



Mwangi Keng'ara & Company Advocates v Mungai (Miscellaneous Application E354 of 2021) [2022] KEHC 13381 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 13381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E354 OF 2021**

WA OKWANY, J

JULY 28, 2022

BETWEEN

MWANGI KENG'ARA & COMPANY ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

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

Application dated November 10, 2021.

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. That the 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.
 3. The costs of this application be provided for.
3. The application is brought under rule 11 of the *Advocates Remuneration Order* (ARO).
4. The application is supported by the affidavit sworn by the client Ms Zipporah Mungai and is based on the following grounds:-
 - i. The applicant objects to the assessment of items I, 17 and 19 of the bill of costs dated May 13, 2021.



- ii. The taxing officer fell into an error of principle when she failed to appreciate that *Nairobi CMCC NO 4673 of 2019* was referred to arbitration because the Subordinate Court lacked the requisite jurisdiction to deal with the dispute.
 - iii. 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*.
 - iv. The taxing officer fell into an error of principle when she failed to appreciate that the memorandum of appeal filed by the advocate in *Milimani Commercial and Tax Civil Appeal No 046 of 2019* was merely a memorandum of appeal against an interlocutory determination of the Subordinate Court in *CMCC No 4673 of 2019* in which the court found that it had no jurisdiction.
 - v. The taxing officer fell into an error of principle when she failed to appreciate that the subject matter of the memorandum of appeal could only have been on whether the Subordinate Court in *Nairobi CMCC No 4673 of 2019* had jurisdiction to hear and determine the suit before it.
 - vi. The taxing officer fell into an error of principle when she found that the value of the subject matter of the suit was Kshs 2,470,209.
 - vii. The taxing officer fell into an error of principle when she failed to appreciate that the advocate merely filed an intimation of the client's intention to appeal but did not file an appeal and was thus not entitled to the assessed costs.
 - viii. The taxing officer fell into error of principle when she failed to appreciate that to allow instruction fees in respect of *Nairobi CMCC No 4673 of 2019*, and allow instruction fees in respect of *Nairobi HCA No 046 of 2019* and further allow instruction fees in respect of arbitral proceedings arising out of the same subject matter would amount to a multiplicity of assessments of costs in respect of one instruction to the great detriment of the client.
 - ix. The taxing officer fell into an error of principle when she failed to appreciate that no denial of liability of whatsoever nature was filed in *Nairobi HCA No 046 of 2019* and under schedule 6(1)(a), the instruction fees if any ought to have been reduced to 65%.
 - x. The taxing officer proceeded on mistaken principles and consequently failed to exercise her discretion judicially as to justify interference by this honourable court.
 - xi. The taxing officer fell into an error of principle where she failed to appreciate that under schedule 6, under the subheading appeal, it is provided " to present or oppose an appeal in any case not provided for such sum as may be reasonable but not less than Kshs 25,200"
5. The respondent opposed the application through the replying affidavit of Mercy Nduta Mwangi who states that the client instructed her to institute *Milimani CMCC No 4673 of 2019* and thereafter prepare an application for summary judgement. She avers that the application was opposed and the court delivered its ruling after which the client instructed her to appeal against the ruling. She avers that the subject matter of the appeal was a liquidated claim and that there was no error of principle.
6. The reference was canvassed by way of written submissions.
7. I have considered the reference and the rival arguments made by the parties. The main issue for determination is whether the taxing officer erred in law and in principle while taxing the bills of costs.



