



Mulekyo and Company Advocates v Athi Water Works Development Agency (Environment and Land Miscellaneous Application E097 of 2022) [2023] KEELC 18276 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E097 OF 2022
EK WABWOTO, J
JUNE 16, 2023**

BETWEEN

MULEKYO AND COMPANY ADVOCATES APPLICANT

AND

ATHI WATER WORKS DEVELOPMENT AGENCY RESPONDENT

RULING

1. This ruling is in respect to two applications dated December 6, 2022 and January 12, 2023. The Respondent filed a Reference vide a Chamber Summons application dated December 6, 2022 which was accompanied by a supporting affidavit sworn by Eric Onyancha where the following orders:
 - a. That this Honourable Court be pleased to enlarge the time for which the Applicant is to file this reference to the ruling by the Honourable Deputy Registrar made in November 14, 2022.
 - b. That the Honourable Court be pleased to set aside and/or review the Ruling and determination made by the Deputy Registrar of this Honourable Court on November 14, 2022.
 - c. That the Honourable Court be pleased to review and/or set aside the Certificate of Taxation issued in favour of the Applicant/ Respondent on December 2, 2022.
 - d. That the Honourable Court be pleased to grant any other orders it deems fit.
 - e. That the costs of the reference be awarded to the Applicant.
2. The Application was premised on 21 various grounds including that the proceedings herein stem from the Applicant/Respondent's representation of the Respondent/Applicant in Nairobi ELC 449 of 2018, Joreth Limited vs Nairobi City Water And Sewerage Company Limited , Athi Water Services Board And The County Government Of Nairobi to wit the Plaintiff(Joreth Limited) sort various



orders as against the Defendants, that by way of a ruling dated July 23, 2019, this Honourable Court dismissed Joreth Limited's suit as against the Defendants with costs, that the Applicant in turn filed party to party bill of costs dated September 11, 2019 on behalf of the Respondent, that the Applicant's party and party bill of costs was taxed at Ksh 9,979,250 on August 30, 2021 with basic instruction fees taxed at Ksh 7,462,500, that an Advocate-Client bill of costs dated June 16, 2022 which was determined by ruling on November 14, 2022 and taxed at Ksh 17,389,089.20, that the Honourable Deputy Registrar erred in principle by awarding an excess amount of instruction fees contrary to Schedule 6 Part A and B of the Advocates Remuneration order of 2014, that the Honourable Deputy Registrar erred in principle in failing to appreciate that the ascertained instruction fees of Ksh 7,462,500 should have been the basis for the award of item 1 of the Bill of Costs dated June 16, 2022 instead of Ksh 9,979,250, that this Honourable Court has jurisdiction to interfere with the Ruling as the same is contrary to Schedule 6 of the Advocates Remuneration Order of 2014, that the Respondent further seeks to have time enlarged for purposes of filing its Reference to the ruling dated November 14, 2022 and that the ruling was only availed on December 5, 2022 thus the failure to file within the prescribed period of 14 day and that the enlargement of time would not prejudice the Applicant/Respondent who has yet to file an application under Section 51 of the Advocates Act.

3. The Applicant filed a Notice of Motion application dated January 12, 2023 seeking the following orders:
 - a. That the Court be pleased to strike out the Respondent's Chamber Summons application dated December 6, 2022
 - b. That the Court be pleased to enter judgement in favour of the Applicants as against the Respondent for the sum of Ksh 17,389,089.20 together with interest at 14% per annum with effect from September 24, 2021
 - c. That costs of the application be borne by the Respondent.
4. The Application was supported by an affidavit by Anthony M. Mulekyo on the following grounds:
 - i. That prior to filing the application dated December 6, 2022, the Respondent failed to challenge to decision as per provisions of Rule 11(1) of the Advocates Remuneration Order.
 - ii. That after filing the Chamber Summons the Respondent failed to serve the Applicant and the Applicant learnt of its existence on the e-filing portal as he was filing his application for adoption as a judgement.
 - iii. That prior to filing the said bill, the Respondents had been served with a Demand Notice to pay the said fees.
 - iv. That the Respondent has failed to honour the Certificate of Taxation despite service.
 - v. That the Applicant is desirous of enjoying the fruits of his judgement.
5. On March 9, 2023, the Court directed that both applications be heard simultaneously and that the same be canvassed by way of written submissions. Parties were granted 14 days to file and exchange their written submissions.
6. The Applicant filed submissions dated April 25, 2023 in which five main issues for determination were outlined:
 - a. Whether the applicant has properly invoked the jurisdiction of the Court



- b. Whether the Respondent filed the Chamber Summons dated December 6, 2022, late and without Court's leave
 - c. Whether the Respondent has properly challenged the Ruling of the Taxing Master as per the law
 - d. Whether there are proper grounds for setting aside or reviewing the Ruling of the Taxing Master
 - e. Whether the ruling of the taxing master should be converted in a judgement of this Honourable Court.
7. It was submitted that filing the reference was contrary to Rule 11(1) of the *Advocates Remuneration Order*. It was further submitted that the Applicant only sought leave to file reference and not to give Notice to the Deputy Registrar which should be a precursor to filing the reference.
8. Having considered the all the parties' submissions and responses, it is clear that the issues for determination in respect to the two applications are as follows:
- i. Whether this court should enlarge time and consider the reference filed therein.
 - ii. Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and therein reached a wrong assessment.

