



**A.N. Ndambiri & Co. Advocates v Piulva Engineering &
Technology Ltd (Civil Miscellaneous Application E831 of 2020)
[2021] KEHC 427 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL MISCELLANEOUS APPLICATION E831 OF 2020**

MW MUIGAI, J

DECEMBER 17, 2021

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

A.N. NDAMBIRI & CO. ADVOCATES APPLICANT

AND

PIULVA ENGINEERING & TECHNOLOGY LTD RESPONDENT

RULING

CHAMBER SUMMONS

1. The Applicant filed a Chamber Summons Application dated 9th December 2020 for orders that;
 - a. The taxation and ruling delivered by the Taxing Master on 26th November 2020 in relation to Item 1 Section A (i) of the Advocate/Client Bill of Costs dated 7th July 2020 be set aside.
 - b. An order do issue that the Applicant is entitled to have Item 1 (Section A(i)) of the Advocate-Client Bill of Costs dated 7th July 2020 taxed under Schedule 6 Part (B)(a) of the [Advocates Remuneration Order, 2014](#).
 - c. The Court be pleased to assess and tax Item 1 (Section A(i)) of the Advocate-Client bill of Costs dated 7th July 2020.
 - d. In the alternative and without prejudice to prayer 3 above, that the Advocate-Client Bill of Costs dated 7th July 2020 be remitted for taxation of Item 1 by a Taxing Master as this court shall deem fit and just.



2. Which Application was supported by the sworn Affidavit of Alfred Njeru Ndambiri dated 9th December 2020 and based on the grounds that;
- a. a. The Applicant acts for, and represents the Respondent in HCCC NO. 149 of 2014 (NRB)- Piulva Engineering & Technology Ltd vs Ministry of State for Special programs & Anor. Judgment in the said suit was entered on 30th October 2018 in favour of the Respondent and thereafter, a decree dated 31st January 2019 and a Certificate of Costs on Party and Party Costs dated 1st March 2019 given.
 - b. On or about 30th June 2019, a sum of Kshs 8,196,657.50 being part of the decretal sum in the *HCCC No. 149 of 2014* was paid by the 1st Defendant in the said suit but the 2nd Defendant withheld, and is still withholding the balance amounting to Kshs 2,696,018.00 as at 31st August 2019.
 - c. On 10th July 2020, the Applicant lodged the Advocate-Client Bill of Costs dated 7th July 2020 for taxation. In the ruling delivered on 26th November 2020 the Taxing Master taxed Item 1 (Section A(i)) of the said bill at Kshs. 219,000.00 as against the sum of Kshs.4, 459, 012. charged by the Applicant. The Applicant dissatisfied with the Taxing Master's decision filed a notice of objection dated 27th November 2020.
 - d. The Applicant contended that the Taxing Master committed an error of principle when he taxed Item 1 of the bill at Kshs 219,000.00 by failing/ refusing to note, acknowledge and hold that the Applicant had opted and chosen to draw his Advocate-Client bill of costs under Schedule 6 Part (B) (a) of the Advocates (Remuneration) Order 2014 since a Certificate of Costs on Party and Party costs had already been given by the Court.
 - e. It was a grave error of law and principle for the Taxing Master to tax item 1 of the Applicant's bill of costs as instruction fees under Schedule 6 Part A of the Advocates (Remuneration) Order, 2014 and not under Schedule 6 Part (B)(a) of the said Order.
 - f. The Taxing Master erred in law and principle in taxing item 1 of the Applicant's bill of costs as instruction fees based on the value of the subject matter of Kshs.4, 950, 000 while the decretal sum was Kshs.10, 892, 675.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of David Macharia dated 27th July 2021 and stated that;
- a. The Advocate irregularly obtained a Purported Certificate of Costs on Party and Party costs without following the lawful procedures, as he did not file any Party & Party bill of Costs. The Judgment herein was granted by the Hon. LJ. Mary Kasango on 30th October 2018 for Kshs. 4,950,000 (*Copy of the Judgment marked "DM-1"*).
 - b. The Judgment given by the court was Kshs. 4,950,000.00 and not Kshs. 10,892,675.00 as alleged or incorrectly stated by the Advocate in his



Application and Affidavit filed herein the Court should refer to the Judgment and the Decree on record.