8. It is trite that the court will only interfere with the decision of the taxing master where there is an error of principle.
9. In *Machira & Co. Advocates vs. Magugu* [2002] 2 EA where 428 Ringera J (as he then was) held that:-
 “As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to a judge in accordance with paragraph 11 of the *Advocates Remuneration Order*.”
10. In *Joreth Ltd Vs Kigano & Associates Civil Appeal* No 66 of 1999 [2002] 1 EA 92, [2002] eKLR it was held that unless the taxing officer had misdirected himself on a matter of principle, the judge sitting on a reference against the assessment ought not to interfere with the findings. This exception to the general rule was pronounced by Ringera J (as he then was) in *First American Bank of Kenya vs Shab and Others* [2002] E A 64 at 69, as follows:
 “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.”
11. Similarly, in *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held as follows:-
 “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.”
12. The above-cited cases show that the general rule is that the court should not interfere with the findings of the taxing officer unless there is an error in principle. The client contended that the taxing master erred in principle in failing to appreciate that the incompetent pleadings filed before a court that lacked jurisdiction could not be a basis for a claim of fees. The client further contended that the taxing master made an error in finding that the value of the subject matter was Kshs 2, 470,209
13. In a rejoinder, the advocate stated that the taxing master made no error of principle as the subject matter of the case was a liquidated sum. It was submitted that the taxing master used the memorandum of appeal as the basis for determining the value of the subject matter of the suit given that there was no judgment or order produced before her.
14. In assessing the instruction fees the taxing master observed that;
 “I am guided by the decisions above; the advocate is entitled to full instruction fees once instructions are issued. The subject matter of the appeal can be derived from the Memorandum of Appeal filed at 2,470,209.00 the basic instruction fees is calculated Pursuant to schedule 6 1(B) of the advocate remuneration order 2014 as follows:-
 1st 1000000 KSHS 120,000
 1300,278.50*2% KSHS 29,404.18
 Total 149,404.18



Item 1 is taxed as drawn at Kshs 149,404.18

15. With regard to instruction fees the court of appeal in *Joreth Ltd vs Kigano & Associates* (2002)1 EA 92 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.”

16. In the instant case, I note that the advocate filed an appeal pursuant to instructions given to her by the client. I have perused the memorandum of appeal and I note that the value of the subject matter could be ascertained. I therefore find that the correct schedule to tax the instruction fees was schedule 6 1 (b) of the advocates remuneration order which provides that:-

- (b) To sue in any proceedings described in paragraph
- (a) where a defense or other of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—
- That value exceeds But does not exceed Kshs. Kshs
- Kshs - 500,000 75,000
- 500,000 750,000 90,000
- 750,000 1,000,000 120,000
- 1,000,000 20,000,000 fees as for Kshs 1,000,000 plus an additional 2%.
- Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.

17. In view of the foregoing, I find that the taxing master applied the correct schedule for taxing the instruction fees. The value of the subject matter could be ascertained from the memorandum of appeal. The client has not denied that she instructed the advocate to file an appeal and I therefore find that the advocate is deserving of the legal fees. I do not find any error in principle in ascertaining the instruction fees as the amount is also not too high to amount to unjust enrichment.

18. In the upshot I find that the application dated November 10, 2021 lacks merit and I therefore dismiss it with costs to the respondent.

Application dated November 1, 2021

19. Through the application dated November 1, 2021 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 274,075.76.
 2. That interest be awarded on the taxed costs of Kshs 274,075.76 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.



20. 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 274,075.76 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.
21. The application was opposed by the client who averred that she had filed a reference to set aside the certificate of taxation and that the advocate had filed 25 bills of costs against her in related matters.
22. The application was canvassed by written submissions which I have considered.
23. The main issue is whether judgment should be entered against the respondent/client for Kshs 274,075.76.
24. Section 51(2) of the *Advocates Act* stipulates as follows:-
- “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 recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
25. In *Lubulellah & Associates Advocates v NK Brothers Limited* [2014] eKLR the court observed that:-
- “The law is very clear that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the respondent herein for the taxed sum indicated in the certificate of taxation that was issued on November 25, 2012.”
26. Having found that the taxing master did not err in principle in taxing the bill of costs, the application by the advocate succeeds.
27. The certificate of taxation dated October 29, 2021 has not been set aside or impugned by this court. I hereby enter judgment in favour of the advocate/ applicant as prayed.

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

