



**Lubulellah & Associates Advocates v Isaac's Investments Company Ltd  
(Miscellaneous Civil Application E626 & E625 of 2021 (Consolidated))  
[2023] KEHC 4083 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4083 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E626 & E625 OF 2021 (CONSOLIDATED)  
DO CHEPKWONY, J  
APRIL 28, 2023**

**BETWEEN**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**ISAAC'S INVESTMENTS COMPANY LTD ..... RESPONDENT**

**RULING**

1. This ruling determines two applications pending in the two matters, which are cited in the title herein as consolidated because they are twin applications in the two matters and a determination of one would as well lead to the determination of the other.
2. For precision, in Misc civil application No E626 of 2021, Isaac's Investments Company Ltd (herein the client/respondent) filed a notice of motion application dated May 20, 2022 under the provisions of rule 11(2) and (3) of the [Advocates Remuneration Order](#) and sections 1A, 1B and 3A all of the [Civil Procedure Act](#) seeking the following orders: -
  - a. That this honourable court must be pleased to set aside and review the ruling and award of the taxing master the honourable Elizabeth Chepkoech Tanui delivered on May 5, 2022 in respect to the advocates/client bill of costs dated August 24, 2021.
  - b. That upon review, this honourable court be pleased to issue such further directions as it may deem fit in respect to the disputed items in the advocate/applicant's bill of costs dated August 24, 2021.
  - c. Spent.
  - d. That the costs of this application/reference be awarded to the applicant/client.



3. The application is premised on the grounds on its face and supported by averments in the affidavit of Ali M. Isaac, the respondent's director sworn on May 20, 2022. His case is that subject suit giving rise to the present taxation sought prayers for mere injunctive prayers and declarations without disclosing the value in the subject matter. Therefore, where the subject matter is not disclosed, taxation should proceed as provided under schedule 6A paragraph 1(L) of the [Advocates \(Remuneration\) Order, 2014](#) which provides for the minimum instruction fees of Kshs 6,000/=. It is the deponent's case that in this case, the taxing master erred in subjecting the taxation to schedule 6a paragraph 1(b) of the [Advocates \(Remuneration\) Order, 2014](#) for purposes of assessing the instruction fees and ended up arriving at a manifestly excessive award. It is his further contention that in any event, the said schedule 6A paragraph 1(b) above, provide that where a case is withdrawn without proceeding to full hearing, the instruction fees is to be reduced by 75% but the taxing master failed to do so.
4. The deponent also averred that the taxing master failed to appreciate that the respondent had paid the sum of Kshs 1,120,000/= as legal fees deposit to Dr Wilfred Mutubwa, who was then a partner in the applicant law firm. In addition to that, the respondent had made a deposit of Kshs 150,000/= to the applicant's bank account in relation to civil suit No 316 of 2018. The deponent further faulted the taxing master for failing to acknowledge that Dr Mutubwa had the authority to receive the payments and he indeed acknowledged having received Kshs 900,000/= as legal fees from the respondent.
5. In Misc civil application No 625 of 2021, the client/respondent filed a similar application again dated May 20, 2022 now seeking to set aside the taxing master's ruling on taxation dated May 5, 2022. The grounds in support of the application are a reproduction of the grounds in support of the application in miscellaneous civil application of No 626 2021 as set out hereinabove hence will not repeat them here.
6. The second set of applications are filed by the advocate, Lubulellah & Associates Advocates and are both dated May 12, 2022. They have been filed under section 51 of the [Advocates Act](#), rule 13A of the [Advocates Remuneration Rules](#), section 3A, 63(e) of the [Civil Procedure Rules](#) and order 41 rule 1 of the [Civil Procedure Rules](#).
7. In Misc civil application No E626 of 2021 dated May 12, 2022 the applicant is seeking the following orders:-
  - a. That the court be pleased to enter judgment against the respondent on the advocate/applicant's taxed costs of Kshs 4,475,000/= certified on the certificate of taxation herein dated May 10, 2022, together with interests thereon at the rate of 14% per annum from November 11, 2020 until payment in full.
  - b. That a decree issues in respect of the sum of Kshs 4,475,000/= together with interest thereon at the rate of 14% per annum from November 11, 2020 until payment in full, and that the applicant be at liberty to executive for recovery of same in such manner as a decree of this honourable court.
  - c. That the costs of this application be provided for.
8. The advocate's case as elaborated in the grounds on its face and in the affidavit of Lubale Lubulellah is that the advocate client bill of costs was taxed, and a certificate of taxation issued therefrom. He thus urges the court to enter judgment upon the sums certified in the certificate of taxation together with interest at the rate of 14% per annum from September 16, 2021.
9. In Misc civil application No 625 of 2021, the advocate *vide* the notice of motion application dated May 12, 2022 seeks judgment to be entered against the client/respondent on the advocate/applicant's



