



**Geoffrey Muriungi Kiugu t/a Kiugu & Company Advocates v County
Government of Kiambu (Miscellaneous Application E003 of 2021)
[2023] KEHC 21369 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E003 OF 2021**

**HI ONG'UDI, J
AUGUST 15, 2023**

BETWEEN

**GEOFFREY MURIUNGI KIUGU T/A KIUGU & COMPANY
ADVOCATES APPLICANT**

AND

THE COUNTY GOVERNMENT OF KIAMBU RESPONDENT

RULING

1. The Applicant filed an objection to the taxed Bill vide Chamber Summons dated 4th March 2022 supported by his affidavit sworn on even date and the grounds on its face. He seeks the following orders:
 - i. That the Learned Deputy Registrar's decision dated 22nd February, 2022 with respect to Item 1 and Item No.42, Instruction fees and getting up fees on the Applicant's Advocate-client Bill of Costs dated 24th February, 2020 be set aside and taxed afresh by this Honourable Court.
 - ii. That in the alternative of prayer 1 above, the Advocate-client Bill of Costs dated 24th February, 2020 be set aside and the said Bill of Costs dated 24th February, 2020 be referred back for taxation afresh with appropriate directions before any Taxing Officer other than the Learned Hon. T. E. Marienga, the Deputy Registrar.
 - iii. That the costs of this application be provided for.
2. His main ground is that the Taxing officer (Deputy Registrar) erred in law and in principle in taxing Item No.1 of the Bill of Costs at Kshs.500,000/= without giving sufficient reasons for her decision. In the grounds and supporting affidavit he states that this instruction fees ought to have been pegged on the value of the suit property and not Schedule 6(1)(j) of the *Advocates Remuneration Order*, 2014.



He further depones that the main matter (Petition No. 398 of 2015) was a very complex land matter that required research and skill. It involved many acres of land and the Taxing Master did not consider all this. That the matter was finally settled by the parties with the petitioner receiving an extension of 7,137 acres and ceding 690 acres to the respondent.

3. The Respondent filed a replying affidavit sworn by Daniel Kirathe the respondent's county solicitor, on 10th September 2022. He deponed that the applicant had not provided the court with cogent reasons to warrant any interference with the Taxing Master's Ruling of 22nd February 2022. He stated that in the Ruling it was explained how the decision was arrived at. That the amount sought by the Applicant as instruction fees was grossly excessive. He averred that there was nothing in the petition that was above and beyond the normal work of legal practitioners. He therefore supported the Ruling by the Taxing Master (Deputy Registrar).

The Parties' submissions

The Applicant's submissions

4. They were filed by Kiugu & company advocates and are dated 5th December 2022. On whether the Deputy Registrar erred in law and fact by not taxing Item No.1 based on the value of the suit property, he submitted in the affirmative. He referred to the case of *Mwangi Njenga t/a Mwangi Njenga & Company Advocates v Government of Mombasa* [2020] eKLR. He faulted her applying Schedule 6(1) (j) of the *Advocates Remuneration Order* 2014 instead of just ascertaining the value of the suit.
5. According to the applicant this was not an ordinary petition as the three (3) Judge bench found that it fell within the mandate of the Environment and Land Court. Further that based on this finding the instruction fees ought to have been taxed based on the value of the land whose lease was sought to be extended and/or renewed. He placed the value of the land at KShs.8,055,877,260/= and referred to the valuation report dated 17th January 2017 which showed the value to be KShs.5,350,000,000/= . He therefore sought a sum of KShs.188,001,395/28 as instruction fees and KShs.39,333,798/43 as getting up fees.
6. On whether the Deputy Registrar failed to consider the importance of Petition No.398 of 2015 counsel submitted that instruction fees are earned by an advocate at the time of instructions. It did not therefore matter where the matter had reached at the time of settlement. He referred to the case of *Joreth v Kigano & Associates*, Civil Appeal No. 66 of 1999 (2000) eKLR where the Court stated:

“We come now to the Notice of Grounds for affirming the decision of the learned Judge. By the first ground thereof the respondent states that instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct.

The Court further stated that:- “The instruction fees is earned once the advocate is instructed and once, he has filed a plaint, or other originating process, he is entitled to full fees on the suit.”

7. Counsel contends that prior to the filing of the consent he had already filed submissions which were to be highlighted before the three (3) Judge bench. He further submitted that in cases where the value of the property is not ascertained the Court of Appeal gave guidance in the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 at 99 where it was stated:

“...but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the



nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

The Respondent's submissions

8. These are dated 1st November 2022 and filed by David Mararo advocates for the respondent. His main issue is whether this court should interfere with the decision of the Taxing Master. In answering this, he relied on the case of *Mbogo & another v Shah* [1968] EA 15 where the Court stated:

“An appellant court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

9. Further in *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the Court stated:

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

10. Counsel submitted that the Taxing Master properly exercised her discretion in determining the Bill of costs. On this point he referred to the cases of:-

- i. *Joreth Limited v Kigano & Associates* [2002] 1 EA 92
- ii. *Lubulellah & Associates Advocates v N. K. Brothers Limited* [2014] eKLR.
- iii. *Vipul Premchand Haria v. Kilonzo & Co. Advocates* [2020] eKLR and
- iv. Section 51 (2) of the *Advocates Act*.

11. He contended that the Taxing Master was alive to the need to be guided by principles of Law delineating the parameters for the exercise of the said discretionary mandate, and acted on the same. In a nutshell counsel urged this Court not to interfere with the Taxing Master’s Ruling.

