



Koceyo & Co Advocates v Nairobi City Water & Sewerage Company Limited (Environment and Land Miscellaneous Application E231 of 2021) [2023] KEELC 18801 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E231 OF 2021**

JO MBOYA, J

JULY 13, 2023

BETWEEN

KOCEYO & CO ADVOCATES APPLICANT

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

RULING

1. Vide Chamber Summons Application dated the March 1, 2023, the Respondent/Applicant, or better still, the Client; herein has approached the Honorable Court seeking for the following reliefs;
 - i. That the Ruling by Hon. Diana Orago Deputy Registrar delivered on the November 22, 2022 of this Court on the taxation of the Advocate-Client Bill of Costs dated the December 10, 2022 be set aside and/or vacated as relates to item 1 on Instructions.
 - ii. That the Deputy Registrar be restrained by an order of this Honorable Court from issuing a certificate of costs and if one has been executed the same be expunged from the record.
 - iii. That this Honorable Court be pleased to assess the said item 1 of the Respondent's bill based on the fact that the Respondent were only instructed to peruse the file as opposed to relying on the subject matter as used by the Taxing officer.
 - iv. That based on the said value of the suit and the instructions to the Respondent, the fees taxed is inordinately high.



- v. That the Taxing officer failed to consider the Applicant's submissions dated the July 29, 2022.
 - vi. That this Honorable Court do make any additional orders as the demands of justice dictates.
 - vii. That the costs of this Application be provided for.
2. The instant Application is premised and anchored on various, albeit, numerous grounds, which have been alluded to and enumerated at the foot of the Application. Furthermore, the instant Application is supported by the affidavit of one Dickson Khisa, advocate for the Applicant and which affidavit is sworn on the March 1, 2023.
 3. For good measure, upon being served with the instant Application, the Respondent/Advocate filed a Replying affidavit sworn on the March 6, 2023; and in respect of which, same has contended that the award of costs was fair and reasonable, and in any event, that the Learned taxing master properly exercised her discretion in arriving at the some of Kes 186, 893.40/= only.
 4. Notably, the instant Application came up for hearing on the June 6, 2023, where upon the advocates for the respective Parties agreed to canvass and ventilate the Application by way of written submissions. In this regard, the court proceeded to and directed that the Parties do file and exchange their written submissions within a set timeline.
 5. Pursuant to and in line with the directions of the court, the Applicant proceeded to and indeed filed written submissions dated the May 11, 2023; whereas the Respondent/Advocate filed written submissions dated the June 9, 2023. For completeness, the two sets of written submissions forms part of the record of the court.

Submissions By The Parties

a. Applicant's/client's Submissions:

6. The Applicant/Client filed written submissions dated the May 11, 2023; and in respect of which same has raised, highlighted and canvassed two (2) issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant/Client has submitted that the Applicant herein has placed before the Honorable court sufficient and credible basis to warrant interference with the exercise of discretion of the Learned taxing master.
8. Further and in addition, Learned counsel has submitted that the learned taxing master failed to appreciate that the Respondent/Advocate herein was merely instructed to peruse the court file and thereafter ascertain the obtaining status thereof and not otherwise.
9. Additionally, Learned counsel has submitted that by the time that the Respondent/Advocate was being instructed and/or retained in respect of the subject matter, the entire suit had been heard and determined and hence there was no more suit upon which the Respondent/Advocate could purport to take instructions to defend.
10. Be that as it may, Learned counsel has pointed out that despite the fact that the Client's advocate pointed out this pertinent issues to the Learned taxing master, same failed to take cognizance of the pertinent issues and thus the taxing master arrived at and/or reached an erroneous conclusion.
11. In support of the foregoing submissions, Learned counsel for the Client/Applicant has cited and relied on various decisions inter-alia *Mumias Company Sugar Ltd v Tom Ojienda & Associates Advocates*



[2021]eKLR, First American Bank of Kenya v Shah & Another [2002] 1EA 64, Kenya Forest Service v Wanyama C. S & Company Advocates [2021]eKLR, Otieno Ragot & Company Advocates v Kenya Airport Authority [2021]eKLR and Kamunyori & Co Advocates v Development Bank of Kenya Ltd [2015]eKLR, respectively.