as per the certificate of taxation dated May 10, 2022 taxed costs of Kshs 5,560,000/= together with interests thereon at the rate of 14% per annum from November 11, 2020 until payment in full. It also seeks for a decree to be issued in that respect as well as costs of the application.

10. As per court's directions, the applications were canvassed by way of written submissions and as the record reflects, the respondent/client filed submissions dated September 6, 2022 whereas those of the advocate/applicant are dated September 9, 2022.

### **Respondent/Client's Submissions**

11. In submitting on whether the taxing officer has erred in principle in awarding the total amount of Kshs 4,475,000.00 in the certificate of costs, the respondent argued that the taxing master ought to have been guided by principles such as the difficulty and complexity of the matter, the length of the trial, and value of the subject matter. Therefore, it was only open for the taxing master in a suit which essentially sought injunctive prayers to make a finding that the subject matter could not be ascertained in accordance with schedule VI(1)(L) of the Advocates Remuneration Order which provides for instruction fees of not less than Kshs 6,000/= but has to be a reasonable amount and in the present case, it is argued that the award of Kshs 2,370,000/= on instruction fees was manifestly excessive and should be substituted with an award of Kshs 300,000/=. In support of this line of argument, reliance was placed on the cases of Rosafri Limited & others v The Central Bank of Kenya & another, Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited : HCCC Misc No 181 of 2013 and Danson Mutuku Muema v Julius Muthoka Muema & others, civil appeal No 6 of 1991 (Machakos).
12. Further, the respondent/client submitted that the taxing master erred in failing to set off the sum of Kshs 1,120,000/= which had already been paid as legal fees, to the applicant firm through Dr Mutubwa via Mpesa. That these fees were partly paid to Dr Mutubwa who acknowledges having received the sum of Kshs 900,000/= on behalf of the applicant and Kshs 150,000/= was paid via a banker's cheque. The court has been asked to make a finding on whether Dr Mutubwa had the authority as a partner in the applicant law firm to negotiate fees and at the same time bind the firm in such negotiations. To buttress the submissions, reliance was placed on the cases of Vijay Kumar Saidha & another v Tribhuvan Gordhan Barkrania and others Nbi CA civil appeal No 9 of 2007 [2015]eKLR and Nyamweya Osoro & Nyamweya Advocates v Sotik Tea Company Limited [2018]eKLR.

### **Advocate/Applicants Submissions**

13. The advocate while citing the case of Joreth Ltd v Kigano & Associates Nrb CA civil appeal No 66 of 1999 [2002] eKLR, the advocate submitted that in determining instructions fees, the court ought to ascertain the same from the pleading depending on the stage of litigation. In that regard the court was referred to the cases of Peter Muthoka & another v Ochieng Onyango Kibet and Ohaga [2019] eKLR and the Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited [2021]eKLR, where, in both cases the court held that in a matter where a party seeks to challenge the exercise of statutory power of sale by a bank, the subject matter is the sale price of the property and not the accrued debt. And in cases as the one before court, such cases, the value of the property can be ascertained from the pleadings since it was pleaded at paragraph 12.7 of the plaint as Kshs 190,000,000/=. That *vide* an affidavit dated August 8, 2018, the client's director had pleaded the value of the subject matter as Kshs 261,724,085/= and in a further affidavit, it was stated that the value was Kshs 163,000,000/=. In addition to that, a valuation report done on July 9, 2014 stated that the gross market value of the subject matter was Kshs 128,000,000/=.
14. Thus, according to the advocate, the court ought to have the bill retaxed on the value of the property which is Kshs 190,000,000/= instead of the value of the outstanding debt which was Kshs



