



REPUBLIC OF KENYA



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Mwangi Keng'ara & Co Advocates v Mungai (Commercial Miscellaneous Application E207 of 2021) [2023] KEHC 24546 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL MISCELLANEOUS APPLICATION E207 OF 2021**

MN MWANGI, J

JULY 28, 2023

IN THE MATTER OF THE ADVOCATE ACT CHAPTER 16 OF THE LAWS OF KENYA, THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER (REV. 2017)

-AND-

IN THE MATTER OF TAXATION

BETWEEN

MWANGI KENG'ARA & CO ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

(A reference from the decision of Hon. Stephany Bett, Deputy Registrar, dated 24th August, 2021, arising from taxation of a bill of costs)

RULING

1. The Advocate/applicant filed a Chamber Summons application dated 29th September, 2021 under the provisions of paragraph 11(2) of the *Advocates Remuneration Order* seeking the following orders -
 - i. That the ruling dated 24/08/2021 be set aside in its entirety and the Advocate-Client Bill of Costs dated 26th March, 2021 be remitted for re-taxation under Schedule 5 Part 2 before any other Taxing Officer; and
 - ii. That the costs of this reference be awarded to the Advocate/Applicant.
2. The application has been brought on the grounds on the face of the Summons and is supported by affidavits sworn by Mercy Nduta Mwangi, learned Counsel for the applicant on 29th September, 2021 and 19th January, 2022. In opposition thereto, the respondent filed a replying affidavit sworn 12th November, 2021 by Zipporah Mungai, the respondent herein.



3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 17th June, 2022 by the law firm of Mwangi Keng'ara & Co. Advocates, whereas the respondent's submissions were filed by the law firm of Kosgey & Masese Advocates on 9th December, 2022.
4. Ms. Mwangi, learned Counsel for the applicant relied on the provisions of Order 9 Rule 7 of the Civil Procedure Rules, 2010, and the case of Parkesh Kamalakar Naik & another v Cabinet Secretary Ministry of Interior and Co-ordination of National Governments & 2 others [2017] eKLR and submitted that at the time the respondent's Advocates on record filed the respondent's submissions dated 29th June, 2021 to the Notice of Motion dated 21st May, 2021 before the Taxing Master, they were not properly on record since they had not paid the requisite Court fees for the Notice of Appointment of Advocates they had lodged, and that the said fees were paid on 10th November, 2021. She contended that as a result, all the pleadings filed while the respondent's Advocate was not properly on record are a nullity *ab initio* thus rendering the ruling dated 24th August, 2021 irregular and unlawful.
5. She submitted that the Taxing Master made an error in principle in finding that no election had been made since paragraph 22 of the Advocates (Remuneration) Order provides that a separate notice must be served upon the client notifying him of the election. She cited the case of Nyamogo & Nyamogo Advocates v Protex (K) EPZ Limited [2008] eKLR and stated that in compliance with the provisions of Rule 22(1) of the Advocates Remuneration (Amendment) Order, the applicant elected to charge its legal fees under Schedule 5 instead of Schedule 7 of the Advocates (Remuneration) Order and that the said election forms part of the heading of the Advocate/Client bill of costs.
6. Ms. Mwangi stated that the intended purpose of paragraph 22(1) of the Remuneration Order is to notify the client of the election and there is no prescribed form under the said Rule and as such, the endorsement on the bill of costs notified the respondent of the applicant's election. Counsel also stated that at page 2, paragraph 2 of the respondent's submissions before the Taxing Master, she acknowledged that there was an election by the applicant on the face of the bill of costs. In submitting that the Taxing Master by applying Schedule 7 in the taxation denied the applicant the right to recover fees which is otherwise not provided for under Schedule 7, but which the Advocate was entitled to. Ms. Mwangi relied to the case of Mutisya & Co. Advocates v Lazaro Omita Nyagol [2004] eKLR.
7. She contended that the Taxing Master's holding that the bill of costs dated 26th March, 2021 arose from the applicant's representation of the respondent in CMCC No. 4677 of 2019 is a contradiction of the facts since the bill of costs reads that it arose from Nairobi CMCC No. 4674 of 2019. She indicated that the bill of costs was for Kshs.741,170.00 and not Kshs.516,356.38 as held by the Taxing Master, which leads to the conclusion that there was an error in determining the correct subject matter of the taxation and the same was an error in principle. Counsel relied on the decision of the Court of Appeal in the case of Kamunyori & Company Advocates and Development Bank of Kenya Limited [2015] eKLR and stated that the Taxing Master erred in principle in taxing a different bill of costs other than the one that was before her, leading to a wrong assessment of the fees.
8. The applicant's Counsel submitted that pursuant to the provisions of Schedule 5, attendances in ordinary cases are not limited to Court attendances as they also apply to any attendance to the matter which is necessary for an Advocate's ordinary handling of the matter. She submitted that the taxed off items for regular attendances that are outlined in paragraph 5 of the affidavit in support of the application herein are services that are essential for the execution of the client's instructions and the progress of the case. In submitting that an Advocate's entitlement to be remunerated for services rendered to a client is not restricted to the work personally carried out by an Advocate but extends to work also done by his staff members, Ms Mwangi cited the case of London Scottish Benefit Society v Chorley, Crawford and Chester [1884] 1QB, 872 at page 875.



