



**Nzei & Co Advocates v Wendano Matuu Company Limited
(Environment and Land Miscellaneous.(Reference) Application
E032 of 2022) [2023] KEELC 17958 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS.
(REFERENCE) APPLICATION E032 OF 2022**

A NYUKURI, J

MAY 31, 2023

**IN THE MATTER OF ADVOCATE/CLIENT BILL OF COSTS UNDER THE ADVOCATES
(REMUNERATION) ORDER OF THE ADVOCATES ACT (CAP. 16 LAWS OF KENYA)**

BETWEEN

NZEI & CO ADVOCATES ADVOCATE

AND

WENDANO MATUU COMPANY LIMITED CLIENT

RULING

Introduction

1. This reference was filed by the Advocate/Applicant vide Chamber Summons dated 22nd July 2022 against the ruling of the taxing master delivered on 29th June 2022 in regard to taxation of the Applicant's advocate/Client bill of costs dated 1st December 2021. The Applicant sought that this court finds that as the subject matter regarding the instruction fees was valued at Kshs. 80,750,000/-, the taxation of the same should be governed by the provisions of Schedule 6A of the *Advocates (Remuneration) Order 2014* and the said amount to be increased by half and the same be taxed accordingly. The Applicant sought that his advocate/client bill of costs dated 1st December 2021 be taxed afresh and consequently judgment in terms of the taxed amount be entered in favour of the Applicant.
2. The basis of the reference was that the taxing officer failed to consider the provisions of Schedule 6A of the *Advocates (Remuneration) Order 2014* in the taxation and that she erred in failing to increase the fees prescribed by 50% as per the provisions of Schedule 6B of the Advocates Remuneration Order 2014.



3. The reference was opposed. Joshua Kimeu Kioko, a director to the Client/Respondent filed a replying affidavit sworn on 12th September 2022, opposing the reference. He conceded having instructed the Advocate/Applicant to represent the Respondent herein who was the Defendant in Machakos ELC No. 455 of 2017, *Canon Aluminum Fabricators v. Wendano Matuu Company Limited*; in a suit regarding Parcel Donyo Sabuk/Kiboko Block 1/1884 whose value was Kshs. 80,750,000/-, and to also make a counterclaim.
4. He deposed that the taxation by the taxing officer was in accordance with the provisions of Schedule 6A and 6B of the *Advocates Remuneration Order 2014* as the taxing officer considered the value of the subject matter to be Kshs. 80,750,000/- for purposes of ascertaining instruction fees. He stated that the taxing officer taxed the instruction fees on the basis that the subject matter exceeded Kshs. 20,000,000/-. He took the position that the taxing officer awarded an excessive instruction fees as the proper instruction fees should have been Kshs. 372,708/-. According to the Respondent, the taxing officer followed the law in arriving at the instruction fees and using her discretion went above and beyond, in arriving at the excessive amount. He sought for the dismissal of the reference.

Background

5. The Advocate/Applicant represented the Client/Respondent in Machakos ELC No. 455 of 2017, *Canon Aluminum Fabricators v. Wendano Matuu Company Ltd*, in a suit seeking specific performance in regard to the sale of land known as Donyo Sabuk/Kiboko Block 1/1884, whose value was stated in the pleadings to be Kshs. 80,750,000/-.
6. It is apparent that the advocate and the Client disagreed and the advocate filed his bill of costs dated 1st December 2021, which bill was taxed on 29th June 2022. The Advocate was aggrieved by the decision of the taxing officer and sought reasons of the decision by way of objection, and subsequently the taxing officer wrote a letter stating that the reasons were in the ruling.
7. Essentially, the Advocate/Applicant was aggrieved with the decision on instruction fees and the fact that the same was not increased by 50% being an Advocate/Client bill of costs.

