



Mugumya t/a Mugumya and Company Advocates v Salat (Environment and Land Miscellaneous Application E018 of 2023) [2023] KEELC 21962 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21962 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E018 OF 2023
MC OUNDO, J
NOVEMBER 30, 2023
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC MISC APPLICATION NO. E018 OF 2023
IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA
AND
IN THE MATTER OF ADVOCATES REMUNERATION ORDER, 2014
AND
IN THE MATTER OF REFERENCE FROM THE RULING OF THE TAXING OFFICER OF THE ENVIRONMENT AND LAND COURT AT KERICHO
AND
IN THE MATTER ARISING OUT OF HIGH COURT MISC APPLICATION NO. E018 OF 2023

BETWEEN
ROGERS MUGUMYA T/A MUGUMYA AND COMPANY
ADVOCATES ADVOCATE
AND
JOSEPHINE CHESANG CHEPKWONG SALAT CLIENT

RULING

1. Before me for determination is an Application dated 10th July 2023 by way of Chamber Summons brought pursuant to the provisions of Rule 11, Rule 50A of the Advocates (Remuneration) Order,



2014, Sections 1A, 1B and 3A of the Civil Procedure Act, Article 159 of the Constitution and all other enabling provisions of law in which the Applicant herein seeks for the following orders:

- i. That the costs allowed by the Deputy Registrar Mr. E.M Nyakundi on 21st June, 2023 on taxation of the Advocate/Applicant's Bill of Costs dated 3rd May 2023 be set aside in its entirety.
 - ii. That in the alternative, the Bill of Costs dated 3rd May, 2023 be reviewed and taxed off or remitted with appropriate directions to a Taxing Officer as the court shall deem fit for reconsideration.
 - iii. That costs of the application be provided for.
2. The Applicant's application was supported by the grounds therein and the Supporting Affidavits of Josephine Chesang Salat, the Client/Applicant herein dated the 10th July, 2023 and 17th July, 2013 respectively to the effect that the honorable Taxing Master delivered a ruling dated the 21st June, 2023 which had no reasons as to how the figure of Kshs 5,000,000/= on instruction fee had been arrived at keeping in mind that the said Taxing Officer had already found out that the suit was settled by a consent in the sum of Kshs. 20,000,000/=.
 3. That the Taxing Officer failed to appreciate that the case was a non-complex and straight forward dispute which was neither protracted nor did it raise any novel points of law that would require extraneous research hence no justification for the enhancement of the instruction fees payable. Further, that the Taxing Officer erred in failing to utilize the provisions of Schedule VI of the Advocates Remuneration Order in the assessment of the instruction fees despite the value of the subject matter not being in dispute.
 4. The Application was opposed by the Respondent's Replying Affidavit dated 14th July 2023 to the effect that the case at hand proceeded to full hearing of the Preliminary Objection and as the date of the consent order, the same was awaiting ruling hence the Advocate/Respondent was entitled to getting up fees for Kericho Environment and Land Court Case Number E005 of 2022 which was a defended case. That the Applicant herein did not participate in the proceedings before the Taxing Master and was now through the instant application trying to re-open a case whereby most of the issues raised in the Bill of Costs dated 3rd May, 2023 were never objected to during the taxation process. That the Applicant's application was an afterthought as the same was filed after the lapse of the statutory period of fourteen (14) days hence the same should be dismissed with costs.
 5. The Instant Reference was canvassed by way of written submissions to which I shall proceed to summarize as follows;

Applicant's Submissions.

6. The Client/ summarized the factual background of the matter before framing her issue for determination as follows;
 - i. Whether the Reference application was filed within time
 - ii. Whether the decision of the subordinate court should be set aside.
7. On the first issue for determination, it was the Applicant's Submissions while placing reliance on the provisions of Rule 11(1) of the Advocates (Remuneration) Order, that she wrote a letter to the Deputy Registrar on 29th June, 2023 as practice permitted, requesting for the reasons of taxation but did not receive any response hence she diligently proceeded to file her reference application relying on the ruling of 10th July, 2023. That the said letter served as a Notice of Objection and counting from the