9. She contended that the ruling issued to the applicant does not show what was awarded as fees or the computation of fees, thus it is inconclusive and wrong in law as it fails to conclusively determine the fees dispute in so far as the award of costs is not ascertainable from it.
10. Mr. Masese, learned Counsel for the respondent submitted that the Taxing Master taxed the costs payable in this matter alongside another matter being Misc. E208 of 2021 between the same parties. He further submitted that the said bills of costs were assessed at Kshs.452,295.60 in respect of E207 of 2021 and Kshs.298,305.00 in respect of E208 of 2021 after the Taxing Master considered the different primary suits and the subject matter of taxation. He asserted that it is true that there is a typographical error apparent on the face of the record since the taxation ruling in this matter is identical to the taxation ruling in Misc. E208 of 2021 but other than the said errors, the Taxing Master applied the correct principles in carrying out taxation of the applicant's bill of costs.
11. He relied on the case of *Aldrin Ojiambo T/A Ojiambo & Co. Advocates v Mohamedraza Herein Jagani* Misc. Cause 320/2005 (U.R) and stated that the Taxing Master applied the correct legal principles when she found that the applicant had not served a proper election notice under paragraph 22 of the Advocates Remuneration Order. He also stated that the respondent has already paid the costs as assessed by the Taxing Master thus the instant reference should be dismissed with costs for being an academic exercise and a waste of precious judicial time.
12. Mr. Masese contended that the issue of the respondent's representation before the Taxing Master does not lie since her Advocates on record filed a Notice of Appointment dated 14th April, 2021, and there is no prejudice suffered by the applicant since the respondent filed her submissions before the Taxing Master, they were accorded a full hearing and a just decision was arrived at, on the merits of the matter. He asserted that the reference herein is defective having been filed outside the legally stipulated time thus being in contravention of Rule 11 of the *Advocates Remuneration Order*.

Analysis and Determination.

13. I have considered the reference filed herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are -
 - i. Whether the instant application is time barred;
 - ii. Whether the pleadings before the Taxing Master are a nullity and the ruling dated 24th August, 2021 unlawful, due to late payment of Court filing fees for the Notice of Appointment of Advocates lodged on 16th April, 2021 by the respondent's Counsel;
 - iii. If the reference is merited.
14. In the affidavit filed by the applicant she deposed that she filed an Advocate-Client bill of costs dated 26th March, 2021 against the respondent arising from Nairobi CMCC No. 4674 of 2019. She averred that she endorsed the election to proceed with taxation under Schedule 5 Part 2 on the heading of the said bill of costs and the charges for the various items under the said Schedule, instead of Schedule 7.
15. It was stated by the applicant that the respondent opposed the bill of costs dated 26th March, 2021 by filing a Notice of Motion application dated 21st May, 2021 which she responded to, *vide* a replying affidavit sworn on 24th May, 2021. She stated that at the time of filing of the said application the respondent's Advocates on record were not properly on record since the Notice of Appointment of Advocates they lodged was not paid for.



16. The applicant submitted that she filed an objection under Rule 11 of the Advocates Remuneration Order on 25th August, 2021 after she received an email from the respondent's Counsel, where she learnt that the Deputy Registrar forwarded the Taxing Master's ruling dated 24th August, 2021 to the respondent's Advocates on record but she did not receive a copy since her email address was misspelt as mwangikenrara01@gmail.com instead of mwangikengara01@gmail.com. That thereafter, she notified the Deputy Registrar that she was yet to receive the said ruling and indicated her correct email address.
17. The applicant averred that on 27th August, 2021, she applied for certified copies of the Taxing Master's ruling dated 24th August, 2021, and subsequently, the said ruling and reasons were sent to her on 17th September, 2021
18. The respondent in her replying affidavit deposed that in Nairobi CMCC No. 4674 of 2019, being the primary suit from which the bill of costs arose, she was seeking to recover a sum of Kshs. 2,800,000/= thus the value of the subject matter in the said suit was Kshs. 2,800,000/=, and that in the said suit, the defendant entered appearance but never filed a defence. She stated that judgment was entered in her favour and a decree was issued on 6th March, 2020.
19. She averred that her Advocates on record duly filed and paid for a Notice of Appointment dated 14th April, 2021. Further, that the Taxing Master gave a considered ruling where she considered all the items in the applicant's bill of costs and gave cogent reasons supported by law in the said taxation.
20. In response thereto, the applicant deposed that the defendants in Nairobi CMCC No. 4674 of 2019 filed a Memorandum of Appearance dated 18th July, 2019 and grounds of opposition dated 19th August, 2019, which pleadings fall under the category of other denial of liability at Schedule 7 paragraph 1(a). She averred that the respondent's Counsel's Notice of Appointment of Advocates was filed after the application herein was filed and served on the respondent's Advocates on record.

