



Rachier & Amollo Advocates v Kenya Bureau of Standards (Miscellaneous Cause E239, E237, E238, E248 & E249 of 2022 (Consolidated)) [2023] KEHC 3707 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E239, E237, E238, E248 & E249 OF 2022 (CONSOLIDATED)**

JWW MONG'ARE, J

APRIL 28, 2023

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

-AND-

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

RACHIER & AMOLLO ADVOCATES APPLICANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

RULING

1. This is a combined Ruling in respect of the above 5 Applications all filed on 6/3/2023 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya, Paragraph 11 of the Advocates Remuneration Order, 2014, by which the Applicant has applied to this court to have the decision of the Taxing Master delivered on 20th February 2023 on item 1, 2, 3 and 4 in the Amended Advocate - Client Bill of Costs set aside and / or vacated.
2. The Applicant further seeks for an order to have the court to be pleased to tax afresh items 1, 2, 3 and 4 of the said amended Advocates - Client Bill of costs dated 25th October 2022. The Applicant has also sought to have the undisputed sum of Kshs.5,800,000/- awarded by the Taxing be released to the applicant forthwith on each of the applications pending the re-taxation of the Applicant's amended Advocate/Client bill of costs. The applicant among other orders has asked the court to be awarded interest at court rates from 20th February 2023 when the Bill was first taxed and VAT.



3. The applications were supported on the grounds set on the face and supporting affidavits sworn on by the Managing Partner of the Applicant, Dr. Jotham Okome Arwa, Advocate. The applications are opposed and the Client/Respondent filed grounds of opposition to each of the 5 applications all dated 18th day of April 2023.

A brief Background: -

4. The above applications relate to several applications brought by the Judgment Creditor, M/S Geo Chem Middle East in HCCOM Misc 455 of 2016 in which an order was made directing the Respondent, Kenya Bureau of Standards(KEBS) to pay Geo Chem Middle East the sum of USD 15,401,504 which rose, through accrual of interest, to USD, 19,050,496.63 or its equivalent in Kshs1,125,676,966.71/- after a decision of the Supreme Court in Petition No. 47 of 2019 which upheld the decision of the High Court in HCCC 455 of 2016 and vacated the Court of Appeal decision in Civil Appeal No. 259 of 2018.
5. Subsequently the Respondent client was directed to comply with the decision thereto and make payments to the decree holder Geo Chem Middle East. On various dates, the Client/Respondent failed to remit payments to Geo Chem Middle East resulting in the garnishee applications. The Five Applications relate to several garnishee applications brought by the Decree holder to enforce the payment of the judgment debt. On each occasion the client retained Rachier & Amollo Advocates and Mr. Paul Muite Advocate (Senior Counsel) to represent the Client in the said applications. Subsequently after a series of garnishee applications and the successful lifting of the freezing orders on the funds of the client, the matter was finalised.
6. As per the Retainer Agreement between the client and the Advocates, the Advocate requested to be paid their legal fees and the same was not honoured by the client, forcing the Applicant to file its bills of costs with respect to the 5 Applications. The Bills were filed separately and are referred herein as the Amended Advocates-Clients Bills of Costs amended on 25th October 2022.
7. Subsequently the bills were taxed and the taxing Master set the Bills of costs payable (in each of the 5 applications) to Rachier & Amollo Advocates at the sum at Kshs.3,000,000/- and to Paul Muite Advocate (SC) Kshs.2,000,000/- plus VAT at 800,000 on the total fees and therefore certifying the taxed costs at 5,800,00. The Taxing Master disallowed the claim for getting up fees and also made an order that the sum of Kshs.14,500,00/- paid to the Advocates on 27th June 2022 be credited to the client during payment of the 5 Bills.
8. The Advocates, being dissatisfied by the above decision of the Taxing have brought the subject applications seeking to set aside the said decisions of the taxing master and a fresh taxation be carried out either by the court or before a different taxing master with clear directions on the parameters to apply.

The Advocates Case:-

9. During oral submissions the Advocate submitted that each of the applications related a separate cause and hence the reason for filing five separate Advocate-Client bills of costs. The Advocate further stated that the work undertaken by the advocate at each instance with respect to each garnishee application was done was to ensure that the client was able to resume its operations since the garnishee orders would paralyse its operations locally and internationally as they had the effect of freezing all accounts of Kenya Bureau of Standards in Kenya and abroad.



