



**Nabasenge t/a Kutto & Kaira Nabasenge Advocates v Sum (Environment and Land Miscellaneous Application E015 of 2023) [2023] KEELC 21119 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21119 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E015 OF 2023**  
**JM ONYANGO, J**  
**OCTOBER 31, 2023**

**BETWEEN**

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

**AND**

**VERONICA CHEPSAT SUM ..... RESPONDENT**

**RULING**

1. The firm of Kaira Nabasenge T/A Kutto Kaira Nabasenge Advocates who acted for the Respondents in Eld Cm Miscellaneous Application No. 91 of 2022 Veronica Sum (suing As the Legal Representative of the Estate of the Late Ernest Sum) v Director of Survey filed a Notice of Motion dated 20<sup>th</sup> March, 2023 seeking to challenge the decision of the Taxing Master vide his ruling and Certificate of costs issued on 6<sup>th</sup> March, 2023 in Eld ELC Miscellaneous Application No. 50 of 2023 Kaira Nabasenge T/ a Kutto Kaira Nabasenge v Veronic Chepsat Sum & 2 Others.
2. 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 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 (7(A) Advocate-Client Costs) and the *Advocates Remuneration Order*, 2014 for assessing the instruction fees payable. It is also 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.760,800,000 which value was demonstrated by the valuation report supplied to him.



3. The application is further based on the Supporting Affidavit of Kaira Nabasenge Advocate sworn on 20<sup>th</sup> March 2023 in which he deposes that he was instructed to seek orders for resurveying of land parcel number I.R 603 ( LR No. 2226) and he filed an application vide Eldoret CMCC Miscellaneous Application No. 91 Of 2022. That the land in question measures approximately 1,268 acres and is valued at Kshs.760,800,000 which translates to Kshs.600,000 per acre as per the valuation report annexed to his affidavit.
4. It was his further deposition that the Respondents refused to pay the agreed fee and instead engaged another advocate to take up the matter. He states that this is what prompted him to file his Advocate-Client Bill of Costs dated 7.10.22 for Kshs.33,586,280 which was drawn under Schedule 7 of the *Advocates Remuneration Order*, 2014. The said Bill of Costs which was filed vide ELC Miscellaneous Application No. 50 of 2022 was taxed at Kshs.261,825 by the Taxing Master vide his ruling dated 24<sup>th</sup> February, 2023 and a Certificate of Costs dated 6.3.23 was issued.
5. He contends that the Taxing Master misapprehended and grossly misdirected himself in reaching his decision in which he declined to grant the instruction fees as presented and assessed the same at Kshs.120,000 without any basis in law and without any justifiable cause or reason.
6. The application is opposed by the Respondents through the Replying affidavits of Veronica Chepsat Sum and Edel Chepkorir Sum both sworn on 8<sup>th</sup> May, 2023. In the said affidavits they depose that they are aware of the Advocate-Client Bill of costs filed against them which was taxed at Kshs.261,852 vide a ruling delivered on 24.2.23 and a Certificate of Costs issued on 6.3.23. It is their contention that Bill of Costs was properly taxed and they intend to settle the said bill as soon as possible.
7. The court directed that the application be canvassed by way of written submissions ad both parties duly filed their submissions.

### **Applicant's Submissions**

8. In his submissions, learned counsel Mr. Nabesenge submitted that the main contention relates to item No. 1- the Instruction fee. He submitted that the Applicant presented the instruction fees as per Schedule 7A paragraph 1(c) of the *Advocates Remuneration Order*, 2014. It was his submission that the land parcel in question is land Registration No. 2226 measuring approximately 1,268 which is valued at Kshs.760,800,000 according to the valuation report submitted to the Taxing Master and according to his calculation the total instruction fee is Kshs.19,060,000.
9. He further submitted that in his ruling the Taxing Master had indicated that the Applicant presented a bill of Kshs.2,150,530 which was erroneous since the bill was for Kshs.33, 586,280.
10. It was his contention that the Taxing Master in awarding the instruction fees of Kshs.120,000 erroneously relied on the provisions of Schedule 6 Section 1(b) of the *Advocates Remuneration Order*, 2014 and failed to appreciate the fact that the instant Bill of Costs was drawn pursuant to the provisions of Schedule 7A paragraph 1(c) of the *Advocates Remuneration Order*, 2014 bearing in mind that the proceedings which are the subject of taxation herein were filed in the Chief Magistrates Court.
11. He further contended that the Taxing Master did not explain how he arrived at the figure of Kshs.120,000 and he appears to have plucked the figure from the air.



12. 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.

13. 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...”