- c. In a case like this where the learned Judge heard the case on Merits in a full trial, the Deputy Registrar had no jurisdiction and/or cannot issue a Certificate of Costs, without Taxing Party & Party Bill of costs, when the suit was heard on merit by the Learned Judge, as opposed to Judgment entered in default of Defense.
- d. The Taxing Master herein, in a Ruling dated 26th November, 2020 properly exercised his judicial mind, and properly applied law and applicable principles wherein the Advocate was awarded Kshs.1, 084, 285.52/=. (Submissions in opposition to the Advocates Bill of Costs, attached herein Marked "DM -2".)

APPLICANT'S SUBMISSIONS

4. The Applicant submitted that the Advocates (Remuneration) Order 2014 provides a formula for taxing an advocate and client bill of costs for work done in the High Court. Part B of Schedule 6 the said Order provides that:

B-ADVOCATE AND CLIENT COSTS

As between advocate and client the minimum fee shall be

- a) the fees prescribed in A above, increased by one-half; or
 - b) the fees ordered by the court, increased by one-half; or
 - c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondence.
5. Further, the Applicant argued that it is apparent this Part B of Schedule 6 gives an advocate three options to choose from when demanding, and even drawing his bill of costs. The issue of the three options has been widely interpreted in various court decisions including in the case of *Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Housing Scheme & 8 Others* (2017) eKLR where the court held that;

"..the correct position is that instruction fees of an Advocate is dependent on the choice of the advocate while drawing his bill either based on the value of the suit (the prescribed fee under Part A of schedule VI of ARO) or party and party costs taxed (costs ordered by the court), or the agreement between the parties under paragraph 57 of the ARO. In either of the 3 options, the amount is increased by 50%”
 6. The Taxing Master was legally and principally obliged to assess and tax the Applicant's Item 1 on the basis of the said certificate of costs where party and party costs had been assessed at Kshs 2,972,675.00. This amount was to then be increased by 50% making a sum total of Kshs 4,459,012.00.
 7. In addition, the Taxing Master failed to note that there had been no change in representation in the said case up-to and including the date of the said filing. Disregarding these crucial facts, we submit, contributed to the Taxing Masters' findings that Item 1 of the Applicant's bill of costs could only be assessed on the basis of the value of the subject matter and which, according to the Taxing Master was the judgment sum of Kshs 4,950,000.00. This fact on the judgment sum was also erroneous since the



judgment that was entered in favour of the Respondent on 30th October 2018 included interests and costs, with the decretal sum due as at 30th June 2019 being Kshs.10, 982,675.00.

8. In the case of *D. Niogu & Company v Kenya National Capital Corporation* [2005] eKLR the court held;

"..I deem it necessary to point out that although the Taxing Officers do have the discretion to either decrease or increase the instruction fees awardable in a Party and Party Bill of Costs, once he has exercised that discretion by taxing the said Party and Party Bill of Costs, the Advocate/Client costs cannot be taxed to a lesser sum."

9. The sum of Kshs 219.000.00 assessed on Item 1 is manifestly low. The Taxing Master was legally and principally obliged to ensure that the assessed advocates' fees in Item 1 was not lower than the sum of Kshs 2,972.675.00 certified by the Deputy Registrar as party and party costs.

RESPONDENT'S SUBMISSIONS

10. It was the Respondent's submission that the Applicant did not file or tax party and party Bill of Costs as required by law. It is not clear how the purported Certificate of Costs dated 1st March 2019 was issued. The Certificate of Costs was issued irregularly without jurisdiction and in this case the Court did not direct or order otherwise hence the party and party costs should have been taxed.
11. The Respondent further argued that the costs/fees allowable on a Certificate of Costs under paragraph 68A is provided for under item 15 of the Schedule 6 of the Advocates Remuneration Order (Amendment) 2014. In the absence of any taxed party/party Bill of Costs, the Court ought to proceed to tax the Advocates/Client Bill of Costs as guided or provided for under Schedule 6, Item 1(b).

DETERMINATION

12. Having considered the pleadings and submissions filed by the parties herein, the issue for determination is whether the Taxing Officer's decision on the Bill of Costs should be set aside?
13. The legal parameters within which the Court can interfere with the taxing master's decision are well settled. In *First American Bank of Kenya Vs Shah and others* [2002] E.A.L.R 64 at 69, Ringera J (as he then was) 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".