10. In its submission, the Advocate argued that Kenya Bureau of Standards gladly settled the party and party costs of the other advocates but has vehemently refused to pay their fees despite the enormous amount of work. That for the Taxing Master to order the payment of 3,000,000 and 2,000,000 in each application was disrespectful since the total party and party costs paid to the Advocates for the Judgment Creditor were agreed and sanctioned by the client.
11. The Advocate submitted that in Misc. E237 of 2022 the party and party costs paid to the Advocates of the Judgement debtor were Kshs.5,000,000/- while in Misc Cause No. E238 of 2022 was Kshs.6,000,000/-. In Misc. Cause No. E239 of 2022 the party and party costs were Kshs.16,000,000 and in Misc. Cause No. E248 of 2022 was Kshs.15,000,000/- and in Misc. Cause No. 249 of 2022 party and party costs was Kshs.6,000,000/-. In total in the 5 applications the client paid to the Judgment creditors advocates the sum of Kshs.48,000,000/-. The Advocate urged the court to base its fees on the party and party advocates as per Part B of Schedule 6 of the Advocates remuneration Order.
12. The Respondent filed similar grounds of opposition in all the 5 applications and made oral submissions during the hearing before court. In its grounds of opposition, the Respondent states that the application by the Advocate was incompetent, inappropriate and an Oxymoron in that the Advocate sought prayers for setting aside and at the same time a fresh taxation of their Bill. He argued that these prayers could not be granted in the same application but did not elaborate on the reasons during his submissions.
13. Counsel for Respondent client further opposed the prayer by the Advocate for the release of the undisputed taxed amount of Kshs.5,800,000/- and on grant of interest on the taxed costs already and argued that the same could not be granted since there was a prayer of a fresh taxation.
14. The respondent further argued that no sufficient grounds were adduced to challenge the taxing masters finding and stated that the taxed amount was excessive and it is the client who should be aggrieved. During submissions he confirmed that the client had not filed a reference to challenge the taxation. The client/respondent did not also file a replying affidavit.

Analysis and Determination: -

15. I have considered the submissions of the parties and pleadings filed therein. I have perused the five applications I note that there have been two sets of taxation of the Advocate-Client Bills of costs by two different Taxing Masters. The first set of taxation resulted in a ruling by the court dated 24th June 2022 which returned a taxed fee of Kshs.426,414,520.55/- for 8 bills including these 5 under consideration. Subsequently and by consent the said ruling of the court was vacated and parties agreed to negotiate and settle the issue on fees. From the record, the negotiations appear to have collapsed and the Amended Bills of costs were filed again and the same was taxed and on 20th February 2023, the taxing master allowed Kshs.5,800,000/- on each file, making a combined the total of the fees allowed on the 5 matters to Kshs.29,000,000/-.
16. The issue which this court is faced with for determination whether to order a fresh taxation before a different Taxing Master and if that will bring yet different results which will bring forth a new set of reference for determination by this court. Courts have held that litigation must come to an end and a taxation process of bills between Advocates and their clients is usually the tail end of a litigation process. I note that this court is equipped with inherent powers by dint of Article 165 of the Constitution of



Kenya, to determine matters such as these with finality. Justice Ringera (RTD) in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR observed:-

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees and then consider not increasing it as there are no factors to warrant an increase. I am convinced in my mind that that would be a waste of Judicial time in the circumstances of this case. It would also saddle the parties with further unnecessary costs.”

As observed by the learned judge and, in my view, what is prudent in bringing these matters to a conclusion is for the court to determine the issues before it with finality. I will therefore proceed to tax the Bill afresh in line with the Advocates Remuneration Order, 2014 and determine the fees payable to both Advocates Rachier & Amollo Advocates and Paul Muite Advocate, SC.

17. I note that the respondent has not disputed that in the five applications the Client paid party and party costs totalling to Kshs.48,000, 000/-. The basis for any taxation by the taxing master is the power granted to the court under the Advocates Remuneration Order,2014 and the Advocate Act, Cap 16, Laws of Kenya.
18. Secondly, and most importantly, the court must respect the decisions of the parties as per the retainer agreement by which the Respondent/Client chose to instruct two sets of advocates to represent it. In the Retainer and Confidentiality agreement availed to the Court by the parties, the Respondent/Client states “by this agreement the client authorises the Advocate to retain the services of Paul Muite (Senior Counsel) who shall be the lead counsel in the case herein.” To my mind, I am convinced the Client must have appreciated the enormity of the case it was facing and chose to have Mr. Paul Muite Advocate, SC. lead the team. The retainer agreement bound the client, in my view, to pay Mr. Paul Muite Advocate, SC. the same fees to that of the Advocate, which position was correctly adopted by the Taxing Master. The Taxing Master, however, failed to appreciate that each of two law firms was entitled to their full instruction fees with respect to each of the five garnishee applications. A garnishee application is an application seeking or Opposing the grant of garnishee orders however presented. Further, courts have held that parties are bound by the terms they put in the contracts as was stated in *National Bank of Kenya Ltd vs Pipellastic Samkolit (K) Ltd* [2002] 2 E.A 503, At Page 507, the Court of Appeal said;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.

