



Maua t/a Mauwa & Company Associates v JRS Group Limited (Miscellaneous Application E008 of 2021) [2023] KEHC 21243 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E008 OF 2021
MS SHARIFF, J
MAY 31, 2023
N THE MATTER OF ROBERT MAUA**

BETWEEN

**IN THE MATTER OF ROBERT MAUA T/A MAUWA & COMPANY
ASSOCIATES ADVOCATE**

AND

JRS GROUP LIMITED CLIENT

RULING

1. In its Chamber Summons dated and filed on March 21, 2022, the Client herein sought for orders that this court be pleased to review, vary and/or set aside the Ruling of the Learned Taxing Officer that was delivered on March 10, 2022 in respect of the Advocate's Bill of Costs dated December 3, 2021 or in the alternative that the aforesaid Bill of Costs be remitted back for taxation before the same or another taxing officer with appropriate directions on question of assessment.
2. The Client's advocate, Mourice Ouma, swore an affidavit in support of the said application. It averred that the Taxing Officer taxed the Advocate's Bill of Costs dated December 3, 2021 at Kshs 349,931/=. It confirmed having received the reasons of the Taxing Officer which were contained in the Ruling and asserted that the said Taxing Officer erred in law and in fact in erroneously taxing Item 1 of the said Bill of Costs on instructions fees without applying her mind to the applicable law and principle.
3. It added that the Taxing Officer also erred in law and fact in taxing the Advocate's fees on attendances and services at figures that were excessive and completely inconsistent with the provisions of the Advocate's Remuneration Order and the rules thereof.
4. It added that the Taxing Officer failed to appreciate the nature of the suit that was the subject of the Bill of Costs and the nature and extent to which the Advocate rendered his services considering that he prematurely withdrew his services to it without notice and could not therefore be entitled to the fees



- sought. It added that it had paid the Advocate a sum of Kshs 160,755/= as fees and he was therefore not entitled to the taxed fees.
5. In opposition to the Client's said application, Robert Maua, the Advocate herein swore a Replying Affidavit on April 11, 2022. The same was filed on April 12, 2022.
 6. He averred that he filed Kisumu CMCC No 303 of 2014 JRS Group Limited vs Rishi Hauliers Ltd pursuant to instructions it received from the Client on June 26, 2018. He added that he represented the Client by attending the proceedings as particularised in his Bill of Costs on the understanding that his fees were to be paid as the case progressed but the Client failed to pay the same whereupon he filed an application dated December 3, 2021 seeking to have the Advocate-Client Bill of Costs taxed.
 7. He pointed out that on February 11, 2022, the court directed the Client to file a response to his application but it failed to do so and further failed to file written submissions by February 25, 2022. He further averred it also failed to attend court on March 10, 2022 when the Ruling was scheduled to be delivered.
 8. It was therefore his contention that the Client was given a chance to participate in the taxation of the Bill of Costs but intentionally failed to adhere to the court's directions.
 9. He stated that the issues the Client was raising herein ought to have been raised in its response to his application dated December 3, 2022. He asserted that the present application was not based on any law and did not set out specific grounds for demonstration of the orders sought and was therefore a ploy to delay payment of the taxed costs.
 10. He added that the Client did not write to the Taxing Officer asking for reasons for the taxation on specific items which he argued was what donated permission to file a reference. It therefore asserted that the court had no jurisdiction to entertain the Client's reference herein.
 11. It was his further averment that a party who wished to appeal against the decision of a taxing officer had to write to the said officer citing the items he wished to appeal against but that the Client's application herein was based on general grounds and/or reasons with no reference being made to a specific item or cogent evidence to prove its allegations of some amounts having been paid.
 12. He added that the Client failed to annex any receipts or proof of payment of Kshs 160,755/= as alleged in its grounds of its application and its supporting affidavit respectively.
 13. He averred that the instant application was brought in bad faith, was bereft of truth, misconceived in law, lacked merit and aimed at wasting the court's time. He contended that litigation must come to an end and urged the court to dismiss the said application to allow him enjoy the fruits of the Ruling.
 14. The Client's Written Submissions were dated 28th November(sic) 2022 and filed on November 18, 2022 while those of the Advocate were dated and filed on December 7, 2022. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

15. The Client reiterated its contentions in its Supporting Affidavit and submitted that the Ruling of the Taxing Officer stated that the instruction fees was pegged on the amount of money that was awarded in Judgment in default of appearance but that that holding did not take into consideration that the Judgment set aside and appearance entered and that as such the time of taxing the bill of costs, the value of the subject matter was not ascertained.