12. Secondly, Learned counsel for the Applicant/Client has submitted that the taxation and award of instruction fees in the some of Kes 100, 000/= only, taking into account the totality of the evidence and the status of the matter, represents an error in principle by and at the instance of the taxing master.
13. Furthermore, Learned counsel has further submitted that the Respondent/Advocate herein could not be allowed to charge and/or levy charges on account of instructions fees, yet the Respondent/Advocate, neither filed any Pleadings in the matter or at all.
14. Based on the foregoing, Learned counsel has submitted that the award of Kes 100, 000/= only on account of Instructions fees, was therefore erroneous and unlawful.
15. In addition, Learned counsel has submitted that once the court finds and holds that the award on account of instructions fees was erroneous, then same ought to be reviewed and/or set aside.
16. On the other hand, Learned counsel has also submitted that the moment that the Instructions fees is reviewed, set aside and/or interfered with, then it behooves the Honourable court to also interfere with the increment, which is inordinately high on the award of instructions fees.
17. To justify the submissions relating to the review and interference with the award of costs, Learned counsel for the Applicant/Client, has cited and relied on, inter-alia, the case of Keziah Gathoni Supuu v Yano T/A Yano & Company Advocates [2019]eKLR, County Assembly of Kericho & Another v Bett & Another [2022] KEELRC 83 (KLR), respectively.
18. Premised on the foregoing, Learned counsel has thereafter proceeded to and implored the Honourable court to find and hold that the Respondent/Advocate herein is only entitled to nominal payment on account of instructions fees. In this regard, Learned counsel has proposed an award of Kes 15, 000/= only, plus VAT.

b. Advocate's/respondent's Submissions:

19. The Advocate/Respondent filed written submissions dated the June 9, 2023; and in respect of which same has raised and highlighted two (2) issues for consideration by the Honourable court.
20. Firstly, Learned counsel for the Respondent/Advocate has submitted that the learned taxing master applied the correct principles and took into account all the requisite factors in computing and awarding the instruction fees in the some of Kes 100, 000/= only.
21. In support of the submissions that the Learned taxing master correctly applied the principles in computing and awarding the instructions fees, Learned counsel for the Respondent/Advocate has cited various decisions inter-alia the case of Premchand Raichand Ltd & Another v Quarry Services of EA Ltd & Another [1972]EA 162, Mary Wangui Karanja & Another v Joseph Jenga & 2 Others [2020]eKLR, Joreth Ltd v Kigano & Associates [2002]eKLR and First American Bank of Kenya v Shah & Another [2002]1EA 64.
22. Secondly, Learned counsel has submitted that the current Application/reference by the Client/Applicant has neither demonstrated nor established any error of principle on the part of the learned taxing master, to warrant interference with the Judicial discretion of the taxing master or at all.



23. Furthermore, Learned counsel for the Respondent/Advocate has submitted that the learned taxing master complied with the law and hence her discretion in arriving at and awarding the some of Kes 186, 893.40/= only, ought not to be interfered with and/or disturbed, in any manner whatsoever.
24. Based and premised on the foregoing, Learned counsel for the Respondent/Advocate has therefore submitted that the reference beforehand is therefore misconceived and without any legal basis. In this regard, counsel has implored the Honourable court to dismiss the reference with costs.

Issues for Determination:

25. Having reviewed the Chamber Summons Application dated the March 1, 2023; and the response thereto and upon taking into account the written submissions filed by and on behalf of the advocates for the respective Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether or not the Learned Taxing master correctly understood the facts of the matter and thereafter applied the relevant principles in taxing the Advocate- client bill of costs.
 - ii. Whether the Applicant/Client has established and demonstrated any scintilla of inappropriate exercise of Discretion and if so; whether the court ought to interfere with the final award.

Analysis and Determination

Issue Number 1. Whether or not the Learned Taxing master correctly understood of the facts of the matter and thereafter applied the relevant principles in taxing the Advocate- client bill of costs.

26. Before venturing to address and/or consider whether the Learned taxing master appreciated the true facts and the totality of the evidence obtaining in respect of the primary file, whose contents were important in determining and ascertaining the quantum awardable on account of instructions fees, it is imperative to provide a brief background to this matter.
27. Notably, the primary suit was filed by and on behalf of the Plaintiff by the firm of M/s DK Njogu & Company Advocates and thereafter the Defendant retained and or engaged M/s Macharia Nderitu & Co Advocates to act for and essentially to defend the interests of the Defendant's Employees, who had been sued.
28. Subsequently, the primary suit proceeded for hearing and same was ultimately disposed of by way of a Judgment rendered on the May 13, 2014; and wherein Judgment was ultimately entered in favor of the Plaintiff on various terms, inter-alia an award of Kes 1, 000, 000/= only as General damages for trespass.
29. Instructively, long after the delivery of Judgment and extraction of the formal decree; the Respondent/ Advocate herein was instructed to peruse the court file and thereafter to advise on the obtaining status thereof. For good measure, the email correspondence containing the instructions to and in favor of the Respondent's advocate is dated the October 16, 2014.
30. Subsequently, the Respondent/Advocate proceed to and indeed perused the court file and thereafter reverted to and alerted the Client/Applicant herein that indeed the primary suit had been heard and determined culminating into the issuance of a Decree. In this regard, the Respondent/Advocate underscored that the decree which was obtaining in the primary file was indeed valid.



