



**Ngotho Waweru & Co. Advocates v Thiari & another (Petition
1 of 2018) [2022] KEHC 11140 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
PETITION 1 OF 2018
CM KARIUKI, J
JUNE 23, 2022**

BETWEEN

NGOTHO WAWERU & CO. ADVOCATES APPLICANT

AND

SAMUEL CHEGE THIARI 1ST RESPONDENT

SAMMY DOUGLAS KAMAU 2ND RESPONDENT

RULING

1. The matter pending before court is the application dated October 12, 2021 filed by Ngotho Waweru & Co Advocates, the applicant herein seeking for the following orders: -
 - i. That this honorable court be pleased to set aside the decision of the taxing officer delivered on September 28, 2021 in its entirety in as far as the same related to taxation of the advocate/client bill of costs dated October 2, 2021 as the orders given are inconsistent with the provisions of the Advocates (Remuneration) Order, 1962 and the Advocates Act.
 - ii. That the honorable court be please to retax the said advocate/client bill of costs.
 - iii. That in alternative to prayer 2 above, the honorable court be pleased to remit the advocate/client bill of costs dated October 2, 2020 for retaxation before a different taxing officer with appropriate directions thereof.
 - iv. That the costs of the application be provided for.
2. Which application is based on the following grounds and the affidavit of Victor Ngotho Waweru:-
3. That the applicant filed their bill of costs dated October 2, 2020 and the ruling was delivered on September 28, 2021 by the deputy registrar whereby costs to the applicant was assessed at kshs -149,417.



4. That the applicant being aggrieved by the decision of the taxing master as to the assessment of the advocates/client bill of costs has preferred this reference.
5. That the learned taxing officer erred in law by failing to take into consideration the nature and importance of the matter, the amount or value of the subject matter, complexity of the issues raised and novel points of law, the interests of the parties, the time, research and skill expended in the brief and the volume of documents involved in calculating the instruction fees despite it being a constitutional petition.
6. That the taxing officer erred in law and principle by finding that the amount claimed to have been paid by the 1st respondent to the applicant was not disputed while the same was vehemently denied in the applicant's submissions dated June 30, 2021.
7. That the taxing officer erred in law and in principle by taking the instruction fees at a negligible amount and not attuned to the work done
8. That it is in the interests of justice that this honorable court grants the orders herein.

Applicant's submission

9. The applicant averred that there was no logical explanation why the taxing master had concluded that the applicant did not dispute the amount alleged to have been paid by the 1st respondent while in page 3 of the last paragraph of the applicant's submissions dated they disputed the same.
10. The applicant denied having received any amount from the respondents and stated that the document which the 1st respondent introduced to court as proof of payment of kshs 380,000/- was marked "without prejudice" and there was no other evidence produced in respect of the same to support payment of the said amount. Reliance was placed on *Shakila Bano Akram v Ismail Noorani* [2015] eKLR.
11. It was averred that the taxing officer disregarded the proviso under Schedule 6 of the *Advocates (Remuneration) Order, 2014* which require the taxing officer to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties as well as the general conduct of the proceedings.
12. The applicant contended that the instruction fees was manifestly low in the circumstances of the matter and is not commensurate to the work done. That the taxing officer underestimated the work done by the advocate on behalf of the respondents and failed to appreciate the complexity of the matter, the industry put, time taken and work done. It was stated that the award contradicts the spirit and principles of the Advocates Remuneration Order with regard to fair and reasonable remuneration of advocates. The taxing officer misdirected himself by failing to provide the cost of the application.
13. It was asserted that the respondents herein were seeking the removal of five Nyandarua County Public Service Board. In determining the value of the subject matter despite this being a constitutional petition, the interests of the parties were very high and the taxing officer should have used his discretion to apply their respective salaries which they stood to lose to award the instruction fee. The applicant argued that the public officers of this stature would be earning an average salary of kshs 200,000 per month and their salary scale is as provided by the Salaries and Remuneration Commission which makes the value of subject matter easy to establish. That their combined salaries would amount to kshs 1,000,000/- per month and they had about 20 months left of service before retirement. The total value of their salaries alone would be kshs 20,000,000/-



14. The parties were given directions to canvass reference via submissions but only applicant filed same submissions.

Analysis and determination

15. Having carefully perused the application and the material placed before court, the main issue for determination is whether the decision of the taxing officer delivered on September 28, 2021 in relation to the taxation of the advocate/client bill of costs dated October 2, 2021 is inconsistent with the provisions of the Advocates (Remuneration) Order, 1962 and the *Advocates Act*.