Analysis and Determination

12. Upon due consideration of the application, responses and submissions, cited authorities and the Law I find the issue for determination to be whether the decision by the Deputy Registrar on taxation dated 22nd February 2022 should be interfered with by this Court.

13. It is the applicant’s argument that in taxing the applicant’s instruction fees and getting up fees the Deputy Registrar did not base the exercise on the value of the subject matter which was land. That instead she relied on Schedule 6(1)(j) of the *Advocates Remuneration Order* 2014. The applicant is only dissatisfied with the taxation of two items in the entire Bill of Costs.

14. There is no dispute that there had been an issue as to whether this Court had jurisdiction to hear this matter or not. The late Onguto J on 1st October 2015 found that the Court had jurisdiction. The three (3) Judge bench later in its Judgment in which the respondent was not a party found that this Court lacked jurisdiction to deal.

15. On the 13th September 2018 the parties entered into a consent which was as follows:



1. The Petition herein dated 18th September, 2015 and filed in Court on the same day be and is hereby marked as fully and finally settled between the petitioner, Del Monte Kenya Limited and the 2nd Respondent, the County Government of Kiambu, in terms of the Memorandum of understanding dated 7th September 2018, a certified copy whereof is annexed hereto.
2. The Petitioner and the 2nd Respondent shall bear their respective costs of the petition.

This consent was adopted as an order of the Court on 20th September 2018. It is therefore a fact that the matter did not proceed to full hearing, as far the petitioner and Respondent are concerned.

16. At one point counsel for the applicant in his submissions refers to the matter (Petition No. 398 of 2015) as a Petition then he turns around and submits that it was not a Petition but a matter involving thousands of acres of land and so was a land matter. He thus submits that the instruction fees should not have been subjected to the Schedule 6(1)(j) of the *Advocates Remuneration Order* dealing with Petitions.
17. I have read through the Deputy Registrar's Ruling and the reasons for the taxation on the Advocate / Client Bill of costs dated 24th February 2020. The Bill of costs had a total of 178 items. As stated above the Applicant only had issues with two items i.e. Item No.1 (instructions) and item No. 42 (which is an error). Getting up fees is at Item No. 68 and not Item No.42.
18. There is no dispute that what the Deputy Registrar dealt with was a Constitutional Petition as filed. The Court was not dealing with a Land matter as at the time of filing of the Petition and even at the time of settlement. The Land matter had indeed been disguised as a Constitutional Petition, but that's what was before the Court then. On the 29th February 2016 the late Onguto J found the Petition to be raising serious issues of public interest and recommended to the Hon. Chief Justice for empanelment of a bench with an uneven number of Judges.
19. The Deputy Registrar set out all these issues under paragraphs 6 – 25 of her Ruling, considered the Law and relevant case law. She gave sound reasons for increasing the instruction fee from KShs.100,000/= - KShs.500,000/=.
20. Upon perusal of the certified Memorandum of Understanding annexed to the adopted consent I note that the Petitioner Del Monte Kenya Limited (DMKL) ceded 690 acres of its land to the respondent and retained 7137 acres of land. There is no value attached to this Settlement Deed.
21. In the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 the Court of Appeal stated thus:-

“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, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances.”

This was also applied in *Peter Muthoka & another v. Ochieng & 3 others* [2019] eKLR.”
22. In the case of the Applicant herein there was no Judgment entered. Secondly as was found by the Deputy Registrar the Petition sought for declaratory orders only. Therefore the pleadings do not assist in the taxation as no value was attached, to the land.



Thirdly the Settlement Deed besides stating the acreage has not given any values. The above being the position the Deputy Registrar was left with no choice but to exercise her discretion in the matter. She has given her reasons for the decision, she arrived at.

23. The exercise of discretion has been held to be the position in several cases, some of which are:
 - i. *Kipkorir, Tito, & Ikiara Advocates v Deposit Protection Fund* [2005] eKLR
 - ii. *Maronge & Company Advocates v. Kenya Airports Authority* Kisumu Court of Appeal Civil Appeal No. 262 of 2012 [2014] eKLR.
 - iii. *KTDA Limited v J. M. Njenga & Company Advocates High Court* [2008] eKLR.
 - iv. *Otieno, Ragot & Company Advocates v National Bank of Kenya* Kisumu High Court Miscellaneous Application No. 61 of 2015
 - v. *Otieno Ragot & Company Advocates v. Kenya Airports Authority* [2021] eKLR.
24. From the above decisions it is clear that the Deputy Registrar has the right to exercise discretion where the value of the subject matter cannot be discerned from the pleadings, Judgment or Settlement Deed. In the Maronge case the Court of Appeal was of the view that Schedule VI (I) (a) of the *Advocates (Remuneration) Order* gives a guide on how the value of the subject matter of a suit may be determined.
25. Based on the supposed to be value of the total acreage the Applicant is claiming instruction fees of Kshs.188,001,395/43 plus getting up fees of Kshs.39,333,798/43 totalling Kshs.127,335,193/71. How can one justify such a payment, by a county government such as the respondent? Taxation of instruction fees must avoid unjust enrichment. Payment of this sum would bring the respondents to its knees yet it's not commensurate with the service that was rendered to it by the Applicant. Such action would be a real hinderance to access to justice.
26. Upon consideration of all the material placed before this Court I am satisfied that the Deputy Registrar examined well all the items in the Advocate / Client Bill of costs. She also taxed the instruction fees and getting up fees under the correct provisions of the Advocates Remuneration Order applicable then. She has given sufficient reasons in support of her decision. I find no reason to make this court interfere with her Ruling dated 22nd day of February 2022.
27. The upshot is that the objection filed through the chamber summons dated 4th March 2022 lacks merit and is dismissed with costs.
28. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