31. First forward, on the October 28, 2014, the Respondent/Advocate herein signaled to the Applicant/Client that there was an Application which had been filed and in this regard same sought for instructions to defend the impugned Application. For good measure, the Respondent/Advocate indeed proceeded to and defended the Application under reference.
32. The foregoing background is important to bring the entire matter into perspective. In this regard, it is common ground to underscore that by the time the Respondent/Advocate was being instructed to enter into the fray; the dispute in the primary suit had long been heard and determined.
33. In view of the foregoing, there is no gainsaying that the Respondent/Advocate herein did not take any instructions to defend the primary suit. For good measure, the primary suit had been duly defended by M/s Macharia Nderitu who participated up to and including the delivery of judgment.
34. To my mind, if there was an advocate who was entitled to charge the instructions fees for defending the primary suit; then that advocate was the law firm of M/s Macharia Nderitu & Company Advocates and not otherwise.
35. To this end, it is imperative to take cognizance of the ratio decidendi in the case of *Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others [2014] eKLR*, where the court held and observed as hereunder;
 44. 'I am in agreement with the reasoning and the award by the taxing officer. Instruction fees is only paid to an advocate in respect to the work done. Having not drawn the Plaintiff in Malindi HCCC No 118 of 2009, the Applicant is not entitled to the instruction fees in respect to the suit. As was held in the case of *First American Bank of Kenya v Shah & Another [2002]1 EA 64*, an advocate becomes entitled to full instruction fees to defend a suit the moment a defence is filed and the subsequent progress of the matter is not relevant. The same reasoning applies to the filing of a Plaintiff. The advocate who draws a Plaintiff is the one entitled to the full instruction fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done.'
36. Clearly and to my mind, the Respondent/Advocate herein, having been engaged and instructed long after the pleadings had been crafted/drafted; filed and the entire suit heard and determined; same can only charge fees for the actual work done from the time of receipt of instructions and not otherwise.
37. In respect of the instant matter, the Respondent/Advocate herein was engaged to peruse the court file, advise on the obtaining status and thereafter same defended a post Judgment Application which had been filed by and on behalf of the Plaintiff in the primary suit.
38. To the extent that the Respondent/Advocate was only engaged ex-post delivery of the Judgment, same cannot certainly file an advocate client bill of costs and purport to have received instructions to represent Employees of the Applicant/Client in the primary suit that was filed by the Plaintiff.
39. Be that as it may, it is important to point out that this critical aspect of the dispute escaped the mind and attention of the Learned taxing officer and therefore the Learned taxing officer proceeded to deal with the question of instruction fees as if the Respondent/Advocate herein had acted in the primary suit from the inception.
40. Further and in addition, it is also evident that the Learned taxing master also became obsessed with the monetary value of the dispute, which is a critical factor that guides taxation of costs, but essentially



where instructions are taken to defend the matter in question and not incidental proceedings, inter-alia, post Judgment Applications.

41. In my humble view, had the Learned taxing master appreciated the totality of the evidence that was obtaining in the primary file and coupled with the nature/scope of work that was executed by the Respondent/Advocate; no doubt the Learned taxing officer would have arrived at a different/contrary position.
42. Consequently and in the premises, I come to the conclusion that the Learned taxing officer erred in awarding instruction fees in the sum of Kes 100, 000/= only, (sic) on the basis that the Respondent/Advocate had indeed defended the primary suit, which was not the case.
43. Notably and to this end, I discern an apparent and evident error in principle, which colored the mind and discretion of the Learned taxing master and has thus vitiated the Final outcome.

Issue Number 2. Whether the Applicant/Client has established and demonstrated any scintilla of inappropriate exercise of discretion and if so; whether the court ought to interfere with the Final award.

