



County Assembly of Kwale v Muinde & another t/a Apolo Muinde & Ngonze Advocates (Civil Miscellaneous Application 7 of 2016) [2023] KEHC 27526 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL MISCELLANEOUS APPLICATION 7 OF 2016**

F WANGARI, J

JULY 28, 2023

BETWEEN

THE COUNTY ASSEMBLY OF KWALE APPLICANT

AND

**APOLLO MUINDE & DANIEL NGONZE T/A APOLO MUINDE & NGONZE
ADVOCATES RESPONDENT**

RULING

1. The ruling is in respect of the Chamber Summons dated 22nd July, 2022 and filed on 25th July, 2022. The application seeks the following orders: -
 - a. That the Honourable Court do hear and determine the Respondent/Advocates' Objection to the decision of the Taxing Officer, that is to say: -
 - i. The Learned Taxing Officer erred in law and in fact in the manner in which he taxed items 1, 2, 6, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 58, 59 and 63 of the Applicant/Client's Party & Party Bill of Costs dated 28th May, 2021 which were taxed at amounts which were unjustifiably higher than the applicable Advocates Remuneration Order;
 - ii. The Learned Taxing Officer erred in law and in fact in allowing the charge of Value Added Tax (VAT) on a Party & Party Bill of Costs despite the fact that the Applicant had not offered any services to the Respondent which would have justified such a charge;
 - iii. The Learned Taxing Officer erred in failing to give any or any proper reasons for taxing the said items 1, 2, 6, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 58, 59 and 63 of the Applicant's said Bill in the sums therein;



- iv. There were errors of principle in the Taxing Officer's ruling and/or ruling;
 - v. That the Learned Taxing Officer erred in law in failing to give reasons for the taxation contrary to the mandatory provisions of paragraph 11 (1) of the Advocates Remuneration Order.
- b. That this Honourable Court do consider/assess the Applicant's Party & Party Bill of Costs dated the 28th May, 2021 and;
- i. Set aside the Taxing Officer's decision on taxing of items 1, 2, 6, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 58, 59 and 63 in the said Bill and;
 - ii. Then reassess the fees payable on the said items 1, 2, 6, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 58, 59 and 63 at such sums as justice of this case would require bearing the applicable scale based on the relevant Advocates Remuneration Order;
 - iii. Set aside the award of VAT allowed in the Bill in its entirety;
- c. That the Applicant be ordered to pay the costs of this Reference.
2. The application is opposed through a replying affidavit dated 28th October, 2022 and filed on 31st October, 2022 sworn by the Respondent's Counsel.
3. Directions were taken that the application be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival submissions. I am grateful to Counsel for their industry in complying with the directions as the said submissions are a useful guide to the court in arriving at a just decision one way or the other.

Analysis and Determination

4. I have considered the application, the responses, written submissions, the various authorities cited as well as the law and I deduce the following as the issues for determination: -
- a. Whether the Taxing Master erred in taxing the Bill of Costs dated 28th May, 2021 in the manner he did;
 - b. If the answer to (a) above is in the affirmative, whether this court has the jurisdiction to tax the Bill;
 - c. Who bears the costs?
5. This is a reference from the Taxing Master's ruling delivered on 11th May, 2022. It is thus based on Rule 11 of the [Advocates Remuneration Order](#) which provides as follows: -
11. Objection to decision on taxation and appeal to Court of Appeal
- (1) 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.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector 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.

- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

6. I have no hesitation that there was compliance with Rule 11 (1) as evidenced by the letter dated 18th May, 2022. Now turning to the first issue, both parties are agreed that the *Advocates (Remuneration) (Amendment) Order*, 2014 is the one applicable. Equally, parties are agreed that Schedule 6 is the relevant schedule as the matter proceeded in the High Court. The Applicant contends that item 1 was not correctly taxed as the value of the subject matter could not be ascertained. Is this the case? I note that on 12th October, 2018, this court delivered a judgement on the following terms: -

- i. The defendant herein shall within 30 days from today transfer LR No. Kwale/Galu Kinondo/1165 and hand over title documents to the plaintiff;
- ii. If the defendant fails to comply with the above order within the said timeline, it shall within 15 days thereof, reimburse the plaintiff the sum of Kshs. 7,200,000/= being the purchase price for LR No. Kwale/Galu Kinondo/1165;
- iii. The defendant shall pay the plaintiff interest on the said sum of Kshs. 7,200,000/= at the rate of 12% per annum from 9th October, 2015 until payment in full; or until delivery of the title deed for Kwale/Galu Kinondo/1165; and
- iv. Costs are awarded to the plaintiff.