- 29th June, 2023 when the letter was sent, 14 days had not lapsed by the time the reference application was filed. She thus submitted that by the said letter, she had duly entered her objection on record and was only waiting for substantive reasons before filling the reference, hence the time should start running after the filling of the letter of 29th June, 2023.
8. She relied on the provisions of Order 50 of the Civil Procedure Rules, 2010 as read together with the *Interpretation and General Provisions Act* on how the statutory set time should be computed, to submit that the same excluded Sundays or a day office closes or official non-working days hence, filing the instant reference on 10th July, 2023 when the Notice of Objection had been issued on 29th June, 2023 was well within time.
 9. The Client/Applicant further relied on the decision in the case of *Mereka & Company Advocates vs. Engineer A.S Kitololo T/A Consultants Engineers (sic)* to submit that the practice of requesting for reasons in taxation matter was meant to allow the person affected by the decision of the Taxing Master to understand the reasons for the decision before deciding on the next cause of action. That the letter dated 29th June, 2023 fully communicated the intention of the Client/Applicant setting out the grounds and as such amounted to a valid Notice of Objection. That the Deputy Registrar was bound to respond to the said letter to enable her file her Reference. That she was diligent in filing the instant Reference before receiving the Deputy Registrar's reasons for the ruling on Taxed of Bill of Costs.
 10. That notwithstanding the fact that sometimes even one day may be inordinate, in the instant case, she had presented good and substantial reasons to support her case and that each case ought to be decided on its facts. Reliance was placed on the decided case of *Tom Ojienda & Associates vs. Nairobi City County [2021] eKLR*.
 11. That from the foregoing, the alleged delay in filing her Reference was not on volition but due to the uniqueness of the instant case hence was excusable as no prejudice would be occasioned against the Advocate/Respondent. That this was thus a sufficient cause for the court to allow the application for reference as filled.
 12. On the second issue for determination as to whether the decision of the subordinate court should be set aside/taxed afresh, the Applicant reiterated that she had instructed the Respondent herein to represent her in Kericho ELC Case No. E005 of 2022 but the said suit did not proceed for hearing and was settled by consent of the parties pursuant to the terms of the consent which among other things expressly stated that the matter would be settled upon the payment of a sum of Kshs. 20,000,000/= . That she was aggrieved by the subsequent decision of the Taxing Officer particularly with regards to the instruction fees which had been taxed at Kshs. 5,000,000/= despite the case not having been complex but straight forward. Further that in the Ruling dated 21st June, 2023, the Learned Taxing Master stated that the matter was neither protracted nor did it raise any novel points of law that would require extraneous research.
 13. That the Respondent herein not only sought to punish her but also to unjustly and unreasonably enrich himself by charging exaggerated amount without any legal justification. That the instruction fee awarded was manifestly excessive and the Taxing Officer did not exercise his discretion as he failed to justify how he arrived at Kshs. 5,000,000/= without considering the value of the subject matter.
 14. In relying on the decided case in *Eastland Hotel Limited vs. Wafula Simiyu & Co. Advocates [2014] eKLR* where it had been held that in calculating instruction fees, the Taxing Officer should address himself to the subject of the instructions, the Applicant submitted that the instruction fees payable in the instant matter related to the resolution of the dispute on the illegal occupation of the suit property and not adjudication of the monetary value of the suit property. That the consent did not in any way



