



**Mulwa & Mulwa Advocates v County Government of Machakos
(Environment and Land Miscellaneous.(Reference) Application
2 of 2021) [2023] KEELC 17529 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS.(REFERENCE) APPLICATION 2 OF 2021
CA OCHIENG, J
MAY 17, 2023**

BETWEEN

MULWA & MULWA ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF MACHAKOS RESPONDENT

*(Being a Reference from hon J.P. BARTOO (the Taxing
Officer's) Ruling delivered on 3rd August, 2022)*

RULING

1. What is before the court for determination is a Chamber Summons Application dated August 8, 2022 where the Applicant/Advocate sought for the following orders:
 1. That the decision of the Taxing Officer Hon J B Bartoo delivered on August 3, 2022 on the taxation of the Applicant's Amended Bill of Costs dated September 1, 2020 and filed on September 2, 2020 and any other consequential orders thereon be set aside and/or vacated.
 2. That the Advocate/Bill of Costs Amended on September 1, 2022 be taxed afresh by a different constituted taxing officer in strict compliance with the Advocates Remuneration Order and the Applicable principles of taxation, fairness and equity as guided by this court.
 3. That in the alternative that this Honourable Court be pleased to assess/tax the costs lawfully payable to the Applicant vide the said Amended Bill of Costs dated September 1, 2020 on item I being the Instruction Fees, Item 2 being Getting Up Fees and the Value Added Tax (VAT) payable thereon.
 4. That the Honourable Court be pleased to order that costs of this application as well as the costs in the contended Bill of Costs be borne by the Respondent.



5. That the Honourable Court be pleased to make any such order and or orders as it may deem just and appropriate in the circumstances.
2. The Application is premised on the grounds on the face of it and supported by the Affidavit of Philip M Mulwa, Advocate who deposes that in 1998 he received instructions to act for the County Government of Masaku (as it then was) in a matter which was settled via a consent in the year 2014. He states that he demanded payment of his legal fees from the Respondent without success which necessitated filing of the Amended Bill of Costs dated September 1, 2020 before the Taxing officer. He avers that the Respondent opposed the said Bill of Costs vide a Replying Affidavit sworn on August 3, 2021 by its Legal Officer and in response the Applicant filed a Supporting Affidavit sworn on August 24, 2021 and submissions dated August 24, 2021. He explains that the Taxing Officer taxed instruction fees in the said Bill of Costs at Kshs 5,000,000 and being dissatisfied with the same, he lodged this Reference. He claims that the Taxing Officer grossly misapprehended the law and principles of taxation by failing to correctly apply the principles provided for under Schedule IV of the Advocates Remuneration Order 1997 for assessing the instruction fees at Kshs 5,000,000 for the subject matter property known as L R No 1491/Machakos Township measuring 3796 Acres (hereinafter the “Suit Property”) was valued at Kshs 2,336,780,000 as at 1998.
3. The Respondent opposed the instant Application by filing a Replying Affidavit sworn by the County Attorney where he deposes that the instant Application lacks merit and ought to be dismissed as the grounds set out in the Supporting Affidavit do not warrant the grant of the orders as sought. He reiterates that the decision of the Taxing Officer delivered on August 3, 2022 was in accordance with the laid-out principles of taxation. He states that payment of an award of Kshs 75,556,058 claimed by the Applicant would be contrary to public interest. Further, that the Chamber Summons Application herein is devoid of merit and ought to be dismissed with costs.

Submissions

Applicant’s Submission

- 4 The Applicant reiterated its averments and contended that the reason the Taxing Officer gave for granting the excessively low instruction fees is that the suit was a matter of public interest. Further, she stated that the advocate did not act for the public despite the suit property being public land. It further submitted that full instruction fees to defend a suit is earned the moment the Advocate gets instruction and files a defence on behalf of the client. On the complexity of the case, it submitted that the suit before the court involved 120 Plaintiffs who claimed to own the subject parcel of land in different acreages. Further, that the suit also involved two local authorities, Commissioner of Lands and the Attorney General. It argued that the case had been in court for 16 years and the suit property was valued at Kshs 2,280,980,000 in 1998. It referred to Schedule VI Paragraph 2 of the 1997 Advocates Remuneration Order that provided for Getting up fees. It stated that Advocates are entitled to charge VAT on fees paid by the client to avoid condemning the Advocate to pay tax for his client. It insisted that the Application is merited and should be allowed as prayed. To buttress its arguments, it relied on the case of *KTK Advocates v Baringo County Government* [2017] eKLR.