Whether the instant application is time barred.

21. The instant application has been filed pursuant to the provisions of Paragraph 11 of the [*Advocates Remuneration Order*](#) which provides as hereunder-
 - “(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.”



22. When challenging a Taxing Master's decision in the High Court, the objecting party has to first give the Taxing Master a notice in writing within fourteen (14) days of his decision of the items of taxation to which he/she objects to, thereafter, the Taxing Master is required forward to the objector the reason(s) for her decision and the objector may within fourteen (14) days from receipt of the said reasons, make an application commonly referred to as a reference to a Judge by way of Chamber Summons, setting out the grounds of objection.
23. In this instance, the Taxing Master delivered her ruling on 24th August, 2021. The applicant averred that on 25th August, 2021, she filed an objection to the said ruling and on 27th August, 2021, she applied for certified copies of the said ruling. That thereafter, the ruling dated 24th August, 2021 and its reasons were sent to her on 17th September, 2021. The applicant then filed the instant application on 29th September, 2021.
24. Based on the foregoing averments by the applicant's Counsel, it is evident that the instant application was filed within the stipulated timelines since the notice of objection was filed on 25th August, 2021, a day after the Taxing Master delivered her ruling and the instant application was filed on 29th September, 2021 which is exactly thirteen (13) days from 17th September, 2021 which is the day when the applicant was supplied with a copy of the ruling dated 24th August, 2021 and reasons for the said ruling. It is therefore my finding that the instant reference is not time barred.

Whether the pleadings before the Taxing Master are a nullity and the ruling dated 24th August, 2021 unlawful, due to the late payment of Court filing fees for the Notice of Appointment of Advocates lodged on 16th April, 2021 by the respondent's Counsel.

25. The applicant submitted that at the time the respondent's Advocates on record filed the respondent's submissions dated 29th June, 2021 to the Notice of Motion dated 21st May, 2021 before the Taxing Master, the respondent's Advocates were not properly on record since they had not paid the requisite Court fees for the Notice of Appointment of Advocates lodged on 16th April, 2021, and that the said fees were paid on 10th November, 2021. She contended that all the pleadings filed while the respondent's Advocates were not properly on record are a nullity *ab initio* thus rendering the ruling dated 24th August, 2021 irregular and unlawful. The applicant attached a screenshot of its computer which shows that as at 29th September, 2021 the respondent's Advocates on record had not paid the requisite Court fees for the Notice of Appointment lodged on 16th April, 2021. The applicant's Advocates exhibited a receipt dated 10th November, 2021 issued to the respondent's Advocates on record confirming receipt of payment for a Notice of Appointment.
26. The respondent's contention on the other hand was that on 16th April, 2021 her Advocates on record duly filed and paid the requisite Court fees for the Notice of Appointment lodged on 16th April, 2021 thus they were not only properly on record but also all the pleadings filed by them before the Taxing Officer are properly on record. In support of this averment, the respondent annexed to her replying affidavit a copy of the said Notice of Appointment and an invoice for payment. The said law firm did not tender any evidence to confirm that on 16th April, 2021, the said Advocates actually paid the requisite Court fees for the said Notice of Appointment of Advocates.
27. Given the said circumstances, it is my finding that Court fees for the Notice of Appointment of Advocates lodged on 16th April, 2021 was paid after the Taxing Master delivered her ruling in the taxation matter. This therefore begs the question whether all the pleadings and proceedings before the Taxing Master are a nullity for failure by the respondent's Counsel to pay Court filing fees for the



Notice of Appointment of Advocates. Section 96 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya states that -

“Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”

28. In the circumstances, I hold that the delay in payment of Court filing fees is curable under the provisions of Section 96 of the [Civil Procedure Act](#) reproduced hereinabove. Since the said Court fees was eventually paid on 10th November, 2021, the respondent’s pleadings before the Taxing Officer are not a nullity hence the ruling dated 24th August, 2021 is not unlawful.

If the reference is merited.