16. In that regard, it placed reliance on the case of *Kamunyori & Company Advocates vs Development Bank of Kenya Ltd [2015] Civil Appeal No 206 of 2006*(eKLR citation not given) where it was held that failure to ascertain the correct subject matter in a suit for the purpose of taxation was an error in principle. It was emphatic that the Taxing Officer erred in failing to make proper determination on the applicable assessment of the instruction fees.
17. It pointed out that the Ruling did not touch on Items 9 and 18 of the Bill of Costs which were taxed excessively. It added that it had paid a sum of Kshs 160,755/= towards fees in this matter and that it was unfair that the Advocate gets to tax for more fees yet the retainer was willingly terminated before conclusion of the case.
18. It invoked Section 45 of the *Advocate's Order*(sic) which it argued permits clients and advocates to agree on fees payable in a matter before representation and where such fees had been paid, it was only fair that the same be taken into consideration while taxing bills of costs as between the client and advocate, if at all.
19. It contended that it was trite that where a taxing officer had given the reasons for the taxation in the Ruling, there was no need to request for reasons. In this respect, it relied on the case of Evans Thiga Gaturu Advocate (no citation given) where it was held that where there were reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. It further submitted that the Ruling bore the reasons on the face of it and there was no need of further reasons to be furnished. It urged the court to set aside the Taxing Officer's Ruling and refer back the matter for fresh taxation before the same taxing officer or another taxing officer.
20. The Advocate also reiterated the averments in his Replying Affidavit and took issue with the Client referring to a totally different case thus rendering the present application and argument, misplaced, baseless and non-factual.
21. He submitted that the Bill of Costs as taxed was consistent with the provisions of the Advocates Remuneration Order. He pointed out that it was not true that he prematurely withdrew his services to the Client but that the Client stopped communicating with him or giving clear instructions forcing him to withdraw his services.
22. He pointed out that Client failed and/or neglected to pay its fees as a result of which it filed the application dated December 3, 2021. He pointed out whereas the Advocates Remuneration Order permitted advocates and clients to agree on fees before representation, that did not stop an advocate from filing a bill of costs where a client refused to pay the advocates' fees.
23. It was emphatic that the Client did not annex any agreement as to payment of fees or evidence of payment of Kshs 160,755/= as it had alleged. He submitted that the Bill of Costs as taxed was consistent with the provisions of the Advocates Remuneration Order.
24. On the question of whether or not this court had jurisdiction to entertain the present application, this court had due regard to Paragraph 11 (1) of the Advocates (Remuneration) Order, 2014 which provides as follows:-

' Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects (emphasis court).'



25. Further, Paragraph 11(2) of the Advocates (Remuneration) Order states that:-
- 'The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector (emphasis court) may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.'
26. In her Ruling that was delivered on March 10, 2022, the Taxing Officer stated as follows:-
- ' Parties are at liberty to file a reference and obtain certified copy of ruling that bears the taxing Officers reasons as per rule 11(2) of the ARO'
27. In view of the fact that the Taxing Officer had indicated her reasoning in the said Ruling, the Client was not required to seek further reasons. This was a position that was also adopted in the case of *Abmednasir Abdikadir & Co Advocates vs National Bank of Kenya Limited (2) [2006] 1 EA 5*.
28. Even so, this court could not have declined jurisdiction to hear this matter on a technicality in view of the fact that Article 159(2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities. The Advocate's argument that the present application should be dismissed for want of jurisdiction thus fell by the wayside.
29. Turning to the substantive issue herein, this court noted that although the Client had argued that the figures the Taxing Officer awarded were excessive and inconsistent with the provisions of the Advocate's Remuneration Order, it did not specifically demonstrate the specific provisions that the figures were inconsistent with.
30. Be that as it may, the court deemed it prudent to ascertain whether or not the Taxing Officer misapplied herself as the Client had submitted with a view to ascertaining whether or not she arrived at the correct assessment of the costs the Advocate herein was entitled to.
31. The principles upon which the court exercises jurisdiction in a reference are well settled. In the case of *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Nairobi [2005] eKLR*, the Court of Appeal held that in a reference to a judge from taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion of the taxing officer unless such taxing officer, erred in principle in assessing the costs. This is because questions based solely on quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will only interfere with such discretion in exceptional cases.
32. This court also had due consideration of the case of *Republic vs Kenyatta University & Another Ex parte Wellington Kibato Wamburu [2018] eKLR* where the court therein stated that the taxing Officer had discretionary power to take into account the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit (emphasis court) with a view to awarding a reasonable fee.
33. Indeed, the Kenyan legal system is not inquisitorial. It is adversarial. Hence, the court must never be seen to be litigating the case on behalf of one party as it is a neutral arbiter in any dispute that is presented before it. It is not for the court to enquire about the value of the subject matter, the complexity of a matter or the work done as that is within the purview of the taxing Officer.
34. Notably, the duty of a taxing officer is an exercise of lawful discretion. However, it is guided by transparent, regular, reliable and just criteria. A court should only therefore uphold such discretion when and where it has taken into account relevant factors.