- relate to the value of the suit property neither was a valuation done or required in the circumstances. That accordingly, the instruction fees should be calculated based on the work expended before the court in so far as the same related to the resolution of the matter by consent of the parties. Further reliance was placed on the decision in the case of Vincent Kibiwott Rono vs. Abraham Kiprotich Chebet & another [2022] eKLR.
15. The Applicant further submitted that the Taxing Officer had failed to consider the following factors;
 - i. That the matter never went to full trial as the same was settled, by a consent, at Kshs. 20,000,000/= hence according to the Advocates Remuneration Order, the Advocate/ Respondent should be awarded a total sum of Kshs 712, 234.20/=.
 - ii. That the work done by the Advocate/Respondent was not complex and the research involved was not tasking.
 - iii. The amount or value of the subject matter.
 16. She thus submitted that the Learned Taxing Officer erred in principle by arriving at a wrong computation of the instruction fees payable after having determined that the matter was settled by way of consent of Kshs. 20,000,000/=. That if the ruling of 21st June, 2023 was not set aside, she would be greatly prejudiced the Taxing Officer having assessed the instruction fees at Kshs. 5,000,000/= despite having admitted that the subject suit was neither complex nor entailed a novel case.
 17. That it was well founded in law that costs were only meant to indemnify the person entitled to them and were not to be imposed as a punishment on the party who had to pay them, or as a bonus to the party who received them. She further submitted that costs chargeable as party and party were necessary to enable the adverse party conduct litigation and no more. They were not meant to oppress an unsuccessful litigant to pay excessive amounts in costs.
 18. That she was not disputing that there was need for a Counsel to be well remunerated so as to attract recruits to the legal profession, however, the compensation ought to be reasonable for the work done. To buttress this assertion, reliance was placed on the decision in the case of Republic v Minister for Agriculture & 2 Others Ex-parte Samuel Muchiri & 6 Others [2006] eKLR.
 19. The Applicant while relying on the provisions of Schedule 6 Paragraph 1(b) of the Advocates Remuneration Order, which stipulated that the instruction fee was Kshs. 500,000/= where the value of the subject matter was Kshs. 20,000,000/= submitted that the instruction fee of Kshs. 5,000,000/= as taxed was exaggerated, excessive and unjustified and that a sum of Kshs 11,500,000/= (sic) ought to be taxed off from the item on instruction fees.
 20. In conclusion, the Applicant submitted that the instant Reference should be allowed since the matter was neither protracted nor did it raise any novel points of law that would require extraneous research. That there was no justification for the increase of the instruction fee payable. That the Bill of Costs dated 3rd May, 2023 be taxed afresh by a different Taxing Officer other than Hon. F.M Nyakundi (Deputy Registrar) Kericho Law Courts, Environment and Land Court Division (sic). That the instruction fees awarded was manifestly excessive and the Taxing Officer did not exercise his discretion as he failed to justify how he arrived at Kshs. 5,000,000/= as instruction fees without considering the value of the subject matter.
 21. That the application was filed within the stipulated time limits hence the argument that the same was filed out of time was in vain and that no prejudice will be suffered by the Respondent if the orders sought were granted.



Respondent's Submissions.

22. In opposition to the Applicants application the Respondent framed his issues for determination as follows;
 - i. Whether the reference had been filed within the stipulated time.
 - ii. Whether the Client/Applicant's advocate is entitled to getting up fees.
 - iii. Who should bear the cost of the reference
23. On the first issue for determination, the Respondent, while relying on the provisions of Paragraph 11 rule 1 of the Advocates (Remuneration) Order 2014 submitted in the negative for the reason that the same had been filed after eighteen (18) days which was outside the fourteen (14) days statutory period, the ruling having been delivered on 21st June, 2023 and the instant reference having been filed on 10th July, 2023. That the said reference was fatally and incurably defective hence the same ought to be dismissed with costs. Reliance was placed on the decided case in Meru High Court, Election Petition Appeal Number 3 of 2013, Charles Nyaga Njeru vs. Independent Electoral and Boundaries Commission & Another.
24. That the Deputy Registrar specified his reasons hence he was not required to do so again following the Applicant's Advocate's letter dated 29th June, 2023. That the Applicant's Advocate was present when the ruling was delivered virtually thus fully aware of the reasons for the said ruling. That the letter to the Deputy Registrar dated 29th June, 2023 seeking reasons was hence an afterthought meant to hoodwink the court into thinking that the 14 days period for filing the reference ran in their favour. Reliance was placed on the decision in Siaya High Court, Miscellaneous Civil Application Number E022 of 2021, KCB Bank Limited & Another vs. Yesta Antony Joseph (sic).
25. That the Applicant had not advanced any reasons for the inordinate delay in bringing their Reference and since the stipulations of statute regarding time were there for a reason, failure to adhere to them rendered the application incompetent in the first instance. That the Applicant never served them with the letter dated 29th June, 2023 buttressing the fact that the same was an afterthought hence the same should be struck out with costs to the Respondent. He reiterated that the Applicant who did not participate in the proceedings before the Taxing Officer was seeking to rehash matters that could have been raised at the taxation stage. To buttress the above assertion, he placed reliance on the decision in Nairobi High Court, Miscellaneous Cause Number 76 of 2013, Ekuru Kabage Nyamathwe and Company Advocates vs. Rose Wanjiru Kibe (sic).
26. That the Applicant after being indolent during the taxation proceedings and not participating in the same was now seeking to do that at this advanced stage, which conduct amounted to an abuse of court process. He thus urged the court to inhibit the futile attempt by the Applicant as litigation must come to an end. That the Applicant was employing a scheme to delay the Respondent from enjoying the fruits of his labour and ruling in his favour.
27. On the second issue for determination as to whether the Respondent was entitled to getting up fees, the Respondent submitted that he was entitled to getting up fees as the court record would bear him witness that the instant case was set down for hearing of the Preliminary Objection dated 27th of May, 2022. That as at the date of the consent order, the file was awaiting a ruling date and as such the Respondent was entitled to getting up fees since the instant case was defended hence the court should consider the same in the event that re-taxation was ordered.