Issue no. 1- Whether this court should enlarge time and consider the reference filed therein.

9. The procedure by an aggrieved party to challenge a taxation ruling is set out in the *Advocates Remuneration Order* Paragraph 11 and is very specific on what an aggrieved party should do. A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the bill of costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.
10. Paragraph 11 of the *Advocates Remuneration Order* stipulates-
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- (1) should any party object to the decision of the taxing officer, he may within 14 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 14 days from the receipt of the reasons apply to the judge in chambers which shall be served on all parties concerned, setting out the grounds of his objection.
 - 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - 4) The High Court shall have power in its discretion by order enlarge the time fixed by subparagraph (1) or subparagraph (2) of the taking of any step.
 - 5) Applications for such an order may be made by chamber summons upon giving every other interested party not less than 3 clear days' notice in writing or as the court may



direct, and may so made notwithstanding that the time sought to be enlarged may have already expired.

11. Should the court enlarge the time for the Respondent to file a reference against the costs awarded in the taxation herein? The Respondent explained that the delay in filing the reference was occasioned by the fact that the Respondent could not obtain the copy of the Ruling by the Honourable Deputy Registrar when the same was delivered on November 14, 2022 or within the prescribed 14 days. It was also submitted that the issues raised in the reference are substantial as the Honourable Deputy Registrar erred in the taxation.
12. The court record shows that the Respondent's advocate was in court when the ruling on the taxation was delivered. The Applicant objected to the Respondent's request for the reasons that the same was filed without any leave of the court. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* {2014} eKLR where the court set out the under-lying principles that a court should consider while exercising the discretion to extend time as follows:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
 - iii. Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.
 - iv. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.
 - v. Whether there would be any prejudice suffered, the respondent if the extension was granted.
 - vi. Whether, the application had been brought without undue delay and,
 - vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”
13. It is important to emphasize that the Taxing Master would often indicate that the reasons are contained in the decision. An obligatory duty is enforced upon the Taxing Officer upon receipt of the notice of objection. Secondly, the use of “may” connotes available options for relief and not necessarily a step by step procedure that is cast in stone. It is therefore apparent from the law that in addition to option of filing a notice of objection, the filing of a reference within 14 days from the date of receiving the reasons for the decision is also an option.
14. On this issue having considered the reasons given in the Respondent's application, I will exercise my discretion and allow the reference field herein out of time. This court must strike a balance between the rights of the Applicant and the Respondent. As the delay cannot be attributed to the Respondent.

Issue no. 2 - Whether the Taxing Officer erred in law and principle while taxing the Advocate - Client Bill of Costs herein and therein reached a wrong assessment.

15. It is common ground that a reference is an appeal against the decision of the taxing officer, therefore the issue of Taxing Officer's jurisdiction is of paramount importance. This Court is guided by the decision



of the Court of Appeal in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR where it was held as follows: -

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the *Advocates Act* and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn vs Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill...”[Emphasis Mine]

16. I echo the sentiments of Ojwang J(as he was then) in *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’njuguna* [2006] eKLR, where he expressed 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors...If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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... The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity ...”

17. In this instance, the crux of the matter is that the Taxing officer should have calculated the final amount of the bill using the basic Instruction fees 7,462,500 and not the total amount of Ksh 9,979,250. My interpretation of Schedule 6(B) is that calculation of fees should include all fees prescribed in A and not instruction fees. This Court therefore finds that the Taxing Officer acted appropriately in arriving at the sum of Ksh 17,389,089.20. The taxing officer in my view did not misapprehend the applicable principles and law in arriving at her decision. It is therefore not open for this court to interfere with the same. As was stated by the [Supreme Court of Uganda (Mulenga, JSC) in *Bank of Uganda v Banco Arabe Espaniol*, Civil Application No. 29 of 2019];

...[S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. (Emphasis added).



18. This Court is guided by Section 51 (2) of the Advocates Act which provides 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 covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

19. In respect to interest as sought by the Applicant. Rule 7 of the *Advocates (Remuneration) Order* provides that:-

“An advocate may charge interests at 14% per annum on his disbursement and costs whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, such claim for interests is raised before the amount of the bill has been paid or tendered in full.”

20. The charge of interest is an option to the advocate and a factor subject to the discretion of the Court. My perusal of the supporting documents confirms that communication to the Client vide a letter dated December 5, 2022 only stated the sum on the certificate of costs and not intention to charge interest. Considering that the bill of costs was awarded for a substantial amount, this Court refrains from adding a bigger burden on the Client’s purse.

21. With regards to the issue of costs, Section 27 of the Civil Procedure Act outlines the Court’s discretion to award costs. Ultimately, it is in the interest of justice for litigation to come to an end therefore I am not inclined to award costs in this instance.

22. Consequently, the applications dated December 6, 2022 and January 12, 2023 are hereby disposed as follows;

- i. Judgment is entered in favour of the Applicant against the Respondent for Ksh 17,389,089.20.
- ii. The claim for interest is declined.
- iii. Each party to bear its own costs of both applications.
- iv. Any other relief not expressly granted is deemed as declined.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Muuo for the Applicant.

Mr. Onyancha for the Respondent.