- 144,198,580.80. That, in any event, the advocate has asked the court to adopt the taxation by the taxing master which was based on the amount of the outstanding debt.
15. Lastly, on the claim that the suit was withdrawn before its conclusion hence calling for instruction fees reduction to 75%, it is the advocate's submissions that no matter the point of instructions, an advocate is entitled to full instruction fees for work done. In that regard, it is the advocates case that no evidence was adduced to show that the suit was withdrawn prematurely or that there was an agreement to warrant reduction of instruction fees to 75%.
  16. The advocate also submitted that where a certificate of the taxing master has been issued, unless set aside or altered, it is the final amount of cost for which the court may enter judgment. It is further contented that, while addressing an application for entry of judgment as per the certificate of taxation, its not open for the court to evaluate the certificate of costs and reach a conclusion that the fees had been paid. Thus, the issue of full or part payment of the fees ought to come up and be determined during taxation.
  17. In this case, it is averred that the client/applicant never produced or annexed the mpesa statements before the taxing officer and is now purporting to introduce new evidence at an appellate stage. The advocate further alleges the Mpesa statement shows that the payments were made to Akhonya Mutubwa and not the designated account for the firm of the advocates. Therefore, the said payments were never received and for those reasons, the advocate asks that the court ignores and or expunges the said Mpesa statements from the record. It is further submitted by the advocate that a partnership is not liable for funds paid in personal accounts of a partner which were not received by the partnership in any way.
  18. As regards to the alleged legal fees settlement agreement, the advocate submitted that there was no signed agreement as required under section 45 of the *Advocates Act* between the client and the respondent's law firm, thus the annexed unsigned agreement has no legal value.
  19. Finally, the advocate submitted that the application for entry of judgment is in the result unopposed, and the certificate of taxation ought to be adopted as judgment of the court together with interest at the rate of 14% per annum.

### **Analysis and Determination**

20. Given the above background, the issues which emerge for determination are as follows:-
  - a. Whether the subject matter could in the circumstance of this case be determined for purposes of taxation;
  - b. Whether there was a settlement agreement for the legal fees between the parties;
  - c. Whether judgment can be entered in terms of the certificate of taxation.
21. On the first issue, it was the client's case that the taxing master erred in failing to acknowledge that the suit was one which sought mere injunctive prayers against the bank without quantifying precise amounts in the prayers sought. As such, the client submitted that the value of the subject matter could not be ascertained from the pleadings hence the taxing master was wrong to proceed under schedule 6a paragraph 1(b) of the Advocates (Remuneration) Order, 2014 which applies on instances where subject matter can be ascertained instead of schedule 6A Paragraph 1(L) of the Remuneration Order which provides for minimum instructions fees of Kshs 6,000/= only. On the other hand, the advocate submitted that the cause of action was to restrain the bank from exercising the statutory power of sale hence the subject matter would be the value of the property which was pleaded under paragraph