28. Reliance was placed on the Provisions of Schedule 2(i) of the Advocates (remuneration) Order 2014 and the decided case in Kericho Environment and Land Court, Miscellaneous Cause Number 1 of 2020, Mwakio Kirwa and Company Advocates vs. County Public Board and Another (sic) to submit that a case that was contested like the instant case merited getting up fees. That through the defence dated 6th June, 2022, the 1st Defendant therein had joined issues for trial through their pleading hence the instant case was a defended suit in which getting up fee was applicable. He further submitted that he had his Submissions ready and filled on the 31st January, 2023 regarding the Preliminary Objection which amounted to preparation for trial.
29. That getting up fee was payable when an Advocate established that he had prepared the case for trial and the same had been confirmed for hearing. He thus submitted that in the event of re-taxation, getting up fee should be considered and included.
30. With regards to the costs of the Reference, the Respondent relied on the provisions of Section 27 of the Civil Procedure Act to submit that the same were at the discretion of the court and that they generally followed the event.
31. In conclusion, the Respondent urged the court to strike out the application with costs to him.

Determination

32. Based on the above, submissions, I find the issues for determination as herein under;
 - i. Whether the References is incompetent for being filed contrary to paragraph 11 of the Advocates' Remuneration Order.
 - ii. Whether the Taxing Officer had committed any errors of principle while Taxing item 1 on the bill of costs.
33. From the analysis of the issue at hand it is clear that the Taxing Officer rendered his written ruling on the 21st June 2023. The Applicant then wrote a letter dated 29th June 2023 to the Taxing Officer, which letter was received on the said day by the environment and land court registry. In the said letter, the applicant herein referred to the bill of costs dated 3rd May 2023 and the decision therein delivered on 21st June 2023 objecting to the decision in its entirety specifically on the amount awarded as instruction fee which she claimed was manifestly excessive. The Applicant thus sought for the reasons for the taxation. The said letter was copied to the Respondent herein.
34. Rule 11(1) of the Advocates Remuneration Order provides as follows:
 - (1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.
35. I find that the said letter which served as a Notice in writing as required by Rule 11(1) of the Advocates (Remuneration) Order, was filed within the stipulated period.
36. I have considered uncontested fact that Kericho Environment and Land Court Case No. E005 of 2022 did not proceed for hearing but was by consent, settled at a sum of Kshs. 20,000,000/= . It is also not contested that subsequent to the consent herein entered by parties, the respondent filed his bill of costs in which he was awarded Ksh. 5,000,000/= as instructions fee and which fee was contested by the applicant in his in her letter dated 29th June 2023 to the Taxing Officer, for been manifestly excessive.
37. Rule 11(2) of the Advocates (Remuneration) Order provides as follows;