Respondent’s Submissions

5. The Respondent submitted that the amount the Applicant is claiming is excessive and unreasonable. It argued that the instruction fees are calculated from the value of the subject matter which is derived from the pleadings, Judgment or settlement but if the same is not ascertainable the Taxing Officer is entitled to use his/her discretion to assess such instruction fees as he/she considers just. On Getting



up fees, it stated that the sum of Kshs 1,666,666 should suffice being a third of the instruction fees therefore the court should not interfere with the decision of the Taxing Officer. On Value Added Tax (VAT) it submitted that the same should not be awarded as the Applicants have not provided proof as per Section 107 of the *Evidence Act* and it is clear that the taxation process demands proof of what is claimed by a party in terms of expenses claimed which the Applicant has failed to provide. On the issue of inflation it insisted that the Applicant had not engaged the Central Bank for guidance thereon and had not come up with a figure as to the loss per shilling for the period 1998 to date. To support its averments, it relied on the following decisions: *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR; *Republic v Commissioner of Domestic Taxes Ex parte Ukwala Supermarket Limited & 2 Others* [2018] eKLR; *Republic v Minister for Agriculture & 2 Others Ex parte Samuel Muchiri W’Njuguna; Joreth Limited v Kigano & Associates*, Civil Appeal No. 66 of 1999; *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No. 3 [1972] E.A. 162; *First American Bank of Kenya v Shah and Others* [2002] EALR 64 at 69; *Hezekiel Oira t/a Oira Advocate v Kenya Broadcasting Corporation* [2015] eKLR and *Mwangangi & Company Advocates v Machakos County* [2020] eKLR.

Analysis and Determination

6. Upon consideration of the instant Chamber Summons Application including the respective Affidavits and rivaling submissions, the only issue for determination is whether the court should set aside the decision of the Taxing Officer dated August 3, 2022
7. The Applicant has sought for setting aside the decision of the Taxing Officer Hon J B Bartoo delivered on August 3, 2022 in respect to the taxation of its Amended Bill of Costs dated September 1, 2020 and filed on September 2, 2020. Its main contention is that the Taxing Officer erred in failing to award a higher Instruction Fees, Getting up fees as well as VAT. It relied on a valuation report and insisted that the value of the suit property was much higher than what the Taxing Officer had considered. On instruction’s fees, an excerpt from Schedule 6 of the Advocates Remuneration Order 2014 provides that:-

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (b) To sue in any proceedings described in paragraph (a) where a defense or other denial 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...”

8. In the case of *Joreth Limited V Kigano & Associates* [2002] eKLR the court held *inter alia*:

We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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.”



9. Further in *Republic v Ministry of Agriculture and 2 others: Ex parte Muchiri W’Njuguna & others* (2006) eKLR it was held as follows:

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 facts.”

10. I note the Applicant’s main contention is the failure of the Taxing Officer to award a higher amount on the Instruction Fees, Getting Up Fees as well as VAT in respect to their Amended Bill of Costs. It emerged that the impugned suit was compromised through a consent in 2014. Further, the value of the subject property was not provided in the Pleadings as well as Judgment. The Applicant sought for the Taxing Officer to allow a Valuation Report which was done post Judgment in respect to the suit property but she declined. Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 clearly provides on how the value of the subject matter should be determined while assessing instructions fees and these are from the pleadings, Judgment or settlement between the parties. In this instance, the Taxing Officer proceeded to determine instructions fees based on her discretion and insisted that due to public interest the award was fair. The Respondent insists the instructions fees awarded is reasonable. Further, that the getting up fees is also reasonable and the VAT cannot be awarded since the Applicant did not provide proof of paying the same.

11. Based on the facts before me while relying on the legal provisions cited above as well as associating myself with quoted authorities, I opine that the Applicant has failed to demonstrate how the Taxing Officer erred in principle by determining the instructions fees based on her discretion as she had powers to do so. It is my considered view that the Taxing Officer did not commit any error in awarding the instructions fees as well as getting up fees which is supposed to be one third of the Instructions Fees. On the issue of VAT, Section 6(1) of the *VAT Act 2015* provides *inter alia*:-

Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.”

12. While in the case of *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR, the Court while dealing with the issue of award of VAT observed as following:

On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the Plaintiff had paid VAT and was consequently entitled to indemnity.”

13. From a reading of the legal provision I have cited above as well as associating myself with the observation in the quoted decision, I find that the services that had been rendered by the Applicant to the Respondent was actually a supply of services. It is my considered view that the Taxing Officer erred



in failing to award VAT to the Applicant. In the circumstances, I hold that the Applicant is indeed entitled to VAT on costs.

14. In the foregoing, I will proceed to uphold the determination of the Taxing Officer as regards Items (1) and (2) of the Amended Bill of Costs dated September 1, 2020 in respect to instructions fees as well as getting up fees.
15. From my findings above, I find this reference partially successful in respect to award of VAT. I direct that this matter be placed before the Taxing Officer to determine the amount of VAT in respect to the Awarded Costs.

I will not make any order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

