



**Chirchir v African Merchant Assurance Co. Ltd (Miscellaneous Application E095 of 2021) [2022] KEHC 12617 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E095 OF 2021**

**MW MUIGAI, J**

**AUGUST 3, 2022**

**IN THE MATTER OF ADVOCATES – CLIENT BILL OF COST**

**BETWEEN**

**SOPHIE CHIRCHIR T/A CHERONO CHIRCHIR & CO.  
ADVOCATES ..... APPLICANT**

**AND**

**AFRICAN MERCHANT ASSURANCE CO. LTD ..... RESPONDENT**

*(ARISING FROM MACHAKOS CMCC NO. 505 OF 2013 BETWEEN FM (Minor suing through her and next friend KD (Deceased) ..... PLAINTIFF VERSUS STANLEY KIRIGU ..... 1ST DEFENDANT WILSON WANYOIKE ..... 2ND DEFENDANT AND NORTHERN CONSTRUCTION CO. LTD. .... 3RD PARTY)*

**RULING**

**Chamber Summons**

1. The chamber summons dated November 11, 2022 the applicant seeks the following orders:-
  1. That this court set aside the ruling of the taxing officer entirely as the same was taxed under schedule 7 instead of schedule 5.
  2. That this court adjust the figures, re-assess the fees due in respect to all the items which include but not limited to instructions fees, registry attendances, travelling expenses and all court attendances fees on the basis of schedule 5 of the [Advocates Remuneration Order](#).
  3. That this court to make such further orders in the interest of justice as it may deem just and fit.
  4. That the costs of this reference be awarded to the advocates.



2. The chamber summons is supported by the sworn affidavit of Sophie Chirchir, the applicant herein in which she deposed that the bill of costs herein is an advocate – client bill of costs brought under schedule 5 of the [Remuneration Order](#) and the taxing officer misdirected himself and erred in principle in taxing the bill under schedule 7 when the advocates had elected schedule 5. The applicant contends that the taxing master not only erred in taxing the bill under schedule 7 but also in basing the entire bill on 2006 [Advocates Remuneration Order](#). Further, that the taxing master was under misapprehension that he was taxing a party and party bill of costs while what was before him was an advocate – client bill of costs, by disallowing and striking off certain expenses and by basing the entire taxation on 2006 [Remuneration Order](#) yet some services were rendered after the commencement of 2014 [Advocate’s Remuneration Order](#). The applicant further stated that the taxing master had a misapprehension that the bill was a party and party bill of costs and proceeded to tax it as such.

### **Applicant’s Submissions**

3. The applicant submitted that the bill of costs was taxed under schedule 7 instead of schedule 5 of the [Advocates Remuneration Order](#) having been fully notified about the election to rely on schedule 5 pursuant to paragraph 22(1) of the [Advocates Remuneration Order](#) hence making the same completely erroneous.
4. The election letter was filed as document No 4 of the advocates list of documents of June 9, 2021 as will be confirmed from the court record. The election was communicated to the client through the letter dated June 15, 2017. As a result, the taxing master ended up with wrong findings in all the items for instance; the perusals and drawings, copies and registry attendances were not provided for as schedule 5 provides for the same.
5. There was no increase of billing by 50% as Schedule 5 does not provide for such addition thus the finding that the applicant requested for such increase is factually wrong.
6. The taxing master’s observation that the bill is a party and party costs is not based on the filed bill of costs reading and the documents relied on clearly indicate it was/is an advocate-client bill of costs.
7. The applicant finally submitted that once an advocate elects to rely on schedule 5, then the taxing master does not have the mandate to vary the schedule elected. Reliance was placed in the cases of [Muri Mwaniki & Wamiti Advocates v Kenya Orient Insurance Ltd](#) [2021] eKLR and [Mwangi Kengara & Co Advocates v Invesco Insurance Co Limited](#) [2018] eKLR.

### **Respondent’s Submissions**

8. The respondent relied on their earlier submissions filed on August 4, 2021, in respect of the bill of costs dated June 9, 2021 and submitted that they opposed the bill of costs dated June 9, 2021 in the item 1 – instruction fees since it is not drawn to scale as per the [Advocates Remuneration Order](#) which is amounting to Kshs 43,394.12.
9. On the vote of receiving and perusing documents fees the amount taxed is exaggerated considering that the primary suit was part of a series of suits and all correspondence was done together. Also, on the issue of the court attendance and travelling expenses it was also exaggerated and the respondent urged the court to review the said fees to a fair and reasonable fee in line with the [Advocates Remuneration Order 2014](#).
10. Reliance was made in the case of [Wambugu, Motende & Co Advocates v The Attorney General of Kenya](#) eKLR [2013] where the court restated the principles of taxation as set out in the Court of Appeal case



of *Premchand Limited & Anor v Quarry Services of East Africa limited & others* EALR [1972] EA 162 as follows;

“..... that costs should not be allowed to rise to such a level as to confine the access of the courts to the wealthy”

11. The respondent finally submitted that the bill of costs should not be allowed since the fees are inordinately high and do not represent fair legal representation.

