



REPUBLIC OF KENYA



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**Mwangi Keng'ara & Co. Advocates v Mungai (Miscellaneous Application E345 of 2021)
[2022] KEHC 12061 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E345 OF 2021**

WA OKWANY, J

JULY 28, 2022

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

1. This ruling determines two applications; the client's reference dated November 10, 2021 and the advocates application dated November 1, 2021. I will consider the reference first as its outcome will have a bearing on the advocate's application.

Application dated November 10, 2021

2. The client filed the reference dated November 10, 2021 seeking the following orders:-
 - 1) The ruling and taxation of the taxing master delivered on October 15, 2021 be set aside.
 - 2) That the honourable court be pleased to remit the bill of costs dated May 11, 2021 for fresh taxation, with directions on the conduct of the taxation.
 - 3) The costs of this application be provided for.
2. The reference is brought under rule 11(2) of the Advocates (Remuneration) Order and all enabling provisions of the law.
3. The application is supported by the affidavit of the client, Zipporah Mungai, and is premised on the grounds *inter alia*:



- i. The applicant objects to the assessment of items I, 16, 18, 19, 20, 21, 22, 23 and 24 of the bill of costs dated May 11, 2021.
 - ii. The taxing officer fell into an error of principle when she failed to appreciate that the bill of costs dated May 11, 2021 was brought under schedule 7 of the Advocates Remuneration Order.
 - iii. The taxing officer fell into an error of principle when she applied schedule (6) 1 (b) of the Advocates Remuneration Order in taxing the bill before her that related to a suit filed in a subordinate court and thereby arrived at a wrong conclusion.
 - iv. The taxing officer fell into an error of principle when she failed to appreciate Nairobi CMCC No, 4679 of 2019 the primary suit the subject of the taxation proceedings herein was referred to arbitration for hearing and determination because the subordinate court lacked the jurisdiction to hear and determine the dispute.
 - v. The taxing officer fell into an error of principle when she failed to appreciate that an incompetent pleading filed before a court that lacked the jurisdiction to determine it could not form a basis for a lawful demand for assessment of instruction fees.
 - vi. The taxing officer fell into an error of principle when she failed to appreciate that to allow instruction fees in respect of Nairobi CMCC no 4679 OF 2019 and to also allow instruction fees in respect of the arbitral proceedings arising out of the same subject matter would amount to duplication of fees in respect of one instruction to the great detriment of the client.
 - vii. That the advocate having had her costs assessed herein has filed five bill of costs in Nairobi MISC E640 OF 2021, MISC E6430F 2021, MISC F686 OF 2021, MISC E687 OF 2021 and MISC F688 OF 2021 in which matters she seeks assessment of legal fees in respect of matters which were referred to arbitration for determination and which matters include, Nairobi CMCC no 4679 OF 2019.
 - viii. The taxing officer fell into an error of principle when she failed to appreciate that no denial of liability or statement of defence was filed in Nairobi CMCC 4679 of 2019 and under schedule 7(1)(a) the instruction fee if any, ought to have been reduced to 65%.
 - ix. The taxing officer fell into an error of principle when she failed to appreciate that the applicable scale in taxing the bill of costs before her was schedule 7 paragraph 2.
 - x. The taxing officer proceeded on mistaken principles and consequently failed to exercise her discretion judicially as to justify interference by this honourable court.
4. The respondent opposed the reference through the replying affidavit of the advocate, Mercy Nduta Mwangi, who states that the client instructed her to institute the suit Milimani CCMC no 4673 OF 2019}}- Zipporah Mungai versus County Capital Limited and 2 Others. She states that the reference is an abuse of the court process as it alleges that the costs were assessed and awarded for items no 18,19,20,21,23and 24, while the ruling stated that items 18-28 were taxed off.
 5. She states that the application is misconceived as the taxing master applied schedule 6(1) (b) instead of schedule 7 of the Advocates Remuneration Order. She further avers that the taxing master exercised her discretion judiciously in the ruling dated October 15, 2021.
 6. The parties reiterated their respective positions through their written submissions.



