



CM Advocates LLP v Nairobi City County & 3 others (Environment & Land Case E270 of 2022) [2023] KEELC 21228 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E270 OF 2022
MD MWANGI, J
OCTOBER 31, 2023**

BETWEEN

CM ADVOCATES LLP APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

METROPOLITAN SERVICES 3RD RESPONDENT

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 4TH
RESPONDENT**

(Being a Reference from the Ruling on Taxation of Advocate’s Bill of Costs by the learned Taxing Officer, Honourable Diana Orago dated and delivered on 23rd December, 2021)

RULING

Background

1. What is before me is a reference from the ruling on taxation of an Advocate –client Bill of costs delivered on 13th October, 2022. The reference is brought under the provisions of Rule 11(2) of the [Advocates \(Remuneration\) Order](#). It is supported by the affidavit of Caroline Kendi Githinji and the grounds on the face of it. The Advocate/Applicant prays for the setting aside of the ruling of 13th October, 2022 by Hon. Diana Orago; taxing master, taxing the Advocate Client Bill of Costs dated 23rd December, 2021, at Kshs 624,620.00, in ELC Misc. E244/2021. The Advocate Applicant prays that this Court reassesses the quantum of total fees and disbursement in the Advocate-client Bill of Costs. In the alternative, the applicant seeks that the Bill of costs be remitted for re-assessment of quantum of the total fees before a different taxing master.



2. The main grounds upon which the reference is premised on is that the Taxing Master erred in principle by arriving at a decision that the value of the subject matter was unascertainable from the pleadings and the ruling of the Court in Nairobi ELCC No. 218 of 2015 (Mariakani Welfare Estate Association -vs- County Government of Nairobi & others). The applicant asserts that the learned Taxing Master misdirected herself and arrived at a decision that was not only erroneous and unreasonable in the circumstances but legally untenable by awarding the Advocate/Applicant fees which were grossly disproportionate to the work done by the Advocate/Applicant and failing to take into consideration the value of the subject matter which was clearly indicated at Kshs 1,200,000,000/= in the pleadings, without any basis in Law and fact.

Court's Directions: -

3. Despite service of the reference and hearing notices upon the 1st Client/Respondent, it did not file a response to the Bill of costs. On 29th June, 2023, an Advocate by the name of Mr. Waweru appeared before the Court and informed the Court that he had filed a notice of appointment on behalf of the 1st Respondent. He sought 14 days to file a response to the reference. The Advocate did not however comply within the 14 days.
4. Again on 27th July, 2023, the Advocate for the 1st Respondent sought a further 30 days which was granted. However, on the date that the matter was rescheduled for hearing of the reference, the Advocate informed the Court that he did not intend to file a response to the reference. The Court then proceeded to issue a ruling date with leave to the Advocate/Applicant to file written submissions in 7 days. The Advocate/Applicant duly complied. The Court has had occasion to read the submissions filed.
5. The 2nd Respondent is the defunct Nairobi Metropolitan Services.

Issues for Determination:

6. Having considered the application and the submissions filed in its support, the Court is of the view that the issue for consideration is whether the Taxing Master erred in principle in making the impugned ruling.

Analysis and Determination:

7. In the impugned ruling of 13th October, 2022, the Taxing Master made a finding to the effect that:

“In this matter, it is evidence that the value of the subject matter is unascertainable from the pleadings and the ruling”.
8. This finding by the Taxing Master, off course informed the choice of schedule of the Advocates Remuneration Order under which she proceeded to assess the costs including the instructions fees. The Advocate/Applicant in his submissions argue that the finding by the taxing Master was erroneous because the value of the subject matter was indeed determinable from the pleadings. The Applicant avers that the subject matter of the suit, ELCC 218/2015, was a debt swap agreement in respect of a debt of Kshs 1.2 billion for a property valued at Kshs 1.95 billion which was stated in the pleadings.
9. Consequently, as a result of the erroneous finding, the Taxing Master awarded instruction fees that was manifestly low because she relied on the wrong schedule of the *Advocates Remuneration Order*. The Taxing Master applied schedule VI paragraph j of the *Advocates Remuneration Order* as if the Applicant had taken over the conduct of the matter halfway, while the Advocate/Applicant was



entitled to his full fees. The applicable schedule according to the Applicant was schedule VI paragraph (a) of the *Advocates Remuneration Order*.

10. The Advocate further submits that the Application dated 10th October, 2016 was not a proceeding within the suit, rather, it was a fresh proceeding filed after the suit had been determined by way of a consent judgment.
11. I have carefully considered the submissions by the Advocate/Applicant before this court and before the Taxing Master in ELC Misc. E244 of 2021, the Bill of Costs filed 23rd December 2021 and the submissions by the Respondent. I have also taken time to peruse the file ELCC 218 of 2015. I agree with the submissions of the Advocate/Applicant that the finding by the taxing Master was erroneous because the value of the subject matter was indeed determinable from the pleadings. The subject matter of the suit ELCC 218/2015, was a debt swap agreement in respect of a debt of Kshs 1.2 billion for a property valued at Kshs 1.95 billion which was stated in the pleadings.
12. In the case of *Kamunyori & Company Advocates v Development Bank of Kenya Limited* (2015) Civil Appeal 206 of 2006, the court held that;
 - “.. 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”
13. My finding therefore is that there was an error of principle.
14. On the above basis, I hereby allow the Advocate’s application dated 15th November, 2022 and set aside the ruling of 13th October, 2022 by Hon. Diana Orago. I direct that the Bill of costs dated 23rd December, 2021 be remitted for re-assessment of quantum of the total fees before a different taxing master.
15. I further grant the Applicant the costs of this application.
16. The final disposition is that the Advocate’s application dated 15th November 2022 is hereby allowed in the following terms;
 - a. The ruling of 13th October, 2022 by Hon. Diana Orago is hereby set aside.
 - b. The Bill of costs dated 23rd December, 2021 be remitted for taxation before a different taxing master.
 - c. The Advocate shall have the costs of this application.

It is so ordered.

RULING DATED, SIGNED ND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023

M. D. MWANGI

JUDGE

In the virtual presence of:



Mr. Gisemba holding brief for Ms. Otunga for the Advocate/Applicant

No Appearance for the Respondent

Yvette: Court Assistant

M. D. MWANGI

JUDGE