14. It was the Applicant's contention that the Taxing Master erred by taxing item 1 of the Applicant's bill of costs as instruction fees under Schedule 6 Part A of the Advocates (Remuneration) Order, 2014 and not under Schedule 6 Part (B)(a) of the said Order.
15. Schedule VI of the Advocates' Remuneration Order which is applicable, is divided into two sections, that is Section A, and Section B. Section A, provides for party and party costs, and for our purposes, paragraph 1, which provides for instructions fees is relevant. It is drawn as follows: -

1. Instruction fees

Subject as hereinafter provided, the fees for instructions shall be as follows—

- (a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for



leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).

- (b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).
- (c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule.

16. The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—

- (a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—

That value exceeds Kshs. But does not exceed Kshs.

Kshs.

— 500,000 45,000

500,000 750,000 65,000

750,000 1,000,000 75,000

Kshs. 1,000,000 20,000,000 fees as for 1, 000,000

plus an additional 1.75%

Over 20,000,000 fees as for 20,000,000

plus an additional 1.5%.

- (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds Kshs. But does not exceed Kshs. Kshs.

- 500,000 75,000

500,000 750,000 90,000

750,000 1,000,000 120,000

1,000,000 20,000,000 fees as for Kshs.

1,000,000 plus an additional 2%.

fees as for 20,000,000 plus an additional 1.5%.

Over 20,000,000

On what is chargeable between Advocate and Client, Part B, of Schedule 6, provides as follows: -



As between advocate and client the minimum fee shall be—

- (a) the fees prescribed in A above, increased by 50%; or
- (b) the fees ordered by the court, increased by 50%; or
- (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

17. It was the Respondent's contention that the Applicant did not file or tax party and party Bill of Costs as required by law. It is not clear how the purported Certificate of Costs dated 1st March 2019 was issued. The Certificate of Costs was issued irregularly without jurisdiction. Contrary to this averment, the Applicant produced a Certificate of Costs dated 1st March 2019 issued after the Party to Party Bill of Costs was taxed and allowed in the sum of Kshs.2, 972,675.
18. The Taxing Officer in his Ruling dated 26th November 2020 pointed out that the amount determined at party and party cost does not automatically form basis of assessment of the advocate client cost.
19. In the case of *M Njenga & Co. Advocates vs. Kenya Tea Development Agency Limited* [2011] eKLR the Court stated;

Be that as it may be, in my considered view, I am unable to find any support to the Ruling made by Hon. Mrs. Ougo, when she embarked upon changing the value of the subject matter shown and taken while taxing the Party and Party Bill of Costs. She went beyond the guidelines and directions made both by Hon. Waweru J. and Hon. Nambuye J. and also departed from the principle of taxing Advocate/Client Bill after Party and Party Bill of Costs is taxed. The Party and Party Bill of Costs after Certificate of Costs is an order of the court as regards the Instruction fees and becomes an order of the court as stipulated in Schedule V Part B.

...

20. There is no justifiable reason proffered by the Respondent to deviate from the position taken earlier by the Respondent in respect of the Instruction fees. The Respondent cannot be now permitted to renege or relent from accepting the Instructions fees allowed in Party and Party Bill of Costs. I do further consider that even this court cannot interfere in its award so as to decrease the same. The Hon. Taxing Master, as stated hereinbefore, has definitely misdirected herself and erred in making a fresh evaluation of the value of the subject matter and overlooking the Party and Party Bill of Costs which was taxed.”
21. In the matter at hand there is a Party and Party Bill of Costs. For that reason, the matter of assessing the Advocates costs would fall under B (a). Clearly the process of taxing an advocates fees is by applying fees prescribed in schedule 6(A) and then increasing it by 50%.
22. The Taxing Officer in this case misdirected himself in overlooking the Party and Party Bill of Costs which was taxed. This amounts to an error in principle. The language in Schedule 6(B) is unequivocal. It is by simply applying the fees prescribed in A and increasing it by 50%.

DISPOSITION

The upshot of the above is that the Reference in that regard is allowed in favor of the Applicant and to be taxed again before another Taxing Officer.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021 (VIRTUALLY)



M.W.MUIGAI
JUDGE

