



Rachier & Amollo Advocates v Kenya Bureau of Standards (Miscellaneous Cause E241 of 2022) [2023] KEHC 3708 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3708 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E241 OF 2022
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
EMANATING FROM
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISIONS
MISC. CAUSE NO. E231 OF 2021
IN THE MATTER OF TAX PROCEDURES ACT, 2015 ACT NO. 29 OF 2015
IN THE MATTER OF AN APPLICATION BY KENYA REVENUE AUTHORITY
FOR AN ORDER UNDER SECTION 43 OF THE TAX PROCEDURES ACT
BETWEEN
KENYA REVENUE AUTHORITY.....APPLICANT
-VERSUS-
KENYA BUREAU OF STANDARDS)1ST RESPONDENT
GEO CHEM ME(KENYA BRANCH).....2ND RESPONDENTS
GEO CHEM MIDDLE EAST LIMITED.....3RD RESPONDENT
BETWEEN
RACHIER & AMOLLO ADVOCATES APPLICANT



AND

KENYA BUREAU OF STANDARDS RESPONDENT

RULING

1. Before the court is the Chamber Summons application dated 6/3/2023 brought under section 1A, 1B and 3A of the *Civil Procedure Act* Paragraph 11 of the *Advocates Remuneration Order* and, 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 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 also sought to have the undisputed sum of Kshs.5,800,000/- awarded by the Taxing be released to the applicant forthwith, pending the fresh 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 application supposed on the grounds set on the face of it and a supporting affidavit sworn on by the Managing Partner of the applicant, Dr. Jotham Okome Arwa, Advocate. The application is opposed and the Client/Respondent has filed grounds of partial opposition/ support dated 18th day of April 2023.

A Brief Background: -

4. Rachier and Amollo Advocates HCCC Misc 455 of 2021(Kenya Bureau of Standards –v- Geo Chem Middle East) unsuccessfully sought to set aside an arbitral award that had been issued against the Respondent in favour of a Company known as Geo Chem Middle East, which matter was litigated upto the Supreme Court. Under the Retainer Confidentiality agreement, the said advocates were instructed

“to institute and/or defend such other proceedings as will be necessary to protect the interest of the respondent/Client.....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.”

5. Subsequently on 31th March 2021 a fresh suit being HCC Misc. No. E222 of 2021- was instituted against the Respondent by Geo Chem Middle where KRA sought to restrain the removal of the decretal sum of Usd 19,050,486.63 (Kshs.2,125,676,966.71/-) from the Respondents bank accounts of pending the hearing and determination of a garnishee application which was then pending. The grant of orders sought would greatly prejudice the respondent as it would have been denied the right to utilize all the sums of money in their accounts, which would have completely paralysed their operations, and further, the respondent would be condemned to costs in the suit. The Applicant was instructed to defend the said application, which it did successfully, and the same was dismissed.

The Advocates Case:-

6. Briefly the Advocate has brought this application under Section 1A, 1B, and 3A of the *Civil Procedure Act*, Cap 21 and Paragraph 11 of the *Advocates Remuneration Order, 2014*. The Advocate seeks the following orders;



