfied that the taxing master's ruling was clearly wrong.

Analysis and Determination

9. In the determination of the application, I have read through the grounds on its face, the affidavits in support, and in rebuttal thereof alongside the written submissions and cited authorities filed by both parties. I find the following issues arise for determination:
 - a. Whether the execution of the certificate of costs should be stayed.
 - b. Whether the decision of the taxing officer dated June 24, 2021 should be set aside.
10. On the first issue of whether execution of the certificate of costs should be stayed, it is the applicant's submission that the reference raises various arguable issues for trial, including the fact that the impugned taxed costs involve a substantial amount of money in excess of Kshs 3,951,499.50, and that unless an order for stay of execution is granted, the reference will be rendered nugatory. Further, the applicant submitted that the respondent has commenced steps towards execution of the taxed costs, making reference to a letter dated July 1, 2021 where the respondent requested for the issuance of a certificate of costs with the intention of proceedings with execution of the taxed costs. It is therefore the applicant's submission that the applicant is reasonably apprehensive that unless an order of stay of



execution of the costs is granted, the respondent will proceed with execution of the taxed costs whose effect will render the reference nugatory.

11. In the case of *Labb sign Harman Singh Ltd v Attorney General & 2 others* [2016]eKLR, the court held that:-

“It follows, in my view, that the provisions of the *Civil Procedure Act* with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the court from the taxation of a bill of cost by a taxing officer of the court under the Advocates’ Remuneration Order.

This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates’ Remuneration Order, which is the procedure provided for such determination. Otherwise such reference would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

12. This court associates itself with the above case, noting that the applicant herein stands a risk, and the reference therein stands to be rendered nugatory where the applicant is forced by the arm of the law to pay as per the taxed amount.
13. The court also takes note that the respondent submitted that granting the prayer of stay of certificate of costs would be an academic exercise because by the time this court gives its ruling, the application would have been determined. This is in no way an objection to or reason to deny the grant of the said stay and the court shall treat it as such.
14. On the second issue on whether the taxing officer’s decision dated June 24, 2021 should be set aside, the applicant submitted on the issue of instruction fees, getting up fees and the aggregate total amount awarded. It is the applicant’s submissions that the question arising is which amount ought to have been used as a basis for determining the applicable instruction fees.
15. However, this court disagrees with the applicant’s submissions that the taxing master should neither have used the pleadings or the judgment, noting that the trial court dismissed both the main suit and the suit by way of counter-claim.
16. Reference is made to the case of *Peter Muthoka & another v Ochieng & 3 others* [2019]eKLR, where 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.”



17. In view of the findings in the above cited case, the taxing master also needed to consider other factors such as the importance of the case of parties, the complexity of the issues to be canvassed in the exercise of his/her discretionary power in assessing instructions fee.
18. In this case, the judgment dismissed the plaintiff's case therein, hence affirming that the claim therein was not proven. In such circumstances, the taxing master ought to have used their discretion to give a reasonable amount, relying on the complexity of the case and its importance therein, while noting that the amount awarded should not be punitive to the parties as justice should not only be done but be seen to be done.
19. Further, it is this court's view that a taxing master cannot make assumptions of what an advocate was going to be entitled to should a judgment have been delivered. In this case, the taxing master overlooked the issue of the matter having been dismissed, thereby dealing with the file as though the judgment had been awarded as per the amount claimed therein. This therefore works to the detriment of the judgment-debtor in the trial suit, to whom the dismissal was in favour of, and hence making the taxation herein unjust.
20. In conclusion, having carefully considered the submissions of both parties in respect to the decision of the taxing master dated June 24, 2021, the court finds that the amount taxed off was too high, hence the following orders issue:-
 - a. The certificate of costs be and is hereby stayed.
 - b. The taxation be and is hereby set aside, and the same referred to another taxing master for re-taxation of the bill of costs dated December 11, 2021.
 - c. That the costs of this application be borne by each party.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF APRIL, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Wahinya counsel for Applicant

M/S Naazi holding brief for Mr. Kithi counsel for Advocate/Respondent

Court Assistant – Martin/Sakina