### Determination

12. I have considered the chamber summons, the supporting affidavit and the submissions thereto and the issue for determination is whether the taxingmaster erred in the assessment of the bill of costs. The reference is with regard to the bill of costs dated June 9, 2021 taxed by taxing officer at Kshs 70,257.06.
13. It is trite law that the court will only interfere with the decision of a taxing officer in the instances set out in the case of *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64 as;
  - (1) That 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;
  - (2) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;
  - (3) If the court considers that the decision of the taxing officer discloses errors of principle, the normal practise 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
  - (4) It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
  - (5) The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;
  - (6) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
  - (7) The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate’s unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.
14. The court in *Republic vs Ministry of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna* [2006] eKLR, stated 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 is 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."

15. The applicant made an election under paragraph 22(1) of the [Advocates Remuneration Order](#) and this was communicated to the client vide a letter dated June 15, 2017. The said provision provides as follows:

- (1) In all cases in which any other schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such schedule, his remuneration shall be according to schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.
- (2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) may not by reason of his election charge less than the scale fee under the appropriate schedule.

16. The Court of Appeal in the case of [Joreth Ltd v Kigano & Associates](#) NRB CA Civil Appeal No 66 of 1999 [2002] eKLR in determining the issue of instruction fees stated as follows:

"We would at this stage point out that the value of the subject matter of a suit for the purpose 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 fee as he considers just, taking into account, among 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."

17. The taxing master is bound by the said schedule in the event parties elect to use schedule 5 as seems to be the case herein. The taxing master found that the applicable [Advocates Remuneration Order](#) is that for 2006 schedule 7. I have seen the letter dated June 15, 2021 that was received by the respondent.

18. On perusal of the court file this court confirms that the applicant filed advocate- client bill of costs on July 9, 2021. Annexed to the bill of costs is the applicant's list of documents which among other documents is the letter of June 15, 2017 to the client that the costs shall be billed under schedule 5 of the [Advocates Remuneration Order](#). In terms of paragraph 22 (1) of the [Advocates Remuneration Order](#). Annexed also is an index of documents /pleadings filed in CMCC 255 of 2013.

19. The taxing master in the ruling delivered on October 7, 2021 based the taxation on schedule 7 of the [Advocates Remuneration Order](#) 2006 only. The taxing officer found Ksh45,394.05 was sufficient in light of the award of Ksh 635,764.80/- All costs of receiving, perusing documents, making copies attendance to the registry and transport expenses were all taxed off. The taxing officer found that the bill was a party and party bill of costs, thus not entitled to 50% increase.

20. The applicant contends that it is an advocate- client bill of costs. A perusal of the said bill indicates that it is an advocate client bill of costs and not party to party costs. The legal duties carried out by an advocate ought to be remunerated. However, the issue of increase by 50% of instruction fees does not arise. Secondly, it is the taxing officer's discretion in a party to party costs to award advocates -client costs by an increase of party to party costs by ½. See; [Mumias Sugar Co Ltd v Prof Tom Ojienda & Associates](#) [2019] eKLR.



21. From the pleadings filed by parties and submissions; the taxation ought to have been based on schedule 5 of *Advocates Remuneration Order* and not schedule 7 of the Remuneration Order as the applicant gave notice in advance as per letter of June 15, 2017 to the client and annexed to the list of documents filed in court. In my view, the taxation of the costs was an error of principle which justifies interference with the discretion of the taxing master.

### **Disposition**

1. The ruling of October 7, 2021 is set aside and all consequential orders and direct that the applicant's advocate – client bill of costs be taxed pursuant to schedule 5 of the *Advocates Remuneration Order*.
2. The matter is remitted back for Deputy Registrar/MHC for taxation and should be based on the *Advocates Remuneration Order* of 2006 and the one of 2014 if services rendered were during the 2014 *Advocates Remuneration Order*.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 3<sup>RD</sup> AUGUST 2022.  
(VIRTUAL CONFERENCE).**

**M.W. MUIGAI  
JUDGE**