- a. That the decision of the Taxing Master delivered on 20th February 2023 on item 1,2,3 & 4 in the Amended Advocate/Client Bill of Costs dated 25 October 2022 be set aside and /or vacated.
 - b. That this honourable court be pleased to tax afresh items numbers 1,2, 3 & 4 in the Amended Advocates / Client Bill of costs dated 25th October 2022.
 - c. That pending Taxation, the undisputed sum of Kshs.5,800,000/- awarded by the Taxing Master be released to the Applicant forthwith.
 - d. That the Advocate be awarded interest at court rates from 20th February 2023 when the Taxing Master taxed the costs, until payment in full.
 - e. That the costs of this Application be provided for.
7. The Application is supported by the grounds set on the face of it. The Advocate contents that by a retainer agreement executed as between them and their, Kenya Bureau of Standards, the said client instructed them *inter alia*
- “to institute and/or defend such other proceedings as will be necessary to protect the interest of the respondent/Client.”
- The retainer further instructed the Applicant to retain the services of S.C Paul Muite Advocate to lead them in all proceedings.
8. The Advocates content that they successfully defended the Respondent in the said suit being Misc. Cause E231 of 2021(Kenya Revenue Authority v. Kenya Bureau of Standards & 2 other) and the suit was dismissed. The client refused to pay the advocates their fees for services rendered, culminating in the filing of the Amended Advocate-Client Bill of Costs that was taxed by the taxing master on 20th February 2023 at a sum of Kshs.5,800,000/- for both Advocates Rachier and Amollo Advocates and Paul Muite Advocate, SC.
 9. The Advocate submits that the Taxing master in taxing off its bill of costs made an error of principle in taxing off the total Bill and returning an award of Kshs5,800,000/- as fees for both Advocates. The Advocate argued that the Amended Bill was properly drawn to scale as per the dictates of Schedule 6 Part B. Further and in addition, the Advocates states that the Taxing Master had no basis to ignore the value of the subject matter of Kshs.2,125,676,966.71/- which the Taxing Master acknowledged as the basis for the Bill of costs. That the taxing master also made an error of principle in striking out the aspect of getting up fees for both Rachier & Amollo Advocates and also for S.C Paul Muite, Advocate. The Advocate urged the court that the suit subject matter of the Bill of costs was a suit like any other and retax the Bill on the four items. The four items relate to Instructions fees for the Two Advocates and Getting up fees for the same.
 10. Further and in addition to the foregoing, the Advocate submitted that the Taxing Master made a wrong holding in the finding that the sum of Kshs.14,500,000/- which had been paid to the Advocate related to the present matter. The Advocate maintains that the said payment was for services rendered in a different court and for a different suit. Deducting the same for the total would greatly prejudice the client.
 11. Despite there being a retainer agreement between the Advocate and the Client, the client has refused to settle the advocates fees forcing the Advocate to file the Bill of Costs for taxation.



12. The Advocate has urged the Court to find that this Bill of Costs should be taxed based on value of the Subject matter of the suit at Kshs.2,125, 676, 966.71/- that KRA had sought to preserve unsuccessfully, as acknowledged on the taxing masters ruling.
13. The Advocate urged the court to tax the Bill afresh instead of sending it back to the Taxing Master for a 3rd fresh taxation and bring the matter to a close. The Advocate submitted that the court had power to tax the Bill of costs and provided decided authorities to support the same.

The Respondent's Case: -

14. The Respondent/Client filed grounds of partial opposition and support. In the said ground, it stated thus;
 - a. The respondent is not opposed to the granting of Order No. 1 & 2 of the Application. The Amended Bill of Costs dated 25th October, 2022 may be referred to fresh taxation.
 - b. Having referred the Amended Bill of costs for fresh taxation, there is no basis for granting prayer No. 3 and 4 of the Application.
 - c. In any event the Applicant did not demonstrate the work done in the High Court Misc. Application E231 of 2021 to warrant an award of instructions fees.
 - d. Having consolidated the Applications in High Court Misc. Application No. E222 of 2021 and High Court Misc. Application No. E231 of 2021, there was no basis of award of separate instruction fees.
 - e. In the circumstances, the Applicant's Chamber Summons application dated 6th March 2023 may be allowed in terms of prayers No. 1 & 2.
15. Counsel for the Respondent did not file a replying affidavit to support the grounds of opposition submitted orally in response to the application by the Advocate. Counsel submitted that it was not opposed to a fresh taxation of the Bill of costs as prayed by the Advocate. It was instead opposed to a release of the funds taxed off by the Taxing Master at 5,800,000 and welcomed instead a fresh taxation. Counsel urged the court to find that there was no separate instruction to Paul Muite Advocate, SC.
16. The Respondent denied that the Advocate was entitled to instruction fees in the present suit since the same was an application for preservation of the sum of Kshs.2,125,676,966.71/-, garnished by Geo Chem Middle East held the Accounts of the Respondent/ Client. He submitted that the Taxing Master was right to hold that the Advocates were not entitled to getting up fees as claimed.

Analysis and Determination: -

17. Several issues emerge for determination by the court in this matter. In order. It is important to note that the client is not opposed to the application herein for fresh taxation of the amended Advocate/ Client Bill of Costs herein. The issues that arise for determination by the court are three, to wit
 - i. Whether the decision of the Taxing Master in the Amended Bill of costs under items 1, 2, 3 and 4 should be vacated and a fresh taxation carried out?
 - ii. Whether this court should Tax the Amended Advocate/Client Bill of Costs or send it back to another Taxing Master for fresh taxation.
 - iii. Whether the undisputed taxed amount of Kshs.5,800,000/- awarded by the Taxing Master should be released to the Applicant forthwith pending fresh taxation.