16. In *Republic vs Ministry of Agriculture & 20 Others ex-parte Samuel Muchiri W' Njuguna* [2006] eKLR, it was stated as follows:-

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.”

17. The guidelines which this court ought to consider when directing fresh taxation be undertaken were as enunciated in the aforementioned case as follows;

- i The proceedings in question were purely public-law proceedings and are to be considered entirely free of any private - business arrangements or earnings of the tea production sector;
- ii The taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
- iii The taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
- iv so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
- v Objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
- vi Where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;
- vii Where responsibility borne by advocates is taken into account, its nature is to be specified;
- viii Where novelty is taken into account, its nature is to be clarified;
- ix Where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.



18. In *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court observed;

“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.”

19. The applicant argued that that the instruction fees was manifestly low in the circumstances of the matter and is not commensurate to the work done. That the taxing officer underestimated the work done by the advocate on behalf of the respondents and failed to appreciate the complexity of the matter, the industry put, time taken and work done.

20. From the ruling dated the taxing master enumerated that:-

“I am fairly convinced that the basic fee applicable is governed by schedule 6B Read with schedule 6A of the Advocates Remuneration Order, 2014 and fee provided is fees at kes 100,000/-.

On the question of increase on the aforesaid basic fee and this being an advocates- client bill of costs, I am view that kes 150,000/- is reasonable instruction fees taking into account the 50% increase as well as the time taken in this matter, scope of the work done and the nature of the dispute herein.”

21. The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No 66 of 1999 [2002] eKLR in determining the issue of instruction fees stated as follows:

a. “We would at this stage point out that the value of the subject matter of a suit for the purpose 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 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.”

22. In the primary suit, the issue for determination before the court was the nullification of certain nominations and/or appointments carried out by the Nyandarua Public Service Board. Accordingly, I am of the view that the taxing master did not proceed on any error in principle in assessing the fee at kshs 100,000/-. The taxing master went on to increase the fee by kshs 50,000/- making it kshs 150,000/- taking into consideration the time taken in this matter, scope of the work done and the nature of the dispute herein.”

23. The court needs to address the issue whether or not the increase to the aforesaid basic fee was manifestly low as argued by the applicant. The applicant in the advocates/ client bill of costs assessed the costs at kshs 6,000,000/- and further in his submissions gave an estimate of kshs 20,000,000/-. Even if I took into consideration all the factors that the taxing officer properly took into account, still, kshs 6,000,000/- or kshs 20,000,000/- as suggested by the applicant would appear to be manifestly excessive, unjust and unreasonable.

24. Nonetheless, there is no doubt that much work was done and a lot of time and effort was spent and I am inclined to find that the applicant has shown sufficient ground warranting interference with the assessment of instruction fees at kshs 150,000/- as it was low given the amount of work done.



25. Still under item no 1, given the amount of work involved in drawing the petition I find that the amount of kshs 1,100 awarded by the taxing master was low.
26. Additionally, under the aforementioned item, the taxing master stated that the bill did not include the amounts already paid by the client being kshs 380,060/-. The said amounts were duly subtracted from the subtotal. However, the applicant contended that the applicant denied having received any amount from the respondents and stated that the document which the 1st respondent introduced to court as proof of payment of kshs 380,000/- was marked “without prejudice” and there was no other evidence produced in respect of the same to support payment of the said amount.
27. I am of the view and do hold that, the taxing master should not have delved into the issue of what the client had already paid especially based on evidence from a document that was not supposed to have been presented in court. The taxing master should have taxed the advocate/ client bill of costs and left it at that.
28. I would therefore allow the application by setting aside the taxed bill of cost and in its place order for a re-taxation to be carried out by another taxing officer other than the deputy registrar who taxed the impugned ruling.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 23RD DAY OF JUNE, 2022.

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CHARLES KARIUKI
JUDGE

