



Said & 5 others v Taib Investment Limited (Environment and Land Miscellaneous Application 65 of 2022) [2023] KEELC 19160 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 65 OF 2022
NA MATHEKA, J
JULY 25, 2023**

BETWEEN

**FAHMI SALIM SAID 1ST APPLICANT
TOOL HOUSE LIMITED 2ND APPLICANT
MY HOME LIMITED 3RD APPLICANT
MUWA HOLDINGS LIMITED 4TH APPLICANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH APPLICANT
COUNTY GOVERNMENT OF MOMBASA 6TH APPLICANT**

AND

TAIB INVESTMENT LIMITED RESPONDENT

RULING

1. The Application is dated October 7, 2022 and is brought under rules 2 and 11 of the [Advocates \(Remuneration\) Order](#) and section 3A of the [Civil Procedure Act](#) cap 21 and the inherent jurisdiction of the Court seeking the following orders;
 1. That the decision of the Taxing Master delivered on September 21, 2022, in so far as the same relates to the reasoning and determination pertaining to the plaintiff/respondent's bill of costs dated February 28, 2022 and all other consequential orders made thereafter be set aside;
 2. That this honourable court be pleased to refer the matter back for re-taxation of the plaintiff respondent's bill of costs dated February 28, 2022, with proper and appropriate directions thereon;
 3. That in the alternative, this Honourable Court do exercise its inherent jurisdiction and be pleased to re-tax the item relating to instruction fees, getting up fees and the VAT Charges in the



Plaintiff/Respondent's Bill of Costs dated February 28, 2022, afresh and/ or make appropriate directions for taxation afresh;

4. That the costs of this application be awarded to the Applicants.
2. It is made on the grounds that the Taxing Officer's decision on taxation is based on an error of principle. That as a result of the Taxing Officer's error of principle, the Taxing Officer awarded a party and party costs that was manifestly high as to be highly unjust and detrimental to the Applicants and that the Taxing Master did not exercise his jurisdiction in taxing the said Bill of Costs judiciously.
3. The Plaintiff/Respondent opposed the application and stated that the Application is misconceived and is bad in law. The Defendants have not established that the Learned Taxing Master in the exercise of his discretion erred in enhancing the Instruction fees from Kenya Shillings 75,000 to Kenya Shillings 210,000.00. The said Application is made mala fides. The said Application is made to circumvent and defeat the cause of justice and to make the court act in vain. That the Defendant's/Applicant's Application has no merit and should be dismissed with costs.

This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the [Advocates Remuneration Order](#) which provides as follows:

- “(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 the 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.”

4. Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of [First American Bank of Kenya v Shah and Others](#) [2002] EA 64 and [Joreth Ltd v Kigano and Associates](#) [2002] 1 EA 92, that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In [First American Bank of Kenya v Shah and Others](#) [2002] EALR 64 the court held that;

“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”.

5. These principles reiterate the position of the Court of Appeal in [Joreth Ltd v Kigano & Associates](#) [2002] eKLR, where the said Court held that a Taxing Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.



6. The 1st and 3rd Defendants/Applicants in the instant application contends that being dissatisfied with the Taxing Officer's decision have filed this application. That the Taxing Officer erred in law and in fact in taxing the Instructions Fees by failing to apply Schedule 6 (1)(b) of the [Advocate Remuneration Order 2014](#) as the case was pegged on a monetary award of Kshs 500,000/=. The Taxing Officer erred in law and in fact in including Value Added Tax(VAT) in a party to party bill of costs.
7. In [Republic v Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'Njuguna](#) [2006] eKLR Ojwang, J (as he then was) expressed himself as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him. 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...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

8. The Taxing Master in his ruling dated September 21, 2022 provided that the taxation of the matter would be based on [Remuneration \(Amendment\) order](#) of 2014. Under Item one the taxing master based his calculations on schedule VI Part b of the 2014 [Advocates Remuneration order](#) and taxed it at Kshs 210,000/= enhancing it from Kshs 75,000/=. He considered that the nature of the suit and that it involved many parties in reaching that decision. Item 300 was therefore one third of the same as getting up fees. Be that as it may, I find that the other items might not have been drawn to scale for example on the issue of service and attendance and the Taxing Master was erroneous to that extent. Secondly, it is



trite law that VAT is awarded on Advocate – Client Bills only and can only be awarded if the Plaintiff in question tendered evidence for paid VAT and was consequently entitled to be indemnified as provided in *Pyramid Motors Limited v Langata Gardens Limited* [2015] and *Amalo Company Limited v B N Kotecha and Sons Limited & Another* [2022] eKLR. On perusal of the material on record, the matter did not meet the conditions set out for grant of VAT as it fell under party to party costs and no evidence was provided for payment of VAT.

9. I find that the Taxing Master used the wrong principles on the issue of VAT and the party and party items. Some of the relevant factors to take into account when taxing a bill include the nature and importance of the case 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. From the discrepancy mentioned above I find that there was an error in principle by the Taxing Master in the assessment. Consequently, I find that the application is merited and I grant the following orders;
 1. The Taxing Master’s decision of taxed bill of costs dated February 28, 2022 and ruling delivered on September 21, 2022 be and is hereby set aside.
 2. The bill of costs dated February 28, 2022 shall be remitted to another Taxing Master for taxation.
 3. Costs to the Applicants.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