- iv. Should the Court award interest at court rates from 20th February, the date of taxation?
18. As to “Whether the decision of the Taxing Master in the Amended Bill of costs under items 1, 2, 3 and 4 should be vacated and a fresh taxation carried out?” I note from the submissions of both the Advocate and the client that there is consensus that the four items be retaxed.
19. In making her determination I note that the Taxing Master acknowledged the subject matter of the suit which forms the basis for the taxation of the Advocates/Clients Bill of Costs as being the sum of Kshs.2,125,676,966.71/- The taxing master then notes that the Applicable law is Schedule 6 of the *Advocates Remuneration Order, 2014*. The Advocate had based its fees on the Subject Matter which was not contested as being the sum of 2,125,676,966.71.
20. However, I note that in determining the fees under schedule 6 of the Advocates Remuneration order, the Taxing Master Assessed the fee under schedule 6(1)(k) under “Other Matters” which sets a fee of Kshs.75,000/- for defended suits. The taxing master then increased the said fees for Rachier & Amollo Advocates to Kshs.2,000,000/- but for Mr. Paul Muite Advocate, SC. she awarded Kshs.1,000,000/- under item 1 & 3 respectively. The taxing Master notes in her ruling that increase is based on “the nature and the importance of the cause, the interest of the parties, the value involved and the general conduct of the proceedings” on instructions fees.
21. Item 2 & 4 related to Getting fees. Under this item, Rachier & Amollo Advocates charged 10,528,384.83 each being 1/3rd of the instructions fees as per the *Advocates Remuneration Order*. In determining these fees, the Taxing Master noted that

“getting up fees follow directly from instructions fees”.

The taxing master in her reasoning observed that

“getting up fees is awarded for preparing for full hearing. It cannot be confirmed until a certificate to that effect has been issued.”

Under the two items, being 2 & 4, the taxing master struck off the fees and awarded nothing.

22. I find that the Taxing Master based the taxation of the four items being 1, 2, 3 & 4 on the amended Advocate-Client Bill of Costs on an error of principle. She failed to distinguish between Instructions fees as provided for under Schedule 6 and the reason why the Act set a distinct fee for preparation for hearings as getting up fees. All defended matters require a degree of preparation by an advocate. Further and in addition, the taxing master failed to lay a basis on the for increasing the instruction fees from the minimum set by the Advocates Remuneration Order at Kshs.75,000/- to Kshs 2,000,000/- for Rachier and Amollo Advocates as well as to explain her decision to set the fees payable Paul Muite Advocate, SC. at Kshs.1,000,000/-, a sum 50% less than that awarded to his counterpart. The Court of Appeal in the case of *Joreth Limited v. Kigano & Associates* (2002) 1 EA held that

“where the value of the subject of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement”.

In this matter the value of the subject matter was discernible. In my view, it was not open to the Taxing Master to depart from the said principle.



23. Secondly and most importantly, the 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 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, the Client appreciated the enormity of the case it was facing and chose to have Mr. Paul Muite SC lead the team. The retainer agreement bound the client in my view to pay Mr. Paul Muite a similar fee to that of the Advocate. It is not for the court to determine terms of contracts between parties.

24. The courts have held that indeed 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 EA 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. My finding on this issue is that both Mr. Paul Muite Advocate, SC. and Rachier & Amollo Advocates are entitled to fees as advocates with full instructions from the client.

25. Schedule 6 Part A of the *Advocates Remunerations Order* defines a suit to include an application. It states as follows; (a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion)”. Misc. Cause No. E222 of 2021 was therefore proceedings as per the Advocates Remuneration Order. In striking out items 2 & 4 of the amended Bill of Costs, taxing master opined that this was a miscellaneous application and that the Advocates were underserving of the items taxed off under getting up fees. This in my view was a misdirection on the part of the taxing master. Courts have held that once an advocate has been instructed, he is entitled to his fees and that in all suits that are defended, the advocate is entitled to getting up fees which is translated to 1/3 of the fees allowed under instructions fees. In this case, I find that the Advocates are entitled to getting up fees as per the *Advocates Remuneration Order* Schedule 6 Part B. The same shall be assessed at 1/3 of the instructions fees for items 2 & 4 for both Rachier & Amollo Advocates and Paul Muite SC, Advocate.
26. On the Second issue as to “Whether this court should Tax the Amended Advocate/Client Bill of Costs or send it back to another Taxing Master for fresh taxation”. Arising from the submissions of the parties, I note that while the Advocate/Applicant is desirous of having the Court carry out the taxation of items 1,2 3, & 4 of the Amended Bill of Costs, the respondent submits that the same should be submitted to another Taxing Master for fresh taxation. Having perused the file in the matter before me, I note that there has been two sets of taxation of the Advocate/Client Bill of costs. The first set of taxation resulted in a ruling by the court dated 24th June 2022 which returned a taxed fees of Kshs.426,414,520.55/- for this matter and 7 other files. 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 Bill of costs was filed again and the same was taxed. Each matter was taxed separately and a sum of Kshs.5,800,000/- was allowed.
27. 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 was 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 taxation between the parties which are interrelated.

