



Kaira Nabasenge t/a Kutto & Kaira Nabasenge Advocates v Sum (Environment and Land Miscellaneous Application E016 of 2023) [2023] KEELC 21137 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2023**

JM ONYANGO, J

OCTOBER 31, 2023

**IN THE MATTER OF SECTION 44, 48 AND 51 OF THE ADVOCATES
ACT CAP 16 LAWS OF KENYA AND THE ADVOCATES
(REMUNERATION ORDER) (AMENDMENT) ORDER 2014**

AND

**IN THE MATTER OF INVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEIOUS (ELC) APPLICATION NO.49 OF 2022; KAIRA NABASENGE T/
A KUTTO & KAIRA NABASENGE ADVOCATES VS. VERONICA CHEPSAT SUM**

AND

**IN THE MATTER OF ADVOCATE –CLIENT BILL OF COSTS
PURSUANT TO THE BILL OF COSTS DATED 7TH OCTOBER 2022**

AND

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT AT
ELDORET ELC CASE NO.4 OF 2022(OS); REGISTERED TRUSTEES OF
TH ECATHOLIC DIOCESE OF ELDORET VS.VERONICA CHEPSAT SUM**

BETWEEN

**KAIRA NABASENGE T/A KUTTO & KAIRA NABASENGE
ADVOCATES APPLICANT**

AND

VERONICA CHEPSAT SUM RESPONDENT

RULING

1. By a Notice of Motion dated 20.3.23 the firm of Kaira Nabasenge t/a Kutto & Kaira Nabasenge Advocates which acted for the Respondent in Eldoret ELC Case No 4 of 2022 (OS) Registered



Trustees of The Catholic Diocese of Eldoret v Veronica Sum filed an application seeking the following orders:

- a. That the decision of the Taxing officer (Deputy Registrar) vide his ruling and Certificate of costs issued on 6th March 2023 in ELD ELC Miscellaneous Application No 49 of 2023 Kaira Nabasenge t/a Kutto Kaira Nabasenge v Veronica Chepsat Sum be set aside.
 - b. That the said Bill of Costs dated 7th October 2022 be taxed afresh by a differently constituted Taxing Master/Court.
 - c. In the alternative and in the interest of justice that this court be pleased to assess/tax the costs contained in the Advocate-Client Bill of Costs and Party and Party bill of Costs dated 7th October 2022 lawfully payable to the Applicant.
 - d. That the Court do issue such other orders /directions as it may deem fit and just to issue to serve the ends of justice
2. The costs of this application be provided for.
 3. The application which is expressed to be brought pursuant to Section 44 of the *Advocates Act* Cap 16 of the Laws of Kenya, Schedule 6 of the *Advocates Remuneration Order, 2014* and Order 50 Rule 1 of the *Civil Procedure Rules* is premised on the 13 grounds enumerated on the face of the Notice of Motion. In essence, the application is premised on the grounds that the Taxing Master misapprehended and misapplied the law and principles of taxation in the nature of the suit giving rise to the taxation and failed to apply correctly the principles and formula provided for in Schedule 6 (Advocate-Client Costs) of the *Advocates Remuneration Order 2014* for assessing the instruction fees payable.
 4. It is contended that the Taxing Master erred by failing to exercise the powers and discretion given to him under the Advocates Remuneration Order properly, fairly and judiciously thereby arriving at an erroneous decision. Further that he erred by stating that the value of the subject matter is Kshs 3,000,000/= yet the value is Kshs 45,000,000 which value was demonstrated by the valuation report. Further that he erred by in law and fact by stating that the Applicant had presented a Bill of Costs of Kshs 2,150,530 and yet the Applicant had presented a Bill of Costs of Kshs 2,150,205 vide the Advocate-Client Bill of Costs dated 7th October 2022.
 5. The Applicant further contended that the Taxing Master erred in principle by arriving at an erroneous decision for the reason of her (*sic*) failure to give due and/or proper consideration to the relevant factors of the case including but not limited to the;
 - a. Nature and importance of the suit giving rise to the taxation;
 - b. Interest of the parties;
 - c. Value of the subject matter;
 - d. Importance and complexity of the matter;
 - e. Conduct of the proceedings;
 - f. And all other relevant circumstances.



