



**Robert Maua t/a Mauwa & Company Associates v JRS Group Limited (Miscellaneous Application E009 of 2021) [2023] KEHC 20862 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 20862 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E009 OF 2021**

**JN KAMAU, J**

**MAY 31, 2023**

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

**BETWEEN**

**ROBERT MAUA T/A MAUWA & COMPANY ASSOCIATES ..... ADVOCATE**

**AND**

**JRS GROUP LIMITED ..... CLIENT**

**RULING**

**Introduction**

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 184,622/= . 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.
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 305 of 2018 JRS Group Limited vs Int Con Africa Limited pursuant to instructions it received from the Client on May 3, 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 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.
13. The Client's Written Submissions were dated 28<sup>th</sup> 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**

14. 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.



15. 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.
16. 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.
17. 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. 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.
18. 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.
19. 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).”
20. 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.”
21. 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*”
22. 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.
23. 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.



24. 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.
25. 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.
26. 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.
27. This court also had due consideration of the case of *Republic vs Kenyatta University & Another Ex parte Wellington Kihato 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.
28. 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.
29. 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.
30. 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 343,202/=.
31. 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.
32. Based on the value of the said subject, the Advocate sought costs in the sum of Kshs 64,999/= as the basic instruction fees. The Taxing Officer allowed a sum of Kshs 65,000/=.
33. According to Paragraph 1 (c) of Schedule 7 of the *Advocates Remuneration Order*, the party and party costs where the value of the subject matter was Kshs 200,000/= and Kshs 500,000/= are Kshs 45,000/=.
34. 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).”



35. 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.
36. 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 Kibato 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 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.
37. Notably, under Paragraph 1 (c) of Schedule 7, the basic instruction fees for a subject matter whose value was between Kshs 500,000/= and Kshs 1,000,000/= on the lower scale, the "Lower Scale" being applicable in all cases where no defence or other denial of liability had been filed and the "Higher Scale" being applicable in all other cases, was Kshs 65,000/=.
38. If the Taxing Officer herein exercised her discretion to award the Advocate a sum of Kshs 65,000/= where the value of the subject matter was between Kshs 200,000/= and Kshs 500,000/=, then she ought to have clearly indicated her reasoning in her Ruling. However, this was missing in her Ruling. In fact, the reasoning was left hanging as it was indicated as follows:-

“In this matter judgment in default of appearance was entered. Guided by paragraph 1(a) of the 7<sup>th</sup> Schedule ARO and that the value was Kshs 343,2020 item 1 at Kshs 65,000 calculated as ” (sic)

39. In this respect, it was the considered view of this court that it could not with certainty establish whether or not the Taxing Officer exercised her discretion judiciously in assessing the basic instruction fees at Kshs 65,000/= instead of Kshs 45,000/= more so as the matter was concluded on the basis of an interlocutory judgment and/or if it could interfere with her said discretion or not.
40. Having said so, the Taxing Officer assessed the items provided in Paragraph 10 of Schedule 7 of the said Remuneration Order correctly. Paragraph 10 of Schedule 7 of the Remuneration Order provides for Kshs 1,400/= for service within three (3) kilometres of the subordinate court or district registry. The court attendance fees were also properly assessed as per Paragraph 6 of the said Schedule 7 which provides for Kshs 1,400/= for any necessary application to or attendance on Magistrate in court or chambers.
41. Accordingly, this court came to the firm conclusion that the Taxing Officer exercised her discretion on all items judiciously save for Item 1. 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 Item 1 be considered a fresh.

## Disposition

42. 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 in respect of Item 1 only be and is hereby set aside and/or varied and/or vacated forthwith and the Advocate- Bill of



Costs dated 3<sup>rd</sup> December 2021 on item 1 only 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.

43. It is so ordered.

**DATED AND SIGNED AT KISUMU THIS 25<sup>TH</sup> DAY OF MAY 2023**

**J. KAMAU**

**JUDGE**

**DATED, SIGNED and DELIVERED at KISUMU this 31<sup>st</sup> day of May 2023**

**M.S SHARIFF**

**JUDGE**