7. I have carefully considered the reference, affidavits on record, the submissions of counsel and the authorities cited. The main issue for determination is whether there was an error in principle in the taxation of the bill of costs dated May 11, 2021.
8. It was the applicant's case that the taxing master erred in failing to determine whether or not she had jurisdiction to deal with the bill of costs. The reference is also premised on the ground that the taxing master erred in principle in failing to appreciate that Nairobi CMCC NO 4679 OF 2019 was referred to arbitration for hearing and that the value of the subject matter could therefore not be ascertained from the pleadings.
9. The case of *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held that:-

“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. Similarly, in *Arthur vs Nyeri Electricity Undertaking* [1961] E A 497 it was held that:-

“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 interfere only in exceptional case”.
11. The above-cited cases set the principle that the judge sitting on a reference against the assessment of instructions fees by the taxing officer ought not to interfere with the assessment of costs unless the taxing master had misdirected himself on a matter of principle.
12. On instruction fees, the taxing master observed that since the judgment had not been delivered, the value of the subject matter could be derived from the pleadings and in this case the plaintiff. Item 1 on instruction fees was therefore taxed at kshs 131,755.00 pursuant to schedule VI 1(B) of the Advocates Remuneration Order (ARO)
13. It is trite that the subject matter for purposes of taxation ought to be determined from the pleadings, judgment or settlement. This court is guided by the decision in *Joreth Ltd vs Kigano & Associates* (2002) 1 EA 92 where in determining the instruction fees, the Court of Appeal held that: -

“The value of the subject matter for 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 such instruction fees as he considers just taking in account, amongst other matters, the nature and the 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.”
14. I have perused the record and I note that the taxing master based her ruling on the value stated on of the plaintiff which was kshs 2,470,209. I find that the mere fact that the matter proceeded to arbitration cannot bar the taxing master from ascertaining the subject matter from the pleadings. I see no error of principle herein to warrant this court's interference with the decision of the taxing master. I find that the application dated November 10 lacks merit and I therefore dismiss it with costs.



2nd application dated November 1, 2021

15. The advocate filed the application dated November 1, 2021 seeking the following orders:-
1. That this honourable court be pleased to enter judgment on the certificate of taxation dated October 29, 2021 in favour of the advocate/ applicant for the sum of kshs 217,773.90.
 2. That interest be awarded on the taxed costs of kshs 217,773.90 at the rate of 14% per annum with effect from June 23, 2021 until payment in full.
 3. That the costs of this application be awarded to the advocate/ applicant.
16. The application is supported by the affidavit of the advocate Mercy Nduta Mwangi and is based on the following grounds:-
1. That the applicant's advocate/client costs were taxed on October 15, 2021 at a net sum of kshs 193,157.01 cents.
 2. That the applicant complied with rule 7 of the Advocates Remuneration (Amendment) Order, when she issued to the client a notice to levy interest on unpaid Legal fees at the rate of 14% per annum until payment in full.
 3. That the applicant has been denied the use of her lawfully earned fees and only it is lawful, and just that interest be awarded at the prescribed rate of 14% per annum until payment in full.
 4. That a further demand to pay the taxed costs and interest was issued to the respondent on October 16, 2021 to no avail.
 5. That this honourable court has the power to enter judgment and award interest
17. The application is premised on section 51(2) of the *Advocates Act* which provides that: -
- “The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
18. I note that once a taxing master has taxed the costs, issued a certificate of costs and that the reference against the ruling has been determined in the advocate’s favour. I find that in the circumstances of this case, no other action will be required from this court save to enter judgment. In the instant case the court has not set aside the certificate of costs dated October 29, 2021.
19. Section 51(2) of the *Advocates Act* gives the court the jurisdiction to enter judgment for taxed costs where conditions therein are satisfied. I find that the applicant has made out a case for the granting of the orders sought and find no reason to decline the application to enter judgement as prayed.
20. In the premises I find the application dated November 1, 2021 is merited and I therefore allow it as prayed.
21. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W A OKWANY

JUDGE



In the presence of: -

Ms Mwangi for advocate.

No appearance for client.

Court assistant- Sylvia