44. Whilst discussing issue number one, in terms of the preceding paragraphs, this court has indeed found and held that the Learned taxing master did not appreciate the nature and scope of work that was undertaken by the Respondent/Advocate.
45. Further and in addition, this court has similarly underscored that where a counsel is retained and engaged to attend to and/or handle incidental proceedings and in this case post Judgment Applications, such an advocate can only charge for the actual work done and not otherwise.
46. Despite the foregoing, the Respondent/Advocate herein crafted a bill of costs, which showed and/or exhibited that same had indeed acted for and on behalf of the Applicant/Client in respect of the primary suit. However, the position which was reflected in the body of the Advocate/Client Bill of Costs, has since turned out to be incorrect and erroneous.
47. To my mind, the award of instruction fees in the sum of Kes 100, 000/= only (which was influenced by inter-alia the value of the suit property; the complexity of the suit and the interests of the parties therein), was premised on the assumption that the Respondent/Advocate had indeed defended the entire suit.
48. Had the Learned taxing master appreciated the nature and scope of the work which was undertaken by the Respondent/Advocate, (which has been amplified in paragraph three (3) of the supporting affidavit and which in any event has not been denied in the replying affidavit; the learned taxing officer, would surely not have awarded Kes 100, 000/= only).
49. Premised on the foregoing, I come to the inescapable and inevitable conclusion that the award of Kes 100, 000/= only on account of instructions fees for (sic) defending the Primary suit, was clearly arrived at in vacuum and in any event without any legal foundation, whatsoever.
50. In arriving at the foregoing conclusion, I have taken into account the ratio decidendi in the case of *Kamunyori & Company Advocates v Development Bank Of Kenya Limited* [2015] eKLR, where the court underscored the following remarks;

' Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the



Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside'

51. Having come to the foregoing conclusion, it is apparent and evident that the taxation of the instruction fees and the incidental increment thereof; cannot therefore stand. In this regard, same be and are hereby reviewed and set aside.
52. Lastly, having set aside and reviewed the substratum of the certificate of taxation, the question that does arise is whether or not this court should proceed to undertake the taxation by itself or otherwise.
53. Nevertheless, I must point out that the established and hackneyed position of the law is that where the court has found and discerned an error in principle in the taxation of costs, it behooves the court to remit the concerned bill of Costs to the taxing master, for purposes of taxation, albeit to the subject of guidance of the court.
54. For good measure, the position alluded to in the foregoing paragraph was underlined and emphasized in the case of *Joreth & Another v Kigano & Associates [2002]eKLR*, where the court held as hereunder;

' Besides it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the case of *Steel Construction & Petroleum Engineering [EA] Ltd v Uganda Sugar Factory Ltd [1970] EA 141* per spry JA at page 143:

'Counsel for the appellant submitted, relying on *D'Souza v Ferao [1960] EA 602* and *Arthur v Nyeri Electricity Undertaking [1961] EA 492* that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the prop er course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion.'

55. From the foregoing, it is my humble view that the best and most appropriate recourse is to refer the Advocate/Client Bill of Costs dated the December 10, 2021; to be taxed by a taxing officer other than Hon. Dianna Orago, whose certificate of taxation has been found to have been laced with errors of principles.

Final Disposition

56. In the body of the Ruling herein, I have endeavored to and indeed highlighted assorted errors, which were neither addressed nor taken into account by the Honorable taxing master.
57. Further and in addition, I have come to the conclusion that the highlighted errors or mistakes have vitiated/ impacted on the final outcome; and especially the award on Instructions fees.
58. Consequently and in the premises, the Chamber Summons Application dated the March 1, 2023; be and is hereby allowed on the following terms;
 - i. 'The certificate of taxation arising from the ruling dated ad delivered on the November 22, 2022; be and is hereby set aside and/or quashed.



- ii. The Respondent's/Advocate's Bill of Costs dated the December 10, 2021 be and is hereby remitted to the taxing master for purposes of taxation, albeit taking into account the directions/guidance obtaining in the body of the Ruling hereof.
- iii. For good measure, the Advocate Client Bill of Costs shall be taxed by a Taxing Master other than Hon Dianna Orago (Senior Deputy Registrar).
- iv. The costs of the Reference herein shall abide the outcome of the Taxation.
- v. The Advocate Client Bill of Costs shall be mentioned before the Deputy Registrar/Principal Deputy Registrar on a date to be agreed upon by the advocates for the respective Parties.
- vi. Either party shall be at liberty to apply.'

59. For good measure, the monies at the foot of the certificate of taxation, which had hitherto been paid out to and released to the Respondent/Advocate, shall be refunded to the Applicant/Client within 30 days from the date of the ruling hereof.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant.

Mr. Khisa for the Applicant/Client.

Ms. Clare Nyakundi h/b for Mr. Koceyo for the Advocate/ Respondent.