7. Order (ii) and (iii) are instructive. I have no doubt in my mind that the value of the subject matter could be ascertained from the judgement. In *Joreth Ltd v Kigano & Associates* [2002] eKLR the Court of Appeal held as follows: -

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

8. Further, the same court in *Peter Muthoka & Another v Ochieng and 3 Others* [2019] eKLR, held as follows: -

“It is not lost to us, as we address that single issue, that matters of quantum of taxation properly belong in the province and competence of taxing masters. They fall within their discretion and so that High Court upon a reference will be slow to interfere with them. It is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion to be exercised, not capriciously at a whim, but on settled principles.



When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in injustice, then the decision though discretionary may properly be interfered with”

9. Based on the foregoing, I see no reason to interfere with the Taxing Master’s award on instructions fees. On item 2, the Applicant contends that the matter did not proceed for hearing and thus getting up fees were not awardable. On this item, the applicable provision of law is set out under Paragraph 2 of Schedule 6A of the [Advocates \(Remuneration\) Order](#) 2014 where getting up fees is one-third of the instruction fees and chargeable once the matter has been confirmed for hearing. It provides as follows: -

“In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation”
10. In [Jovet \(Kenya\) Limited v Savaria NV](#) [2020] eKLR, it was held as follows: -

“The fact this matter was heard by submissions and affidavits does not affect the succeeding party’s claim for getting up fee. The taxing master was correct in awarding the getting up fee and doing so was faithful to the [Advocates \(Remuneration\) Order](#).”
11. The Respondent filed a response in the form of grounds of opposition and it was mutually agreed that the matter be ventilated by way of written submissions. Therefore, I equally have no reason to interfere with this award. On item 6, the Applicant contends that it ought to have been taxed at Kshs. 1,400/=. However, the Respondent states that the same was properly taxed. Order 17 of the Advocates Remuneration defines folio to consist of 100 words. I am in agreement with the Respondent that the supporting affidavit is eight (8) folios. As such, the sum of Kshs. 1,700/= awarded was proper and I maintain the same.
12. On items 19 through to 24, it is fact that perusals attract Kshs. 50/= per folio. Having gone through the pleadings, I am satisfied that the items were properly taxed. I am similarly satisfied that items 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 on attendances were properly taxed. As for items 45, 46, 48 and 49 on filing fees, there are receipts confirming payment of the filing fees and I thus see no merit on the challenge. I arrive at the same conclusion on items 51,52, 53, 54, 55, 56, 57, 58 and 59 on service and item 63 on making copies.
13. On the award of Value Added Tax (VAT), I note that section 5 (4) of the [Value Added Tax Act](#), No. 35 of 2013 mandates a registered person to collect VAT from a recipient of goods or services rendered by the said registered person. The Respondent did not render any services to the Applicant and I thus find that it was not entitled to VAT. I am in agreement with the court’s decision in [Pyramid Motors Limited v Lang’ata Gardens Limited](#) [2015] eKLR. I therefore proceed to set aside the Taxing Master’s award on this head.
14. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the [Civil Procedure Act](#). The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others](#) [2013] eKLR. In the present circumstances, the reference having partly succeeded, I direct that each party to bear their own costs.
15. Following the foregone discourse, the upshot is that the following orders do hereby issue: -



- a. The Chamber Summons application dated 22nd July, 2022 only succeeds to the extent that the sum of Kshs. 52,053/= awarded as Value Added Tax (VAT) is taxed off. Otherwise, all the other items were properly taxed and I so hold.
- b. Consequent to (a) above, the award of Kshs. 52,053/= as Value Added Tax (VAT) is set aside in its entirety.
- c. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of:

N/A for the Applicant

Mr. Tindika Advocate for the Respondent

Abdullahi, Court Assistant

