



**Mohamed & Samnakay v General Hardware Limited (Miscellaneous Application E208 of 2019)
[2022] KEHC 13317 (KLR) (Commercial and Tax) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E208 OF 2019
WA OKWANY, J
SEPTEMBER 22, 2022
IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT
BETWEEN
MOHAMED & SAMNAKAY APPLICANT
AND
GENERAL HARDWARE LIMITED RESPONDENT**

RULING

1. The applicant/advocate filed the application dated July 29, 2021 under section 51(2) of the *Advocates Act* rules 7 of the *Advocate Remuneration Order* (ARO) and order 51 rule 1 of the *Civil Procedure Rules* seeking the following orders: -
 - 1) That judgment be entered for the sum of Kshs 20,419.90 being amount short paid by the respondent in settlement of the taxed costs.
 - 2) That judgment on interest be entered on the said sum of Kshs 20,419.90 at the rate of 14% per annum from the January 5, 2018 being one month after service of bill of costs on the respondent up to the date of payment.
 - 3) That judgment be entered in the sum of Kshs 467,985/= being interest at 14% per annum on the sum of Kshs 1,143,491/= being part payment made by the respondent on the December 8, 2020.
 - 4) That the respondent do pay costs of this application.



2. The application is supported by the affidavit sworn by Zul Mohamed the advocate and is premised on the following grounds:-
 - a. The applicant's bill of costs was duly taxed by the Deputy Registrar of this honourable court.
 - b. The certificate of taxation was duly issued by the Deputy Registrar on the June 3, 2021.
 - c. The applicant is entitled to interest on taxed costs.
 - d. There are no outstanding issues on costs or interest to be determined by this court.
 - e. It is just and proper that Judgment be entered in favour of the applicant as prayed herein.
3. The respondent opposed the application through the replying affidavit of its Director Shaukatali Kaderbhaai who states that the bill of costs was taxed on October 6, 2020 after which the respondent paid Kshs 1,143,491 thus retaining withholding tax amounting to Kshs 20,000 which is 1.74 of the taxed costs. He further states that the applicant did not give the respondent an invoice for the tax and that as a result, the respondent has been unable to claim a total of Kshs 461,383 made up of Kshs 160,487 being refundable VAT and Kshs 300,902 being 30% corporate income tax thus making the respondent incur a loss of Kshs 461,383/= cumulatively.
4. The respondent contend that the applicant's claim for interest of Kshs 467,985 is unconscionable, unjustified and unequitable. He avers that the taxation of the bill of costs on October 6, 2020 represented the complete sum of total costs including the interest and that the taxed costs were fully paid by the by the respondent.
5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether judgment should be entered against the respondent for the sum of Kshs 20,419.90. The application is premised on 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.”
6. In *Lubulellah & Associates Advocates vs 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.”
7. In this present case, the applicant/advocate's bill of costs dated June 4, 2019 was taxed at Kshs 1,163,910.9 and a certificate of taxation issued on the June 3, 2021. It was not disputed that the respondent paid Kshs 1,143,491 thereby leaving a balance of Kshs 20,419.90. The applicant now seeks judgment for the outstanding balance of Kshs 20,419.90 together with interest.
8. In opposing the application, the respondent stated that it retained Kshs 20,000 as withholding tax but had not remitted the same to the taxman owing to the failure, by the applicant, to issue it with an invoice.



9. The question that begs an answer is whether the respondent was under an obligation to withhold the Kshs 20,000 as tax and remit the same to Kenya Revenue Authority.
10. *Black's Law Dictionary*, 8th Edition, defines "withholding tax" as "a portion of income tax that is subtracted from salary, wages, dividends, or other income before the earner receives payment".
11. In Civil Suit No 410 of 2002 *AM Babaji & Co Ltd vs Kenya Ports Authority* [2020] eKLR the court observed that:-
 20. Based on this definition in the Black's Law Dictionary as read together with section 3 of the *Income Tax Act*, under no circumstances does any of the definitions include a decree of a court as a taxable item under the income tax law. If the intendment of the income tax law was to have a decree of court taxable under its provision, the legislature would have come out clearly and provided for this.
 21. To that extent, I agree with the decision in the case of *Ocean Freight (E.A) Limited Vs Commissioner of Domestic Taxes* [2020] eKLR (supra) to the extent that, in a taxing statute, one has to look at merely what is clearly said. There is no presumption as to what a "withholding tax" is and nothing is to be implied. A court decree or interest arising thereof is not mentioned as a form of income and this court cannot presume the contrary.
 22. Considering similar facts under similar circumstances, the court in the case of *Ibrahim Manyar Vs Registered Trustees of Agricultural Society of Kenya (ASK)* [2014] eKLR, had the following to say;

“...His, I suspect was in avoidance of creating confusion by subjecting decrees of court to taxation. This was partly because these are in most cases amorphous amounts and figures that would not necessarily be in law deemed income. For example, would an amount of compensation in damages arising out of a fatal accident claim be deemed income accruing to the aggrieved or injured property? I guess not.”
12. From the foregoing definition of the term 'withholding tax' and the dictum in the above cited case, it is clear that taxable income does not include money awarded in a court decree. For this reason I find that the respondent had no basis for withholding any amount awarded to the applicant and ought to have paid the full amount stated in the certificate of taxation dated June 3, 2021.
13. In the upshot, I find that the instant application is merited and that the applicant is entitled to the balance of Kshs 20,419 together with interest. I therefore enter judgment in favour of the advocate/ applicant against the respondent/client for:-
 - a. The sum of Kenya shillings 20,419.90 together with interest thereon at fourteen (14%) per cent per annum calculable after thirty (30) days from the date when application was served upon the client.
 - b. Costs of this application is awarded to the advocate.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

W. A. OKWANY

JUDGE



In the presence of: -

Mr. Mohamed for the Applicant.

Mr. Nganga for Respondent/Client.

Court Assistant- Sylvia

