



**Kithi & Company Advocates v County Government of Kiambu
(Judicial Review Miscellaneous Application E101 of 2021)
[2022] KEHC 15639 (KLR) (Judicial Review) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E101 OF 2021
AK NDUNG'U, J
NOVEMBER 24, 2022**

BETWEEN

KITHI & COMPANY ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU RESPONDENT

RULING

1. The applicant herein aggrieved by the taxing master's decision dated 27th January, 2022 taxing its bill of costs at the sum of Kshs.2,413,559.22/= has filed a Chamber summons application dated 3rd March, 2022 before this court in which its three primary prayers are as follows;
 - a. That the decision of the taxing officer made on 27th February 2022 on the applicant's Bill of Costs dated 23rd June 2021, awarding the applicant a total sum of Kshs.2,413,559.22 be set aside.
 - b. That the Learned Deputy Registrar's decision made on 27th January, 2022, awarding the sum of Kshs.1,000,000/= as instruction fees in taxation of the Bill of Costs dated 23rd June, 2021 be set aside and in its place the Honourable Judge be pleased to determine the instruction fees payable to the Applicant.
 - c. That in the alternative and without prejudice whatsoever to the above, this honourable court be pleased to remit the Party and Party Bill of Costs dated 23rd June, 2021 for review and reconsideration with direction on taxation by another taxing officer other than Hon. C.A Muchoki.
 - d. That the costs of this application be provided for.



2. The application is supported by the supporting affidavit sworn by George Kithi an advocate in the firm of Kithi & Company Advocates on 3rd March,2022. The applicant's case is that in reaching her decision the taxing master failed to consider the grounds upon which the applicant had justified the increase of the minimum instruction fees to Kshs.19,075,000.00, to appreciate that the issue that was raised in the PO against the judicial review application before the court was novel. Further that she also failed to appreciate the nature, urgency, complexity, time, research and skill expended therein, the amount and value of the subject matter.
3. It is also argued that the taxing master erred in failing to consider the nature and complexity of the matter as was discussed in the case of *R v Minister for Agriculture ex parte Njuguna & 2 others* [2006] eKLR. In addition, she is also faulted for indicating that items no. 6,14,17,18,27,36,40 and 46 relate to service of letters and that the Advocates Remuneration order does not provide for service of correspondences.
4. The taxing master is also faulted for finding that as items no.53 have not been supported by any evidence and therefore the same should not be awarded yet it is normal practice that disbursements have to be incurred and in that respect the the respondent in its submissions during the taxation had proposed for the sum of Kshs.5,000/= to be awarded to the Applicant to cover the costs.
5. The respondent in its replying affidavit sworn on 20th September,2022 by Daniel Kirathe, the County Solicitor contends that service of the Chamber Summons was never effected on the county and further that the county fully associates itself with the Ruling of the Taxing master.
6. Further that the work done in JR Misc. Application No.73 of 2015 by the applicant according to the respondent does not reveal anything which is above and beyond the work day chores of legal practitioners. In addition, that the taxing master in preparing her ruling was alive to the need to be guided by principles of law delineating the parameters for the exercise of her taxation mandate.
7. The application was canvassed by way of written submissions. The applicant in its written submissions cites the cases of *Premchand Raichand vs. Quarry Services EA Limited No.3* [1972]EA 162 and *Kyalo Mbobu t/a Kyallo & Assocaites vs. Jacob Juma* [2015] eKLR where the courts have set out the principles to be applied by a taxing officer in the exercise of his/her discretion to increase the instruction fees.
8. On the complexity of the matter counsel refers to the cases of *Republic vs. Minister of Agriculture & 2 Others ex parte Samuel Muchiri W' Njuguna & Others* [2006] eKLR, *Republic vs. Nyeri County Government ex parte Central Kenya Coffee Mill Ltd* [2017] eKLR and *Evanson Jidraph Kamau & Another vs. AG* Misc. Application No.40 of 2000.
9. The respondent in its written submissions contends that the applicant ought to have given a notice in writing within fourteen (14) days of the ruling of the items it intended to object to and for the reasons for her decision. In failing to do so the applicant is said to have failed to comply with the requirements of Paragraph 11 Rule 1 of the Advocates Remuneration Order,2014.
10. On the interference of a taxing officer's discretion the respondent refers to the case of *Republic vs. Minister of Agriculture & 20 others Ex parte Muchiri W' Njuguna* [2006] eKLR.
11. I have considered the application, the supporting grounds, affidavit evidence and learned submissions by counsel. Of determination is whether the applicant has laid sufficient grounds to warrant this court's interference with the decision of the Taxing Master, and if in the affirmative, what orders should issue. Am also called upon to make an order on costs.



12. The procedure for the challenge of the results of taxation is provided under Paragraph 11 of the Advocates (Remuneration) Order which provides that:

“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

13. This court takes judicial notice that the applicant in this matter notified the taxing master and the respondent herein of its intention to object to items 1,2,6,14,17,18,27,36,40,46 and 53. This was one day after the taxing masters ruling and therefore well within the stipulated period.

Whether the Taxing Officer applied the correct legal principles in her assessment of instruction fee

14. The applicant in this matter was instructed by the respondent to defend a Bill of Costs in the total sum of Kshs.600,000,000 .

15. The applicant firm entered appearance on behalf of the respondent herein and it is evident from the copy of the Bill of Costs that a Replying Affidavit was drawn and filed on 17th June,2015.