28. Courts have severally held that litigation must come to a stop at one point or another. The suit subject matter of this Bill of costs together with the other six has long been settled and all monies due and owing on the judgement paid. It is indeed important to note that the client has even settled fully all party and party costs on the matter. What is pending to bring this matter to a close is this Bill of Costs and have the matter concluded fully. 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, what is prudent in bringing this matter to a close is to determine which is the best option in conserving judicial time. Already this matter has been before two different taxing masters with different result. What is prudent in my view is for this court to exercise its inherent jurisdiction and conclude this matter with a finality. I will therefore proceed to determine fees payable to both Advocates Rachier & Amollo Advocates and Paul Muite SC.

29. The third issue set out for determination is for the court to determine is

“Whether the undisputed taxed amount of Kshs.5,800,000/- awarded by the Taxing Master should be released to the Applicant forthwith pending fresh taxation.”

Having determine that the prudent use of Judicial time would be to have this court conclusively determine the issues before it and tax the items as per the application before, it will not be necessary to make a finding on this issue.

Conclusion and Disposition: -

30. Flowing from the findings of the court above, I will proceed to determine the four items in the tax afresh items 1, 2, 3 and 4 of the said amended Advocates/ Client Bill of costs dated 25th October 2022. The taxation is based on Schedule 6 of the Advocates which requires that fees is determined under Part A on party and Party costs then to arrive at the Advocate/client the same is increased by 50% of the said Party & Party Costs;

(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and— That value exceeds But does not exceed

1. Kshs.500,000 - 45,000
2. 500,000 - 750,000 - 65,000
3. 750,000 - 1,000,000 - 75,000
4. 1,000,000 - 20,000,000 fees as for Kshs.1,000,000/- plus an additional 1.75%
5. Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.



32. Item 1 & 2 of the amended bill of costs relate to instructions fees and getting fee respectively for M/s Rachier and Amollo Advocates – While Item 3 & 4 Relate to fees payable to Paul Muite Advocate, SC. The same is based on the value of the subject matter of Kshs 2,125,676,966.71/- in the suit and shall be calculated as below;

i. Rachier & Amollo Advocates
(Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.)

- a. Instructions fees
1,000,000 = 75,000
19,000,000 = 380,000
1.5% of the sum over 20,000,000 = 31,585,154
Total instruction fees = 32,040,154
- b. Add Getting up fee
1/3 of above = 10,680,051
= 42,720,205
- c. Increase by 50% as per part B = 21,360,102
Total fees . = 64,070,307

ii. Paul Muite Advocate, SC.

- a. Instructions fees
1,000,000 = 75,000
19,000,000 = 380,000
1.5% of the sum over 20,000,000 = 31,585,154
Total instruction fees = 32,040,154
- b. Add Getting up fee
1/3 of above = 10,680,051
= 42,720,205
- c. Increase by 50% as per part B = 21,360,102
Total fees . = 64,070,307
This sum is subject to VAT at 16%.

32. 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.

33. The final determination of this court as relates to the fees payable by the client to its two advocates is as follows;

i. That Rachier and Amollo Advocates be paid instructions fees and getting up fees under items 1 & 2 of the assessed at Kshs.64,070,307/- plus VAT at 16%.



- ii. That Mr. Paul Muite Advocate SC be paid Instructions fees and Getting fees under items 3& 4 Amended Advocates/Client Bill of costs assessed at is Kshs.64,070,307/- 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.

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J. W. W. MONG'ARE

JUDGE

In the presence of:-

1. Ms. Maina holding brief for Dr. Arwa for the Advocate/Client.
2. Mr. Dachi holding brief for Mr. Nyaanga for Client/Respondent.
3. Sylvia- Court Assistant.