- (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.
38. In awarding the said impugned instruction fee, the Taxing Master was aware of the provisions in Schedule 6 paragraph 1(b) and (j) of the Advocates Remuneration Order, wherein in his ruling he had noted as follows;
- “It is north (sic) worthy to note that only minimum is prescribed, thus the Taxing Master has discretion to award a higher sum, however such discretion must be exercised judiciously as per the above cited case.
- I note that this was not a complex case or a novel case as the matter never went into full trial as the same was settled by a consent of 20, 000,000/= . It is therefore my considered opinion that I do assess 5,000,000/= as instructions fee.”
39. What it clear from the said decision, is that there was no explanation given by the Taxing Officer as to why he had awarded 5,000,000/= as instructions fee and therefore by virtue of the provisions of Rule 11(2) of the Advocates (Remuneration) Order he ought to have forthwith recorded and forward to the applicant/objector the reasons for his decision on this item so as to enable her to file her reference within 14 days from the receipt of the reasons to the judge.
40. The reference herein was filed on 10th July 2023, which was 5 days, excluding the weekends, after notice, by a letter dated 29th June 2023 had been issued to the Taxing Officer and where there had been no response. Although there was no strict compliance with Rule 11(2) of the Order, I am nevertheless, satisfied that there was substantial compliance with Rule 11 of the Order.
41. In the case of Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004; (2005) eKLR, the Court of Appeal held:
- “...It is true that the Taxing Officer did not record the reasons of the decision on the items objected to after the receipt of the respondent’s notice. It seems that the Taxing Officer decided to rely on the reasons in the ruling of taxation dated 24th February, 2004. That ruling at least indicated the formula that the Taxing Officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a Taxing Master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”
42. I shall now proceed to look at the application on its merits and on this aspect, I shall consider whether in the Ruling given on 21st June 2023, the Taxing Officer had committed any errors of principle while Taxing item 1 on the bill of costs.
43. The Applicant’s contention was that the instruction fee had been taxed higher than it should have been yet the matter had been compromised with a consent and the Taxing Officer had also noted that the same had not been complex or novel.
44. The often cited case of First American Bank of Kenya vs. Shah & Others [2002] 1 EA 64 sets out the circumstances under which a Judge of the High Court (read Environment and Land Court) can



interfere with the Taxing Master's exercise of discretion. These principles are also to be found in the old Court of Appeal decisions in Premchand Raichand Limited & Another vs. Quarry Services of East Africa Limited and Another [1972] E.A 162 and Arthur vs. Nyeri Electricity Undertaking [1961] E.A 492. The said principles were also re-affirmed by the Court of Appeal in Joreth Limited vs. Kigano and Associates [2002] 1 E.A 92. These principles include

- i. that the Court cannot interfere with the Taxing Master's discretion 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 interference that it was based on an error of principle;
- ii. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;
- iii. if the Court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
- iv. it is within the discretion of the Taxing Master to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

45. From the above stated, it can be discerned that there is a general caveat on judicial review of quantum of taxation unless there is a clear error of principle or the sums awarded are either manifestly high or low so as to lead to an injustice, see Premchand's case (supra)

46. The Applicant is aggrieved by Taxing Master's 'inflated and exaggerated' awards on the item 1 of the Bill of Costs which was as submitted was not in tandem with Advocates' Remuneration Order of 2014.

47. The Applicant contends that in Item 1, the Taxing Master erred in awarding instruction fees of 5,000,000/= which was way beyond the amount provided for in schedule 6 paragraph 1 (j) of the Advocates Remuneration Amendment Order 2014 and in the absence of evidence to justify such a high award considering that the suit had been compromised by a consent, at Kshs. 20,000,000/= hence according to the Advocates Remuneration Order, the Advocate/Respondent should have been awarded a total sum of Kshs. 712, 234.20/=.

48. It is not therefore contested that the suit herein had been compromised on consent of the payment of Ksh. 20,000,000/=. In the case of Joreth Limited (Supra) the Court of Appeal held that the value of the subject matter 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/her discretion to assess such instruction fee as (s)he considers just, taking into account, amongst other matters, the nature and the 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.

49. Schedule 6 paragraph 1b of the Act provides that,

"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 fee chargeable under item 1(b) of this Schedule."



50. This matter was settled and did not go to full trial. Further there was nothing to show that the matter was complex or novel as indicated by the Taxing Master and therefore the responsibility entrusted to Counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. On this item, the Taxing Master awarded the instruction fee of Ksh 5,000,000/- which was way beyond the minimum instruction fee not minding that the matter had been settled.
51. It is my conclusion therefore that the Taxing Master did not exercise his discretion judicially thereby following a wrong principle in reaching his decision. I therefore find that the Application dated 10th July 2023 is merited, I allow the same with the following orders:-
- i. The taxation of the Respondent's Bill of Costs dated 3rd May, 2023 in reference to Item No 1 is hereby set aside.
 - ii. The said Bill of Costs be and is hereby remitted back to another Deputy Registrar to be taxed afresh on the item objected to by the Applicant.
 - iii. Each party shall bear its own costs for this Application.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 30TH DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