16. In her assessment of the instruction fee, the Taxing Officer awarded Ksh. 1,000,000.00/=. She factored in the fact that the Instruction fee in judicial review suits is found under Schedule 6 (j) of the Advocates Remuneration Order,2014 and is set at a minimum of Kshs.100,000/=.

17. The applicable principles on the increase or decrease of instruction fee by a Taxing master are well settled. In the case of *Kyalo Mbobu T/A Kyalo & Associates Advocates v. Jacob Juma* [2015] eKLR, the court ruled that in order to increase or decrease the instructional fees, a Taxing Officer must use the established principles and provide specific justification, not a broad one.

18. The Court of Appeal in the case of *Joreth Ltd v. Kigano & Associates* [2002] 1EA 92 stated that the taxing Officer must give reasons for increase of instruction fees such as care and labour required by the Advocate, the volume of papers to be perused, the nature and the importance of the matter, the value of the subject matter and novelty of the matter.

19. The taxing master in her reasons regarding item 1 stated;

The court has discretion to enhance instruction fees considering the complexity of the matter, responsibility by counsel, time spent, reason done(sic) and skill deployed by counsel. The court must ensure that the advocates instruction 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, am fully convinced that the amount sought by the applicant overly excessive (sic). In public law litigation, the amount involved is not the sole determinant when it comes to costs. Judicial review costs are not money suits as they merely seek declaratory reliefs and orders.”



20. The court in the case of *Kenyariri & Associates Advocates v. Salama Beach Hotel Ltd & 4 others* [2014] eKLR held as follows;

- “28. The bill of costs in Miscellaneous Application number 14 of 2013 arose from a constitutional petition in which the Applicant was given instructions to defend the Respondents. In the Petition, the petitioner was claiming for prerogative orders. The taxing officer proceeded to tax the bill of costs under schedule VI (1)(j) which provides for fees payable in respect of prerogative orders. The minimum allowable amount is Ksh. 28,000 which the taxing officer set out before awarding the Applicant Ksh. 400,000/-.
29. In awarding the said amount, the taxing officer observed that the matter required diligent preparation as well as research. The taxing officer noted that the matter was still pending and there was another counsel on record.
30. The taxing officer went further to observe, and rightly so, that in constitutional and judicial review matters, instruction fees is not pegged on the value of the subject matter. The taxing officer relied on the case of *R vs Minister of Agriculture, ex-parte Samuel W. Njuguna*. In that case, Ojwang J (as he was then) stated that judicial review proceedings were purely public law proceedings and are to be considered free of any private business arrangements or earnings.”

21. While I recognise that the Taxing Master correctly appreciated some of the factors for consideration in assessing instruction fees, it has not escaped my notice that she completely failed to factor in an important consideration which is “the importance of the matter to the client”. The applicant took up instructions to defend a claim of costs to the tune of Kshs. 600,000,000 against the Respondent. This matter was no doubt of great importance, of high value and of serious economic consequences to the Respondent.

22. It is now widely recognized under what conditions a High Court judge may interfere with the taxing officer's exercise of discretion. The court in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64 sets 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 vs. Caroline Wangari Njoroge* [2019] eKLR, in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet and Ohaga Advocates vs. 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. ”

23. Bearing these principles in mind, am of the finding that it was an error of principle on the part of the Taxing Master for failing to consider the relevant factor of the great importance and immense interest of the Respondent in the matter. The amount awarded in instruction fees is so manifestly low as to justify an inference that it was based on an error of principle. This opens the doors for this court to interfere with the Taxing officer's decision in regard to the instruction fee as held in *First American Bank of Kenya vs Shah and Others* [2002] 1 E.A. 64 at 69 by Ringera J. (as he then was) who delivered himself thus;

“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”.



Whether the Taxing Master in taxing off items 6,14,17,18,27,36,40,46 and item 53 erred in principle.

24. Items 6,14,17,18,27,36,40 and 46 relate to service of letters/correspondence while item 53 was on disbursements.

25. The Advocates Remuneration Order,2014 under schedule 6(6) provides as follows;

“6. Correspondence

Letters before action or other necessary letters Kshs 1,000”

26. I am in agreement with the taxing master’s finding that the Advocates Remuneration order only provides for correspondence and not service of the said correspondence and that the applicant ought to have included any expenses incurred in delivery of the said correspondence under disbursements and produced evidence to support the same.

27. The court in the case of *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR while citing the case of *Makumbi & another v Sale Electric (U) Ltd* [190-1994] EA 306 (SC)110 stated as follows;

“It is for that reason that the Rules of taxation demand that disbursements be shown separately at the bottom of the bill of costs and there must be presentation of receipts or proof at the time of taxation before the award is made by the taxing officer.

111. In this case, the taxing officer at pages 7 and 8 of the ruling and reasons for taxation clearly stated that items 120-133 were disbursements and correctly held that disbursements must be proved by way of receipts. She confirmed items 122, 124,126,129,131 and 133 as receipts were in the file which she allowed and disallowed the rest of the disbursements for want of proof.”

28. I am in agreement with the Taxing Master’s decision to tax off item 53 on grounds that the same has not been supported by any documents, receipts or evidence.

29. With the result that the Taxing Master’s decision on the instruction fee and, automatically, the getting up fee is set aside. All other findings on the taxation are upheld. The matter is remitted back for taxation by any other Taxing Master other than C.A. Muchoki. Each Party is to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

A. K. NDUNG’U

JUDGE