- 12.7 of the plaint as Kshs 190,000,000/=. In the advocate's view, although the taxing officer failed to appreciate taxing officer failed to appreciate the subject matter as the value of the property, it was not a graver error to conclude that the value of the subject matter was the amount the bank sought to recoup.
22. In this court's my view, the subject matter of the suit was the property which the client/applicant intended to salvage and the same was not based on the prayers sought. The value of the property was also well pleaded under paragraph 12.7 of the plaint as Kshs 190,000,000/- and in that regard, this court is unable to agree with the client's submissions that the subject matter could not be ascertained. However, although the taxing master based her calculation of instruction fees on the debt the bank intended to recover instead of the value of the property, the final amount arrived at was reasonable within the exercise of the taxing master's discretion and cannot be said to be inordinately high or low to warrant interference of the court. Additionally, I find the record shows that the suit was defended and consequently in this court's view, the advocate was entitled to full instructions fees and not to 75% of the fees as submitted by the client/applicant. Lastly, in his submissions, the advocate invited the court to have the bill re-taxed based on the value of the property and at the same time filed another application seeking entry of judgment in terms of the certificate of costs. In this court's view, the prayer can only be viable and worth of consideration had the advocate filed a reference seeking to have the award set aside on ground of error of principle. Based on the foregoing, this court's finding is that the advocate has not demonstrated any grounds to warrant this court interfere with the taxing master's assessment on instruction fees.
23. On the 2<sup>nd</sup> issue of whether there was a settlement agreement between the parties with regard to the legal fees, the client submitted that the taxing master erred in failing to appreciate that the client had already paid the advocate the sum of Kshs 1,120,000/= through Dr Wilfred Mutubwa who was then an associate in the respondent firm of advocates. The client also submitted that it paid Kshs 900,000/= to Dr Mutubwa's Mpesa account and a further Kshs 150,000/= directly to the firm's bank account. Further to that, in his affidavit dated January 25, 2022, Dr Mutubwa admitted to having received the money and therefore the taxing officer ought to have taken into account the said monies already paid. On the other hand, the advocate/respondent submitted that Dr Mutubwa had no authority to receive legal fees into his personal accounts and the partnership law firm was thus not liable to monies received in a partner's individual account.
24. However, it is this court's finding that there is a common ground that the parties had not executed an agreement on the remuneration payable to the advocate/respondent for the fees payable for the services rendered or to be rendered in accordance with section 45 of the *Advocates Act*. In this case, the client/respondent averred that he had agreed with Dr Mutubwa, an associate in the respondent law firm on the legal fees payable. In the affidavit of Dr Mutubwa, an agreement for fees payable was annexed however the same is not signed. In the circumstances, in my view, for such an agreement to be binding, it has to be written, and signed by both the client and the advocate and or their agents for it to be enforceable.
25. Lastly, this court finds that the taxing master correctly found that the suit had been prepared for trial and awarded the advocate full instructions fees. Also, the court has perused the record and found no evidence that the suit was withdrawn as averred by the client. In any event, an advocate is entitled to full instruction fees for work done and not to 75% of the fees as submitted by the client. The above discussion therefore determines the client's applications and inevitably, the client's applications dated May 20, 2022 seeking to set aside the taxing master's rulings in the two matters are found to be without merit and are hereby accordingly dismissed.
26. The third issue is in respect of whether judgment can be entered in terms of the certificate of costs. The guiding legal provision for this prayer is section 51 of the *Advocates Act* provides:-



- (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
- (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
27. From the above provision, it appears that once a certificate of costs is issued by a taxing officer pursuant to subsection (2) above, the same is final unless set aside or altered by the court and judgment may thus be entered in terms of the amount in the certificate of taxation.
28. In the present case, the court has not found justifiable grounds to warrant the setting aside the certificates of taxation by the taxing officer. That being the case, and the certificate of taxation having not been altered or set aside, this court has no option but to allow the application for entry of judgment.
29. Consequently, the advocates applications dated May 12, 2022 are allowed and judgment entered against the client/respondent for Kshs 4,475,000/= and Kshs 5,560,000/= being the taxed costs as per the certificate of taxation herein respectively in Misc civil application No 626 of 2021 and Misc civil application No 625 of 2021.
30. Having found that the advocate/applicant is entitled to judgment as per the certificate of taxation, rule 7 of the *Advocates Remuneration Order* provides for payment of interest one month from the date of taxation, which is, May 5, 2022. I therefore enter judgment in favour of the advocate sum of Kshs 4,475,000/= and Kshs 5,560,000/= together with interest thereon at the rate of 14% per annum - from June 6, 2022 until payment in full, in miscellaneous civil application No E625 of 2021 and miscellaneous civil application No E626 of 2021 respectively.
31. Each party shall bear its own costs for the applications.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...28<sup>TH</sup> ... DAY OF ...APRIL... 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Lubullela Eugene counsel for Advocate/Applicant

No appearance for and by Client/Respondent

**Court Assistant – Mwenda/Sakina**