29. Courts have held that they can only interfere with the decision of the Taxing Master where there has been an error in principle but not on questions solely of quantum since that is an area where the Taxing Master is more experienced and therefore more apt to the job. Additionally, a Court can only interfere with the Taxing Master’s decision in instances where he has not directed his mind in accordance with the provisions of the law that is, if he considered factors that he ought not to have considered in the first place or failed to consider facts which he ought to have considered. In the case of [Tom Ojienda v County Government of Meru](#) [2021] eKLR the Court held as hereunder;

“The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in *Visser vs Gubb* 1981 (3) 753 (C) as follows;

“the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

30. It was submitted by the applicant’s Counsel that the Taxing Master made an error in principle in finding that no election had been made as provided for under paragraph 22 of the [Advocates \(Remuneration\) Order](#). In addition, she stated that in compliance with the said provisions, the applicant elected to charge its legal fees under Schedule 5 instead of Schedule 7 of the [Advocates \(Remuneration\) Order](#) and that the said election forms part of the heading of the Advocate-Client bill of costs. The applicant averred that the intention of paragraph 22(1) of the [Advocates Remuneration Order](#) is to notify the client of the election, but there is no prescribed form under the said rule, thus the endorsement on the bill of costs notified the respondent of its election



31. The Taxing Master in her ruling found that the applicant did not send a proper notice pursuant to paragraph 22. She stated that -

“...paragraph 22 speaks for itself clearly, a notice must be sent to enable the advocate elect schedule 5 as the applicable schedule. The notice may not be on the bill itself, but it must be sent before or contemporaneously with the bill itself. In my mind, the notice is a separate document which may be delivered before the bill is drawn or together with the bill as drawn.”

32. Paragraph 22 of the *Advocates (Remuneration) Order* states the following –

“(1). In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.”

33. Paragraph 22 of the *Advocates (Remuneration) Order* provides that all an Advocate is required to do is signify to his client that he shall charge his fees according to Schedule 5. The Rule does not provide for a prescribed form which the notice to the client should take, instead it provides that it should be made and/or sent to the client before or contemporaneously with the bill of costs. On perusal of the bill of costs dated 26th March, 2021, it reads as follows –

“Advocate/Client Bill of Costs under schedule 5 part 2 of the *Advocate(Remuneration) (Amendment) Order*, 1962, (Rev. 2017). Pursuant to an election by the Advocate under Rule 22(1) of the *Advocate (Remuneration) (Amendment) Order*, 1962.”

34. In *Nyamogo & Nyamogo Advocates vs. Protex (K) EPZ Limited* (*supra*) Lenaola, J (as he then was) held that -

“Under paragraph 22(1) of the *Advocates Remuneration Order* it is not open to the taxing officer to make an election to apply schedule V of the Order since the right to make an election vests in the advocate...The refusal by the taxing officer to tax the Bill of Costs under schedule V in the light of the election was an error which was so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all parties...The proper course where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a re-taxation of the bill in terms of the court’s ruling. That is the usual and proper course. Where a case is remitted, there is sometimes an advantage in its coming before a different taxing officer, who can bring a fresh mind to it. On the other hand, if the taxing officer from whose taxation appeal was made, is familiar with what is a complex case, no objection being taken against him and especially if there is no other officer of comparable experience, the same taxing officer should re-assess the bill.”



35. It is not disputed that the said bill of costs was served on the respondent who acknowledged in her submissions before the Taxing Master that there was an election by the applicant on the face of the bill of costs. I agree with Counsel for the applicant that the intention of Paragraph 22 of the *Advocates (Remuneration) Order* is to notify the client of the election. For this reason, I find that the applicant duly complied with the provisions of Paragraph 22 of the *Advocates (Remuneration) Order* hence the Taxing Officer made an error in principle in finding that the applicant did not send a proper notice pursuant to the said provisions, thereby proceeding to tax the bill of costs dated 26th March, 2021 pursuant to Schedule 7 of the *Advocates (Remuneration) Order*, 2014. As a result, the bill of costs dated 26th March, 2021 was taxed pursuant to the wrong Schedule of the *Advocates (Remuneration) Order*, thus making the ruling dated 24th August, 2021 irregular and a nullity.
36. The upshot is that the reference dated 29th September, 2021 is merited. It is allowed in the following terms –
- i. The ruling dated 24th August, 2021 delivered by Hon. Stephany Bett, Taxing Master is hereby set aside in its entirety;
 - ii. The Advocate-Client Bill of Costs dated 26th March, 2021 is hereby remitted for re-taxation under Schedule 5 Part 2 before another Taxing Master in the Commercial and Tax Division; and
 - iii. Costs to the applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE
OUTBREAK OF THE COVID-19 PANDEMIC.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mwangi for the Advocate/applicant

No appearance for the Client/respondent

Ms B. Wokabi – Court Assistant.