Analysis and Determination

8. I have considered the reference and the response and the issue arising is whether the taxing officer took into account the relevant principles in taxing the Applicant's Advocate/Client bill of costs.
9. The principles governing a Judge's interference with the taxing officer's taxation are well known. These are;
 - i. That the court cannot interfere with the taxing officer's decision unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive to justify an inference that it was based on an error of principle;
 - ii. It would be an error of principle to take into account irrelevant factors or to fail to consider relevant factors;
 - iii. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for re-assessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 - iv. It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;



- v. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;
 - vi. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
 - vii. The mere fact that the Defendant does not research before filing a defence and puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may be indicative of the advocates unfamiliarity with the basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. (See *First American Bank of Kenya v. Shah and Others* [2002] 1 EA 64).
10. In the case of Ochieng, *Onyango Kibet and Olega Advocate v. Adopt a Light Ltd* (HC Misc 72 of 2006), the court stated as follows;

The taxing officer must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject matter.

- 11. Essentially, in assessing the basic instruction fees, the taxing officer must have regard to the value of the subject matter, which ought to be determined from the pleadings, judgment or settlement and if the same is not so ascertainable the taxing officer may use their discretion to assess the instruction fees taking into account, the nature and importance of the matter, interest of the parties, general conduct of proceedings, the direction of the trial court and all such relevant matters (See *Joreth Limited vs. Kigano & Associates* [2002] 1 EA 92 at 99).
- 12. Once the judge concludes that the taxing officer erred in principle, the judge may refer the bill back for taxation by the same or another taxing officer with appropriate direction on the fresh taxation.
- 13. In this matter, the taxing officer clearly noted that the value of subject matter was ascertainable from the pleadings and the same was Kshs. 80,750,000/-. She also noted that the Advocate proposed instruction fees to defend in the sum of Kshs. 6,000,000/- as well as the same amount for the counterclaim. It is therefore my view that the taxing officer in finding that the value of subject matter was Kshs. 80,750,000/- did not error in principle as that was the value disclosed in the pleadings.
- 14. Having ascertained the value of the subject matter as being Kshs. 80,750,000/-, the taxing officer proceeded to tax item 1 which is in regard to instruction fees at Kshs. 1,731,250/-. She taxed a similar amount for the counterclaim making it a total of Kshs. 3,462,500/-.
- 15. Therefore taking into account the provisions of Schedule 6A paragraph 1 (b) for proceedings where a defence or denial of liability is filed, which provides that for a sum over 20,000,000/- the amount will be fees as for Kshs. 20,000,000/- plus an addition of 1.5% of the excess. Applying the same to the value of the subject matter of Kshs. 80,750,000/- that would culminate in a sum of Kshs. 1,365,250/-. In this matter, the taxing officer granted a sum of Kshs. 1,731,250/-, as instruction fees, which means that in her discretion, she enhanced the amount for instruction fees by Kshs. 366,000/-. In the premises, there is no justification to interfere with the discretion of the taxing officer who considered the relevant matters in arriving at the sum of Kshs. 1,731,250/-.
- 16. The second complaint by the advocate was that the taxing officer did not increase the instruction fees by 50% as per Schedule 6B of the *Advocates Remuneration Order 2014*, which guides the taxation of



Advocate/Client fees. Under Schedule 6B, fees as between advocate and client are to be assessed per the fees prescribed in Schedule 6A and increased by 50%.

17. Having considered the ruling of the taxing officer, I note that she failed to increase the instruction fees awarded under Schedule 6A by 50% considering that this was an Advocate/Client bill of costs.
18. In the premises, having found that the taxing officer rightly directed herself in arriving at the sum of Kshs. 3,462,500/- as instruction fees, the Advocate/Applicant is entitled to an additional 50% thereof which is a sum of Kshs. 1,731,250/-. As the total amount taxed for the bill of costs was in the sum of Kshs. 3,533,931/-, increasing the same by Kshs. 1,731,250/- makes it Kshs. 5,265,181/-.
19. For the above reasons, I set aside the decision of the taxing officer made on 9th June 2022 and substitute therefor with taxation in the sum of Kshs. 5,265,181/-. I therefore enter judgment for the Advocate/Applicant against the Respondent/Client in the sum of Kshs. 5,265,181/- as sought by the Applicant, pursuant to the provisions of Section 51 (2) of the Advocates Act. I also award interest on the above sum at court rates from the date of this ruling.
20. Each party shall bear their own costs.
21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Nzei for Applicant

Mr. Nyamweya for Respondent

Josephine – Court Assistant