14. Counsel submitted that their instruction fees was based on the value of the subject matter in accordance with Schedule 7A paragraph 1(c) of the *Advocates Remuneration Order*, 2014. He relied on the case of *Joreth Ltd v Kigano & Associates* (2002) 1 E.A 92 where the Court of Appeal held that:

“We would at this stage point out that the value of the subject matter of suit for the purposes of taxation of a bill of costs ought to be determine from the pleadings, judgment or settlement (if such be the case) but if the same is not 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 judge and all other relevant circumstances.”

15. It was his further contention that the Taxing Master ought to have ascertained the value of the subject matter from the pleadings, judgment or settlement. He was of the view that in the instant case which related to proceedings filed in the subordinate court, the land was valued at Kshs. 760,800,000 as per the valuation report supplied to the Taxing Master but the Taxing Master chose to ignore the same. He added that the Taxing Master misapplied and misapprehended the principles in the Joreth case.



16. Counsel submitted that the Taxing Master ought to have exercised his powers under Section 13A of the [Advocates Remuneration Order](#) 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 relied on the case of [Mwangangi & Company Advocates v Machakos County](#) (2018) eKLR where the court emphasized the need for the taxing officer to rely on the above provision of the [Advocates Remuneration Order](#).
18. He submitted that the instruction fee of Kshs.120,000 arrived at by the Taxing Master was inordinately low and had no legal basis.
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 of the figure being too low or manifestly excessive.
22. It was his submission that in the case at hand, the Applicant was instructed to seek orders compelling the director of Surveys to conduct a fresh survey of the land parcel known as I.R 603 measuring approximately 1300 acres which consists of the estate of Ernest Sum (deceased) whose administratrix is the 1<sup>st</sup> Respondent. He submitted that Schedule 7A paragraph 2 of the [Advocates Remuneration \(Amendment\) Order](#), 2014 provides for the remuneration where there is no specific sum claimed in the following terms:

“In any suit or appeal by the nature of which no specific sum is sued for, claimed for or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000 if undefended or unopposed



and (subject to any special order for good reason connected with the nature and importance of the difficulty or the urgency of the matter) not to exceed Kshs.50,000.”

23. He contended that it was patently misguided for the Applicant to base their instruction fees on the value of the land parcel known as I.R 603 yet they were not defending the said suit land but merely seeking orders for a resurvey of the said parcel of land. In the circumstances the law demands that the instruction fees be revised downwards to Kshs.50,000. He urged the court to exercise restraint by not interfering with the decision of the Taxing Master. 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 CM Miscellaneous Application No. 91 of 2022 in which the Applicant was instructed to file an application seeking a resurvey of that parcel of land known as I.R 603 (Land Reference No. 2226). The Bill of costs was drawn pursuant to Schedule 7A paragraph 1(c) of the *Advocates Remuneration (Amendment) Order*, 2014. The said Schedule provides as follows:
1. Where the sum found due (in the case of a wholly or partially successful plaintiff) or the sum sued for in the case of a wholly successful defendant) Subject as provided in this Schedule, the fees for instructions shall be as follows:
    - a. To sue in an ordinary suit in which no appearance is entered under Order 1X A of the Civil *Procedure Rules* where no application for leave to appear and defend is made, the fee shall be 65% of the fee 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 fee 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 of the fee chargeable under item 1(b) of this schedule.
26. The opening paragraph of Schedule 7 refers to “where the sum found due” or “the sum sued for.” In Miscellaneous Application no. 91 of 2022 there is no “sum found due” or “sum sued for” as what the Applicant seeks is a resurvey of the suit property. The miscellaneous application is not a pleading from which the value of the subject matter can be ascertained as contemplated in the case of Joreth vs. Kigano & Associates (supra).



Under Section 2 of the [Civil Procedure Act](#), pleading includes:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

27. The applicable provision is Schedule 7A paragraph 2 of the [Advocates Remuneration \(Amendment\) Order](#), 2014 which provides for the remuneration where there is no specific sum claimed.
28. I am alive to the fact that a judge ought not to interfere with the decision of the taxing officer unless it is shown that the taxing officer erred in principle. See [KTK Advocates v Baringo County Government](#) (2017) eKLR and [Republic v Ministry of Agriculture and 20 Others Ex-parte Muchiri W' Njuguna](#) (2006) eKLR (*supra*).
29. In so far as the Taxing Master relied on Schedule 6 part B of the [Remuneration Order](#), instead of schedule 7A paragraph 2 he applied the wrong principles and hence it becomes necessary for me to interfere with his decision.
30. Consequently, the ruling of the Taxing Master delivered on 24<sup>th</sup> February is hereby set aside and I direct that the Applicant's Advocate–Client Bill of Costs be taxed pursuant to Schedule 7A paragraph 2 of the [Advocates Remuneration Order](#), 2014.
31. The matter is remitted back to the Deputy Registrar, High Court for fresh taxation.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

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**J.M ONYANGO**

**JUDGE**

