



**Mwangi Keng'ara & Co Advocates v Mungai (Miscellaneous Application E363 of 2021)
[2022] KEHC 12076 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E363 OF 2021**

WA OKWANY, J

JULY 28, 2022

BETWEEN

MWANGI KENG'ARA & CO ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

1. This ruling disposes of two applications; the client's application dated November 10, 2021 and the advocates application dated November 1, 2021. I will consider the reference first as its outcome will also determine the advocate's application.

Application dated November 10, 2021.

2. The client Zipporah Mungai filed the application 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. The honourable court be pleased to remit the bills of costs dated May 17, 2021 to a different taxing officer for fresh taxation with directions on the conduct of the taxation.
 3. The costs of this application be provided for.
3. The application is supported by the client's affidavit wherein she states that:-
 - i. The applicant objects to the assessment of items 1, 2, 3, 5, 8, 21 and 22 of the bill of costs dated May 17, 2021.



- ii. The taxing officer fell into an error of principle when she failed to appreciate that the advocate only sent one demand letter and schedule V (7)(a) of the Advocates Remuneration Order provides that where not more than one letter of demand has been written the scale fees shall be reduced by one half, subject to a minimum fee of Kkshs 1,000/-
 - iii. The taxing officer fell into an error of principle when she failed to appreciate the provisions of schedule V (7)(b) of the Advocates Remuneration Order which provides that where the demand letter is followed by the institution of proceedings at the instance of the same advocate, the scale does not apply.
 - iv. The taxing officer fell into an error of principle when he failed to appreciate that fees for drawing of pleadings is duly provided for in the event of institution of proceedings and the taxing officer unduly prejudiced the client by ordering her to pay costs for a demand letter and costs for preparation of pleadings in respect of the same matter.
 - v. The taxing officer proceeded on mistaken principles and consequently failed to exercise her discretion judicially as to justify interference by this honourable court.
 - vi. The taxing officer fell into an error of principle when she failed to appreciate that the advocate only sent one demand letter and the instruction fees ought to have been reduced by 50% to kshs 81,232.50 and not kshs 246,888.60 as assessed by the court.
4. The reference was opposed by the advocate through the replying affidavit sworn by Mercy Nduta Mwangi who states that the client instructed her to commence recovery of a debt of kshs 6,173,608.40 from Speed Capital Limited. The advocate complied with the client's instructions and issued a statutory notice dated June 19, 2019. Upon the debtor's reluctance to settle the debt, the client advised the advocate to prepare a plaint for filing in court. She states that the draft plaint was submitted to the client through an email dated November 18, 2020 but that she later successfully negotiated with the debtors advocate for settlement of the debt. She avers that the reference is misplaced as there was no error of principle.
 5. The reference was canvassed by way of written submissions.
 6. I have carefully considered the pleadings and the rival arguments made by the parties. The main issue for determination is whether the Taxing Master erred in law and principle while taxing the bills of costs.
 7. The procedure for the challenge of the results of taxation is provided under Paragraph 11 of the Advocates Remuneration Order which provides as follows:-
 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.



4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
8. The applicant faults the taxing master for making an error of principle in failing to appreciate the provisions of Schedule V(7)(b) of Advocate Remuneration Order which provides that where a demand letter is followed by institution of proceedings at the instance of the same advocate, the scale does not apply. She further faulted the taxing master for failing to note that fees for drawing pleadings are provided for in the event of institution of proceedings.
9. In opposing the reference, the advocate submitted that the fees awarded was reflective of the work done by the advocate in negotiating with the debtors and for securing a settlement of debt. The advocate observed that the taxing master rightfully applied schedule 5 paragraph 7 of the Advocate Remuneration order in assessing instruction fees. Counsel maintained that the advocate sought fees for preparation of the plaint under schedule 5 rule 4 since no suit was filed.
10. The taxing master held as follows with regard to instruction fees:-

“The advocate sent a demand letter dated June 19, 2019 and also had several communications between the client and advocate and also the advocate drafted a plaint. The value of the subject matter can be derived from the demand letter sent to the debtor at kshs 6,173,698.40.....Item 1 is taxed at kshs 162,605.47.”
11. According to the applicant, the instruction fees ought to have been assessed at kshs 81,232.50 instead of kshs 162,605.47 since the advocate issued one demand letter. Schedule 5 paragraph 7 of the Advocates remuneration order 2014 states:-
 7. Debt Collection

In respect of non-contentious debt collection matters an advocate may enter into a general agreement with a client to charge therefore upon the following inclusive scale in lieu of charging per item for work done, but—

 - (a) where not more than one letter of demand has been written the scale shall be reduced by one-half, subject to a minimum fee of kshs 1, 000; or
 - (b) where the letter of demand is followed by the institution of proceedings at the instance of the same advocate the scale does not apply and fee shall be as prescribed in paragraph 5 of this Schedule or under Schedule 6 or Schedule 7.
12. The principles of varying or setting aside a taxing master's decision are set out in the cases of *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92, where it was held that the taxing master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.
13. In *First American Bank of Kenya vs Shah and Others* (2002) E A L R 64 the court held that:-

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

14. In *Republic vs Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’njuguna* (2006) eKLR Ojwang, J (as he then was) expressed himself 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 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. 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 reassessment unless the judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...

15. The above cited cases show that the scale for taxing the instruction fees is Schedule 5 paragraph 7 of the Advocates remuneration order 2014 on debt collection. In this case, I note that the advocate wrote one demand letter. I therefore the scale on instructions fees ought to have been reduced by one half. This means that the sum of kshs 162,605.47 awarded under this heading should have been reduced by half.
16. The client also faulted the taxing master for awarding the advocate the sum of Kshs 28,000 for drawing a plaint under schedule V of the Advocates remuneration order when no instructions were given to the advocate. The advocate stated that she prepared a plaint which took her an hour and sent to the client. The taxing master assessed the same at 7,000. I find that there was no error in taxation in respect to drafting the plaint.
17. In conclusion I find that the client satisfactorily demonstrated that the taxing master erred in principle in taxing the instruction fees. I therefore order that the bill of costs to be remitted back to the taxing master for re-taxation in accordance to Schedule 5 paragraph 7 of the Advocates remuneration order 2014 and in line with the observations and findings that I have made in this ruling.

Notice of Motion

18. The advocate’s application is brought under section 51 of the *advocates act* cap 16 laws of Kenya. The advocate seeks 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 246,888.60.
 2. That interest be awarded on the taxed costs of kshs 246,888.60 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.
19. The application is supported by, the affidavit of Mercy Nduta Mwangi and is premised on the following grounds :-
1. That the applicant's advocate/client costs were taxed on October 15, 2021 at a net sum of kshs 246,888.60 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 as prayed herein
 6. That it is in the interest of justice that this application is allowed.
20. Given that this court has found that the taxing master erred in principle in taxing the bill of costs, the certificate of taxation dated October 29, 2021 has been challenged. I find that this application is premature and should await the re-taxation of the bill.

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

W A OKWANY

JUDGE

In the presence of: -

Mr Kosgey for Masese for client.

No appearance for advocate.

Court assistant- Sylvia

