



Njeru Nyaga & Co Advocates v Thome Residents Welfare Association (Environment and Land Miscellaneous Application E037 of 2021) [2023] KEELC 17697 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17697 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E037 OF 2021
EK WABWOTO, J
MAY 25, 2023

BETWEEN

NJERU NYAGA & CO ADVOCATES APPLICANT

AND

THOME RESIDENTS WELFARE ASSOCIATION RESPONDENT

RULING

1. This ruling is in respect to three applications dated July 28, 2022, November 11, 2022 and February 6, 2023. The respondent filed a reference *vide* a chamber summons application dated July 28, 2022 which was accompanied by a supporting affidavit sworn by Dominic Njuguna Mbigi where the respondent sought the following orders:
 - a. That time for filing this reference before this honourable court be enlarged and this reference be deemed to be filed on time.
 - b. That the ruling delivered by the honourable deputy registrar Diana Orago on May 19, 2022 taxing the respondents bill of costs dated March 8, 2021 in the sum of Kshs 166,923.4 be set aside and the bill be struck off.
 - c. That this honourable court do give such other order or alternative orders it would deem fit.
 - d. That costs be provided for.
2. The application was premised on 5 varied grounds including that the taxing officer erred in law by finding that an advocate's offer to represent a client for free falls within the agreement under section 45 of the [Advocates Act](#). Additionally, the taxing officer erred in law by awarding instruction fees that was too high yet the value of the subject matter was unknown.



3. On November 11, 2022, the advocate-applicant made an application seeking orders to enter judgement for the sum as taxed at Kshs 166,923.4. and 14% interest p.a from May 19, 2022 until full payment. On the same date, grounds of opposition were filed consisting of the following:
 - a. That the reference is yet to be heard and was filed out of time should be dismissed.
 - b. That the application offends section 45(2) of the *Advocates Act*. The aggrieved party is the client who is required who is required to file an objection to the advocate-client bill of costs and not the advocate.
 - c. That the application offends order 19 rule 2 of the *Civil Procedure Rules* and rule 9 of the *Advocates Practice Rules* by having an advocate swear an affidavit on behalf of the client.
 - d. That the taxing officer, equally dealt both with the preliminary objection & the alleged “pro bono” services and dismissed them.
4. On February 6, 2023, the client’s advocate filed an application seeking the following orders:
 - a. That the order given in court on January 19, 2023 when the matter was mentioned directing that the application dated November 11, 2022 to be set for hearing on February 22, 2023 be set aside.
 - b. That the client’s application dated 28th July be set for hearing first before the applications dated November 11, 2022.
 - c. That the court grant any alternative orders it would deem fit.
 - d. That costs be provided for.
5. The advocates filed submissions dated March 1, 2023 in which they submitted that the client’s actions were aimed at defeating justice. It was also argued that the client had provided wrong details with regard to the value of the subject matter and if any review was to be done, the instruction fees should be increased.
6. The client filed submissions dated March 20, 2023 in which three key issues were submitted:
 - i. Whether time for filing this reference can be enlarged and this reference be deemed to be filed on time?
 - ii. Whether the client’s advocate can swear the affidavit on behalf of the client?
 - iii. Whether the ruling delivered by the honourable deputy registrar on May 19, 2022 taxing the respondents bill of costs in the sum of Kshs 166,923.4 should be set aside and the said bill be struck off?
7. On February 22, 2023, the court directed that all applications would be determined together and the same be canvassed by way of written submissions. Parties were given 14 days each to simultaneously file submissions.
8. Having considered the submissions, supporting documents and authorities cited, it is clear that the main issue for determination before this court is whether the reference filed herein is merited.
9. It is a well-established principle that the taxation process relies on the discretion and sound experience of the taxing officer. With regard to calculation of instruction fees, I echo the sentiments in *Paul*



Ssemogerere & Olum v Attorney General - civil application No 5 of 2001 [unreported] where the court held:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”[emphasis mine]

10. The role of the court in reviewing taxation has been discussed at length by the Court of Appeal in *University of Nairobi & another v Moses* (civil appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment), where it was held that:

“That the High Court in the discharge of its supervisory mandate over a taxing master has power to correct the taxing master's ruling, not only if the decision is founded on malafides; ulterior and improper motive; not properly applying his/her mind to the matter or exercised the judicial discretion improperly; but also where there is demonstration of the taxing master having disregarded the express provision of a statute, and urged this court to set aside the High Court's decision and allow the appellants' reference with costs.”

11. My perusal of the ruling confirms that the taxing officer considered the value of the property and equally applied the reasoning to ELC Misc E038 of 2021. In *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] EA 492, the court expressed itself on issues of quantum as follows:

“The principles which are applied by judges upon review of the taxing officer's certificates are known. Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene in exceptional cases”

12. With regard to all other disputed aspects of the bill of costs, I find that the taxing officer exercised her discretion judiciously therefore there exists no exceptional circumstance for this court to intervene. With regards to the prayers for costs of the application, section 27 of the *Civil Procedure Act* outlines the court's discretion to award costs. Ultimately, it is in the interest of justice for litigation to come to an end I am not inclined to award costs in this instance.

13. In the foregoing, this court hereby makes the following disposal orders:

- a. The applications dated July 28, 2022 and February 6, 2023 are unmerited and hereby dismissed with no order as to costs.
- b. The notice of motion application dated November 11, 2022 is allowed in terms of prayers 1 and 2.
- c. These orders will be equally applied to ELC Misc E038 of 2021



14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Maina for the Applicant/Advocate.

Mr. Njeru for the Respondent/Client.

Court Assistant: Caroline Nafuna.