6. The application is based on the Supporting affidavit of Kaira Nabasenge Advocate sworn on 20th March 2023 in which he deposes that he was instructed by his client (Veronica Sum) to defend the civil suit against her being Eldoret ELC Case No 4 of 2022 (OS) Registered Trustees of the Catholic Diocese of Eldoret v Veronica Chepsat Sum.
7. He avers that he responded to the application by filing a Replying Affidavit sworn by his client on 20th April 2022. He also filed a Preliminary Objection followed by a Notice of Motion dated 6th May, 2022 seeking to strike out the Originating Summons.
8. He states that the land parcel in dispute being Pioneer/Racecourse Block 2 (Kapmalel)/9 measures 5 acres and is valued at Kshs 45,000,000 as indicated in the valuation report annexed to his affidavit.
9. Mr. Nabasenge avers that he filed that the Advocate- Client Bill of Costs dated 7th October, 2022 for Kshs 2150,205 when his client failed to pay the agreed fees and engaged another advocate. The said Bill was presented vide Eldoret ELC Miscellaneous Application No 49 of 2022. The said Bill of Costs was disposed of by way of written submissions and the same was taxed at Kshs 261, 825 vide the ruling of the Deputy Registrar and Certificate of Costs issued on 6th March, 2023.
10. He contends that the Taxing Master declined to grant the instruction fees as presented and assessed the same at Kshs 120,000 without any legal basis or justifiable reason.
11. The application is resisted by the Respondent through the Replying affidavits of Veronica Sum, Eileen Sum and Edel Sum all sworn on the 8th May 2023 in which they aver that they are willing to pay the fees as taxed.
12. The court directed that the application be canvassed by way of written submissions and both parties duly filed their submissions which I have considered.

Applicant's Submissions

13. In his submissions, learned counsel Mr. Nabesenge submitted that the main contention relates to item No 1- the Instruction fees. He submitted that the Applicant presented the instruction fees as per Schedule 6A paragraph 1(b) of the *Advocates Remuneration Order, 2014*. It was his submission that the land parcel in question is LR No Pioneer/Racecourse Block 2 (Kapmalel)/9 measuring approximately 5 acres and is valued at Kshs 45,000,000 as per the valuation report submitted to the Taxing Master. He submitted that in accordance with the calculation in Schedule 6, the fees works out at Kshs 1,195,000 as follows:
 - a. Instruction fees charged Kshs 120,000
 - b. Add 2% in respect of 20,000,000 Kshs 400,000
 - c. Add 1.5% of 45,000,000 Kshs 675,000
 - d. Total instruction fees Kshs 1,195,000
 - e. In arguing for the review of the taxing Master's decision, counsel relied on the case of *KTK Advocates v Baringo County Government* (2017) eKLR where the



Court relied on the case of *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No 23 of 1999 where the Court held as follows:

“The principles of taxation of costs were restated by the Ugandan Supreme court as follows:

“Save 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 with which the taxing officer is particularly fitted to deal, and he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion, he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or:

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties”.

14. The court further observed that:

“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...”

15. He further relied on the case of *Mwangangi & company Advocates v Machakos County* (2018) eKLR where Justice Nyamweya cited the case of *Joreth v Kigano & Associates* (2002) eKLR as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.



