



**Mwangi Keng'ara & Co. Advocates v Mungai (Miscellaneous Application E353 of 2021)
[2022] KEHC 12078 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E353 OF 2021**

**WA OKWANY, J
JULY 28, 2022**

BETWEEN

MWANGI KENG'ARA & CO. ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

1. This ruling determines the client's application dated November 10, 2021 and the advocate's application dated November 1, 2021. I will consider the reference first as its outcome will have a bearing on the advocate's application.
2. The client filed a 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) The bill of costs dated May 13, 2021 be struck out.
 - 3) In the alternative that this honourable court be pleased to remit the bill of costs dated May 13, 2021 for fresh taxation, with directions on the conduct of the taxation.
 - 4) The costs of this application be provided for.
3. The application is supported by the affidavit sworn by the client Zipporah Mungai and is based on the following grounds:-



- i. The applicant objects to the assessment of items 1, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the bill of costs dated May 13, 2021.
 - ii. The taxing officer fell into an error of principle by failing to appreciate that an incompetent pleading filed before a court that lacked jurisdiction could not be the basis of a lawful claim for fees under the *Advocates Remuneration Order*.
 - iii. The taxing officer fell into an error of principle by holding that he had no jurisdiction to ascertain the lawfulness, competence and validity of the bill of costs before him when the same was admittedly founded on an incompetent pleading filed in a court that lacked jurisdiction.
 - iv. The taxing officer fell into an error of principle when he failed to appreciate that Nairobi CMCC No 4673 of 2019 was referred to arbitration for hearing and determination and an arbitral award having been made, the taxing officer was precluded from having recourse to the pleadings for purposes of ascertainment of the value of the subject matter of the claim.
 - v. The taxing officer fell into error of principle when he failed to appreciate the taxing principle propounded in Nairobi Court of Appeal Civil Appeal Number 328 of 2017, *Peter Muthoka v Ochieng Onyango Kibet & Obaga* and elevated the decision of *First American Bank of Kenya v Shah & another* [2002] I EA to a fetish.
 - vi. The taxing officer fell into an error of principle when he failed to appreciate that to allow instruction fees in respect of Nairobi CMCC No 4673 of 2019 and 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 taxing officer fell into an error of principle when he failed to appreciate that no statement of defence was filed in Nairobi CMCC No 4673 of 2019 and under schedule 7(I) (a), the instruction fees if any ought to have been reduced to 65%, that is Kshs 71,049.
 - viii. The taxing officer proceeded on mistaken principles and consequently failed to exercise his discretion judicially as to justify interference by this honourable court.
4. The respondent/advocate opposed the application through a replying affidavit sworn by the advocate Mercy Nduta Mwangi. She states that the reference is an abuse of the court process as it alleged that the costs were assessed and awarded for items no 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 when the ruling stated that items 4, 5, 18-28 were taxed off. She avers that the application is misconceived as it alleges that the taxing master was required to consider the arbitral proceedings in the assessment of instruction fees. She avers that it was the respondent who should have been aggrieved by the application in the lower scale as the taxing master failed to award the respondent the lawful instruction fees.
 5. The application was canvassed by way of written submissions.
 6. I have carefully considered the reference, the response and submissions.
 7. The applicant contends that the taxing officer erred in principle by assessing the instruction fees at Kshs 109,307.25. 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 by failing to appreciate that Nairobi CMCC No 4673 of 2019 was referred to arbitration for hearing and that the value of the subject matter could not therefore be ascertained from the pleadings.



8. The case of *Kipkorir, Titoo & Kiara Advocates v 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.”

9. Similarly, in *Arthur v Nyeri Electricity Undertaking* [1961] EA 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”.

10. In the above cited case, the Court of Appeal in was categorical that the judge sitting on a reference against the assessment of instructions fees should not interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle. 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.

11. It is trite that the subject matter for purposes of taxation ought to be determined from the pleadings, judgment or settlement. In *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92 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.”

12. A perusal of the record reveals that the taxing master relied on the value claim in the plaint being, Kshs 2,772,290 in assessing the instructions fees. My finding is that the mere fact that the matter proceeded to arbitration should not bar the Taxing Master from ascertaining the value of subject matter from the pleadings. I find no error of principle herein to warrant this courts interference with the amount awarded to the advocate.

13. I therefore find that the application dated 10th November lacks merit and it is hence dismissed with no orders as to costs.

Application Dated November 1, 2021

14. 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 193,157.01.
2. That interest be awarded on the taxed costs of Kshs 193,157.01 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.



15. 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.

16. 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.”

17. I note that once a taxing master has taxed the costs, issued a certificate of costs and the reference against his ruling has been dismissed. This means that no other action is required from the court apart from entry of judgment for the taxed costs.

18. In the premises I find that the application dated November 1, 2021 is merited and I therefore allow it as prayed.

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

WA OKWANY

JUDGE

In the presence of: -

Mr Kosgey for Masese for client.

No appearance for advocate.

Court Assistant- Sylvia

