Tom Ojienda & Associates v Nairobi City County (Judicial Review Miscellaneous Application 51 of 2017) [2022] KEHC 14353 (KLR) (Judicial Review) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14353 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 51 OF 2017

AK NDUNG'U, J

OCTOBER 27, 2022

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... RESPONDENT

RULING

1. This ruling resolves the application dated May 31, 2021.

2. The brief background to the application is that Ms Tom Ojienda & Associates acted for the Nairobi City County (the respondent), in judicial review application No 246 of 2017. Non-payment of the legal fees due led to the filing of a bill of costs which bill was taxed by Hon C. A Muchoki at Kshs 5,256,573.50 in a ruling dated May 18, 2021.

3. It is the applicant's case that the taxing master failed to consider the value of the subject matter which was 4,395,770,826 thus arriving at an erroneous figure in regard to the instruction fee payable.

4. On its part, the respondent maintains that the bill of costs was taxed without the taxing master disposing of the critical issue of lack of advocate/client relationship for want of instructions as had been established by the Deputy Registrar, Hon C Kithinji on June 26, 2019. In that regard therefore, it is urged that the amount claimed is not due at all.

5. The respondent was urged that, even assuming that the amount was due, the taxing master applied the correct principles in reaching her decision.

6. I have applied my mind to the application, the affidavit evidence and submissions on record. The issues for determination are:

1. Whether the question of existence of an advocate/client relationship has been properly raised by the respondent in these proceedings.

2. Whether the taxing master applied the correct principles in the taxation of the bill of costs dated October 24, 2017.

3. What orders should issue.

4. Who bears the costs of this application

7. On issue number 1, the respondent's case is that an advocate/client relationship did not exist between the applicant and the respondent. The record clearly shows that since the delivery of the ruling on taxation on May 18, 2021, the respondent has not taken any steps to challenge the ruling on the basis of lack of instructions to the applicant.

8. There is no pleading on record by the respondent challenging the taxation. Without filing a reference in the prescribed time in law, the respondent cannot raise the issue as a response to the application herein without a cross-reference.

9. On whether the taxing master applied the correct principles in the taxation at the bill of costs, a recap of the applicable principles is necessary.

10. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. The court in the case of *First American Bank of Kenya v Shah and others* [2002] 1 EA 64 set the applicable principles. These principles are:

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. The position was

reiterated in *Karen & Associates Advocates v Caroline Wangari Njoroge* [2019] eKLR, in which the court cited the decision of the court in *Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt Light Ltd* HC Misc 729 of 2006 where the court stated that;

"...The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject..."

In the same case, it was held that:

"The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court."

11. The nature of the suit to which the subject costs relate was a judicial review application seeking prerogative orders. The fees chargeable thereof are provided for under 6A (1) (j) (ii) of the *ARO*which provides:

> " Where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000."

12. Specifically, as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J (as he then was) in *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & 6 others*, (2006) eKLR:

    1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
    2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
    3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
    4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
    5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
    6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
    7. where responsibility borne by advocates is taken into account, its nature is to be specified;
    8. where novelty is taken into account, its nature is to be clarified;
    9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.

13. In her assessment of the instruction fees, the taxing master stated:

> " In determining instruction fees, it must be related to the value of the work done by an advocate.

Advocates should be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised. The applicant has not demonstrated or shown me or satisfied me as to the number of hours they devoted for taking instructions from the time they were employed.

The court has discretion to enhance instructions fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. The court must ensure that the advocates instructions fees is to seek and has more and no less than reasonable compensation for professional work done.

Bearing in mind all the aforesaid factors and the reasons herein and in exercise of the discretion vested in me, I am fully convinced that the amount sought by the applicant overly excessive.

In public law litigation, the amount involved is not the sole determinant when it comes to costs. Judicial review suits are not money suits as they merely seek declaratory reliefs and orders.

From the above, I find that a sum of Kshs 300,000 is reasonable. I proceed to allow item No 1 at Kshs 3,000,000/= Kshs 164,384,632 is hereby taxed off."

14. The subject matter before the court was a judicial review application that sought an order of *certiorari* to quash agency notices issued by the respondent in the matter and to prohibit the issuance of further agency notice(s). The fees chargeable are provided for under order 6A (i)(j), ii of the advocates remuneration order. It provides:

> " To present or oppose an application for a constitutional and prerogative orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate: -
>
> i. Where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000.
>
> ii. Where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000.

15. The taxing master after considering that instruction fees must be related to the value of work done by an advocate and noting that advocates should be fairly, appropriately and justly rewarded for their work, and aware that the court has discretion to enhance the instruction fees considering the complexity of the matter, responsibility by counsel, time spent and skill deployed, reached the finding that the instruction fee claimed in the bill of costs was overly excessive.

16. She, however still increased the instruction fee from the Kshs100,000 provided in the remuneration order to Kshs 3,000,000, thus increasing the fee 30 fold.

17. While the increase herein above might appear excessive, a review of the judicial review application would show that by the shear amount of money at stake, the interest of the respondent in the matter and the responsibility placed on the shoulders of the counsel to protect the said interest was high. Counsel spent considerable time, perused voluminous documents and employed specialized legal skill in tax laws, factors which justify the increase of the instruction fees as done by the taxing master.

18. The increase or reduction of instruction fees must be pegged on ascertainable parameters. It is not a whimsical exercise to be undertaken at the guise of exercise of discretion. I agree with Odunga J (as he then was) in *Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others* [2018] eKLR where in addressing the question of enhancement or reduction of instruction fees stated;

> "Therefore whereas the figure sought was huge, the issue in dispute was clearly a simple legal issue that did not require exceptionally detailed legal research and this was rightly appreciated by the Taxing Officer. Whereas the figure in issue could rightly be taken into consideration, in public law litigation, the amount involved is not the sole determinant when it comes to costs. Whereas the amount involved may cause unnecessary anxiety to the parties and counsel may be called upon to put extra effort in the matter, at the end of the day, the other factors such as importance of the matter, its complexity, novelty of the question raised and time expended by the advocate would no doubt carry more weight in such matters.
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> 35. In this case the effect of the decision of the taxing officer was to increase the basic instructions fees 50 times.
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> 36. In my view the fee awarded in respect of the instructions fees in this matter was clearly manifestly excessive as to justify an inference that it was based on an error of principle. The error of principle being that the huge amount quoted justified such an increase when the issues involved were not so complex and I dare say common-place principles of distinct corporate legal personality. It is further my view that the number of reliefs sought unless they make the matter complex is not ipso facto a basis for the increment of fees by such wide margin."

19. From the foregoing and for reasons above stated, I make a finding that the taxing officer in her finding correctly determined the applicable law on taxation of the subject bill of costs being schedule 6A 1(j) of the *Advocates (Remuneration) (Amendment) Order 2014* and proceeded to apply the correct principles in enhancing the instruction fee but still cautious enough not to overly increase the same in the monumental proportions suggested by the applicant. She operated perfectly within the dicta in *Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others* (supra)

20. I therefore find that the decision of the taxing master in awarding instruction fees at Kshs 3,000,000 was not based on any error of principle, neither were the costs awarded excessive or too low as to justify interference by this court.

21. With the result that the application dated May 31, 2021 is without merit and is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022

A. K. NDUNG'U

JUDGE