Based on the above decision of the Court of Appeal by which I am guided, the Taxing Master could not descend into the arena and attempt to determine what the client had in mind in instructing two sets of advocates and therefore set two different rates of the fees applicable to each. The Client was bound by the terms of the retainer confidentiality agreement to pay each of the two Advocates their full fees as per the Advocates Remuneration order.

19. In making her final decision, the taxing master directed that a sum of Kshs.14,500,000/- be credited to the client. On his part, counsel for the advocate submitted that the said fees were in relation to a different matter where the Advocate provided legal services to the Client in the Supreme Court and was unrelated to the matter being taxed herein. Counsel for the Respondent was not able to offer contrary evidence to rebut the same. I find that in making the said decision, the Taxing Master did not lay a foundation for it. I will therefore vacate the same as I proceed to make my decision in this matter and the several other taxations between the parties which are interrelated.



20. In arriving at taxed costs, the taxing master must have a basis on the decision she or he makes emanating from the law cited above. Schedule 6 of the Advocates Remuneration Order, 2014 deals with matters to be considered in determining fees payable to an advocate. Paragraph 14(b) of part A of the sixth Schedule of the Advocates Remuneration Order, provide that instructions fees to institutor defend garnishee proceedings shall not be less than Kshs.14,000/-. The Client was fully aware of the fact when it settled by Consent the party and Party costs with respect to each of the five Applications. According to the evidence presented by the Applicant, the Party and party costs paid to Geo Chem Middle East with respect to the five Applications was Kshs.48,000,000/- as tabulated below. It follows therefore the taxation on Advocate-Client Bills should be then based under Part B of the said schedule which states as follows;

“B—Advocate and Client Costs

As between advocate and client the minimum fee shall be—

- (a) the fees prescribed in A above, increased by 50%; or
- (b) the fees ordered by the court, increased by 50%; or
- (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.”

21. The Fees due to the two firms on the five applications should be as follows;

1. In Misc. Cause No E237 of 2022
 - a. For Rachier & Amollo Advocates - 5,000,000
Increased by 50%- 2,500,000
Total 7,500,000
 - b. For Paul Muite Advocate (S.C) 5,000,000
Increased by 50%- 2,500,000
Total 7,500,000
2. In Misc Cause E238 of 2022
 - a. For Rachiers & Amollo Advocate - 6,000,000
Increased by 50%- 3,000,000
Total 9,000,000
 - b. For Paul Muite Advocate (S.C) 6,000,000
Increased by 50%- 3,000,000
Total 9,000,000
3. In Misc Cause E239 of 2022
 - a. For Rachiers & Amollo Advocate - 16,000,000
Increased by 50%- 8,000,000
Total 24,000,000



- b. For Paul Muite Advocate(S.C) 16,000,000
Increased by 50%- 8,000,000
Total 24,000,000
- 4. In Misc Cause E248 of 2022
 - a) For Rachiers & Amollo Advocate - 15,000,000
Increased by 50%- 7,500,000
Total 22,500,000
 - b. For Paul Muite Advocate(S.C) 15,000,000
Increased by 50%- 7,500,000
Total 22,500,000
- 5. In Misc Cause E249 of 2022
 - a. For Rachier & Amollo Advocate - 6,000,000
Increased by 50%- 3,000,000
Total 9,000,000
 - b. For Paul Muite Advocate (S.C) 6,000,000
Increased by 50%- 3,000,000
Total 9,000,000

Conclusion and Disposition: -

22. Flowing from the above and taking into consideration all factors and the dictates of the law, I find that the application before me is successful. Subsequently the decision of the taxing master issued on 20th February 2023 is vacated and set aside. For the avoidance of doubt, this ruling is one for the 5-application brought by and between the parties in Misc. Cause Nos. 237, 238, 239, 248 and 249 of 2022 Rachier & Amollo Advocates -v- Kenya Bureau of Standards. The court has assessed the fees payable to the two advocates by the client as follows;
- i. That Rachier and Amollo Advocates - Kshs.72,000,000/- plus VAT at 16%.
 - ii. That Mr. Paul Muite Advocate SC - Kshs.72,000,000/- plus VAT at 16%.
 - iii. Interest at court rates on (i) and (ii) above from the date hereof.
 - iv. Each party will bear its own costs. It is so ordered.

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

J. W. W. MONG'ARE
JUDGE

In the Presence of:-

Ms. Maina holding brief for Dr. Arwa for the Advocate/Client



Mr. Dachi holding brief for Mr. Nyaanga for Client/Respondent
Sylvia- Court Assistant