16. He contended that the Taxing Master is thus not limited to the pleadings, judgment and settlement in determining the value of the subject matter of a suit and is granted such discretion by paragraph 13A of the *Advocates Act* which provides as follows:
- “ 13A. Powers of Taxing officer
- For the purpose of any proceedings before him, the taxing officer shall have the power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such proceedings as may be necessary for the determination of any matter in dispute before him”
17. Counsel submitted that the Taxing Master ought to have ascertained the value of the subject matter from either the pleadings, judgment or settlement and in the instant case the suit property was valued at Kshs 45,000,000 and the valuation report was supplied to him at the time of taxation.
18. He submitted that the instruction fee of Kshs 120,000 arrived at by the Taxing Master was based on the purchase price of Kshs 3,000,000 for 5 acres in 1997 which was not applicable at the moment as the current market price is Kshs 45,000,000.
19. On whether the Court should tax the bill or remit it back to a different officer for taxation, he submitted that the court ought to set aside the award of the Taxing Master and assess the Applicant’s Bill of Costs in accordance with the provisions of the law.

Respondents’ Submissions

20. On his part, learned counsel for the Respondents submitted that it is only in clear and unfair circumstances that the court may interfere with the finding of a Taxing Master. It was his contention that the courts have ruled that it is within the Taxing officer’s discretion to arrive at any award as long as the award is founded on law and the circumstances of each case. He relied on the case of *Republic v Ministry of Agriculture and 20 others Ex-parte Muchiri W’ Njuguna* (2006) eKLR where justice Ojwang (as he then was) stated 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 is 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.”
21. He submitted that in the instant case the Taxing Master in arriving at the award of Kshs 261,825 had given sound and cogent reasons and he could not be faulted for the figure being too low or manifestly excessive.
22. It was his further submission that the Applicant never produced a valuation report to show the suit property was valued at Kshs 45,000,000 and that failure to adduce any evidence to back their allegation offends sections 107 to 109 of the *Evidence Act* as he who alleges must prove. He contended that the Taxing Master had nevertheless arrived at a reasonable figure of Kshs 120,000 in accordance with



Schedule 6 of the Advocates Remuneration Order, 2014, and that the court should restrain itself from interfering with the said award.

23. He was of the view that litigation must come to an end. He relied on the case of *Kamau James Gitutho & 3 others v Multiple ICD (Kenya) Limited & another* (2019) eKLR for the proposition that the principle of finality is hinged on the public policy that litigation must come to an end a certain point regardless of what the parties think of the decision which has been handed down.

Analysis and Determination

24. Having considered the Notice of Motion, Replying Affidavits and rival submissions, the issues for determination are:
- i. Whether the court should set aside the decision of the Taxing Master.
 - ii. Whether the court should tax the bill afresh or remit it to the same or different Taxing Master for fresh taxation.
25. It is common ground that the Bill of Costs which is the subject of this Reference was in respect of Eldoret ELC Case No 4 of 2022 (OS) Registered Trustees of the Catholic Diocese of Eldoret v Veronica Chepsat Sum where the Applicant was instructed to defend his client in the said suit and he filed a Replying Affidavit, Notice of Motion as well as a Notice of Preliminary Objection.
26. Contrary to what the Respondent's counsel has submitted, the Applicant annexed copy of the valuation report for land parcel number Pioneer/Racecourse Block 2 (Kapmalel)/9 when he filed Advocate- Client Bill for Taxation in Misc Application No 49 of 2022. I am therefore of the view that in line with Order 13A of the *Advocates Remuneration Order, 2014* which empowers the Taxing Master to summon and examine witness and direct the production of documents in order to arrive at his decision, the Taxing Master ought to have taken into account the current value of the subject matter which is Kshs 45,000,000 as the basis for assessing the instruction fees under Schedule 6A of the *Remuneration Order 2014*.
27. To the extent that he failed to do so, it is my finding that he applied the wrong principles and hence it becomes necessary for me to interfere with his decision.
28. Consequently, the ruling of the Taxing Master delivered on 24th February is hereby set aside and I direct that the Applicant's Advocate-Client Bill of Costs be taxed pursuant to Schedule 6A paragraph 1(b) of the *Advocates Remuneration Order, 2014*.
29. The matter is remitted to the Deputy Registrar, High Court for fresh taxation.
30. The costs of this application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY of OCTOBER 2023.

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J.M ONYANGO

JUDGE.