35. The Taxing Officer herein identified the taxing provisions as Schedule 7 of the Advocates Remuneration Order. A perusal of the Advocate- Client Bill of Costs dated December 3, 2021 showed that the Advocate had been instructed to file suit on behalf of the Client herein for a claim and/or to recover a debt in the sum of Kshs 993,700/=.
36. As there was no other way of ascertaining the subject matter of the suit, the Taxing Officer acted correctly when she found that the value of the subject matter was the sum the Client had instructed the Advocate to recover on its behalf.
37. Based on the value of the said subject, the Advocate sought costs in the sum of Kshs 119,999/= as the basic instruction fees. The Taxing Officer allowed a sum of Kshs 90,000/=.
38. According to Paragraph 1 (c) of Schedule 7 of the Advocates Remuneration Order, where the value of the subject matter was between Kshs 500,000/= and Kshs 1,000,000/=, the party and party costs are Kshs 65,000/=.
39. Paragraph 1(a) of the Advocates (Remuneration) Order further stipulates that:-
- ' To sue in an ordinary suit in which no appearance is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under items 1(a).'
40. Bearing in mind that the Advocate did not rebut the Client's assertions that the interlocutory judgment that had been entered in the lower court matter, the basic instruction fees ought to have been sixty five (65%) per cent of the assessed fees.
41. Whereas the Taxing Officer may have considered the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit as was held in the case of Republic vs Kenyatta University & Another Ex parte Wellington Kihato Wamburu (Supra) as a starting point for the assessment of instruction fees and the said Order (2014) for the reason that the matter at hand was filed in the year 2018, this court was not able to follow the reasoning of how she arrived at the basic instructions fees in the sum of Kshs 90,000/= instead of Kshs 65,000/= because the matter was concluded on the basis of an interlocutory judgment so as to determine whether or not to interfere with her discretion.
42. Going further, whereas the Taxing Officer applied Paragraphs 5, 6, 7, 8, 9, 10 and 11 of Schedule 7 of the said Advocates Remuneration Order to assess the Items in the said Advocate- Client Bill of Costs, it was not clear how the figures were arrived at as the taxed amounts appearing in the said Advocate-Client Bill of Costs did not tally with the figures in her Ruling.
43. The Client did not provide any evidence that it had agreed with the Advocate on a particular amount and that there was no dispute of the retainer so to remove the matter from the realm of taxation of the advocate-client bill of costs and/or that it had paid the Advocate the sum of Kshs 160,755/= as it had alleged.
44. Accordingly, this court came to the firm conclusion that the calculations by the Taxing Officer made it difficult for this court to establish whether or not she exercised her discretion judiciously. As the taxing Officer is an expert on quantum of costs as was held in the case of Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board Nairobi (Supra) which this court fully associates itself with, it was best that the said Items be considered afresh.



Disposition

45. For the foregoing reasons, the upshot of this Court's decision was that the Client's Chamber Summons dated and filed on March 21, 2022 was merited and the same be and is hereby allowed in the following terms:-

- a. That the Ruling of the Taxing Officer that was delivered on March 10, 2022 be and is hereby set aside and/or varied and/or vacated forthwith and the Advocate- Bill of Costs dated December 3, 2021 be and is hereby remitted and the same to be placed for assessment before another Taxing Officer other than the Taxing Officer who assessed the said Advocate- Client Bill of Costs.
- b. That costs of the application will be in the course.

46. It is so ordered.

DATED and SIGNED at KISUMU this 25th day of May 2023

J. KAMAU

JUDGE

DATED, SIGNED and DELIVERED at KISUMU this 31st day of May 2023

M.S SHARIFF

JUDGE

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