Mbugua Atudo & Macharia Advocates v Nairobi City Water & Sewerage Company Limited (Miscellaneous Civil Case E258 of 2022) [2023] KEELC 21868 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21868 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL CASE E258 OF 2022

JO MBOYA, J

NOVEMBER 23, 2023

BETWEEN

MBUGUA ATUDO & MACHARIA ADVOCATES ..... ADVOCATE

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED ..... CLIENT

RULING

Introduction and Background

1. Vide Chamber Summons Application/ Reference dated the 2nd May 2023; the Applicant/Client herein has approached the Honorable court seeking for the following reliefs; [verbatim]:

    i. That the Ruling by Hon Isabellah Barasa PM Deputy Registrar delivered on the 22nd November 2022; of this court on taxation of the Advocate-Client Bill of Costs dated 19th April 2023; be set aside and/or vacated as relates to items (1), (2) and (3) of the Advocate Bill of Costs dated the 7th November 2023.

    ii. That the Deputy Registrar be restrained by an order of this Honorable Court from issuing a Certificate of costs; and if one has be executed the same be expunged from the record.

    iii. That this Honorable court be pleased to assess the said items (1), (2) and (3) of the Respondent's bill based on the fact that the same is excessive and unsupported in law and fact.

    iv. That based on the said value of the suit and the instructions to the Respondent's, the fees taxed is inordinately high.

    v. That the Taxing Master/Officer failed to consider the Applicant's submissions dated the 20th February 2023.

vi. That this Honorable court do make any additional orders as the demands of justice dictates.

vii. Costs of the Application be provided for.

2. The instant Application/Reference is premised and/or anchored on a plethora of grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of on Dickson Khisa sworn on the 2nd May 2023; and to which the Deponent has annexed two [2] sets of documents, *inter-alia*, a copy of the Ruling rendered by the Taxing Master, which is the subject of the Reference.

3. Suffice it to point out that the Application beforehand has been opposed by the advocates/Respondent vide a Replying affidavit sworn on the 26th September 2023; and wherein the Advocate has contended, inter-alia, that the Applicant has failed to establish and/or demonstrate any iota/ scintilla of improper exercise of discretion by the Taxing Master, (sic) to warrant interference with the Certificate of taxation.

4. Notably, the Reference beforehand came up for hearing on the 26th September 2023, whereupon the advocates for the Parties covenanted to canvass and dispose the Application vide written submissions to be filed and exchanged between the Parties.

5. Pursuant to and as a result of the concurrence/ agreement by the advocates, the Honourable court proceeded to and issued directions, inter-alia, circumscribing the timelines for the filing and exchange of the written submissions.

6. First forward, the Applicant herein thereafter proceeded to and filed written submissions dated the 24th November 2023; whereas the advocate/ Respondent filed written submissions dated the 9th November 2023, which Submissions, were filed earlier than the ones on behalf of the Applicant/ Client.

7. Be that as it may, both sets of written submissions are on record.

The Parties' Submissions:

a. Applicant's Submissions:

8. The Applicant herein adopted and reiterated the various grounds which were enumerated at the foot of the Application/Reference; as well as the averments contained in the Supporting affidavit and thereafter highlighted two[2] pertinent issues for consideration by the Honourable Court.

9. Firstly, Learned counsel for the Applicant/Client has submitted that the Learned Taxing Master erred in law and in any event, failed to appreciate the nature of the Dispute and reliefs, which were sought in the primary suit; and wherein the Advocate/Respondent herein was instructed to defend on behalf of the Client.

10. Furthermore, Learned counsel for the Applicant/ Client has contended that the Pleadings that were filed in respect of the Primary suit and wherein the advocate was instructed, did not contain and or reflect any value on the face thereof. Consequently and in this regard, Learned counsel for the Applicant has submitted that in the absence of any monetary value shown/ reflected on the primary pleadings, the Learned taxing master ought not to have assumed/ applied the sum of Kes 375, 000, 000/- only, as the value of the Suit Property for purposes of taxation of the Instruction fees.

11. To the contrary, Learned counsel for the Applicant contends that the Learned taxing master ought to have proceeded and taxed the Instruction fees on the basis that the value of the suit property, which was being disputed in the primary suit, was neither discernable nor ascertainable from the pleadings or otherwise.

12. Based on the foregoing, Learned counsel for the Applicant has therefore contended that the correct amount/ sum that ought to be awarded on account of the Instruction fees should be Kes 75, 000/= only; and not Kes 2, 500, 000/= only, the latter, being the amount which was awarded.

13. Owing to the foregoing, Learned counsel for the Applicant has thus invited the Honourable court to find and hold that the taxation of the Instruction fees; and the ultimate award of Kes 2, 500, 000/= only, constitutes an error of Principle, which should necessitate interreference with the discretion of the Taxing master and by extension, the Certificate of Taxation, which was issued by the Taxing Master.

14. In support of the foregoing submission and essentially that a basis has been laid to warrant interference with the exercise of discretion by the Taxing Master, Learned counsel for the Applicant has cited relied on, *inter-alia*, the case of *Mumias Sugar Company Ltd v Tom Ojienda & Associates* (2021) eKLR, *Kenya Forest Services v Wanyama C S & Company Advocates* (2021) eKLR, *Otieno Ragot & Co Advocates v Kenya Airports Authority* (2021) eKLR, *Kipkorir Tito & Kiahara Advocates v Deposit Protection Fund Board* (2005) eKLR and *Kamunyori & Co Advocates v Development Bank Ltd* (2015) eKLR, respectively.

15. Secondly, Learned counsel for the Applicant has further submitted that the award of Instruction fees, is also excessive and thus same represents a miscarriage of Justice.

16. Arising from the foregoing, Learned counsel for the Applicant has thereafter invited the court to proceed and undertake the taxation of Advocate's Bill of costs as pertains and in particular, in respect of the specific items highlighted in the Notice of objection to taxation.

17. In support of the foregoing submissions that the Honourable court is seized of the Jurisdiction to tax the advocates bill of costs, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of *Keziah Gathoni Supeyo v Yano T/a Yano & Co Advocates* (2019) eKLR; and *County Assembly of Kerich & another v Bett & Another* (2022)KEELRC 83 (KLR) (12th May 2022), respectively.

b. Advocates/ Respondents Submissions:

18. Learned counsel for the Advocate/ Respondent adopted the averments in the body of the Replying Affidavit sworn on the 26th September 2023; and thereafter, proceeded to highlight and canvas one [1] issue for determination by the court.

19. It is the submissions of Learned counsel for the Respondent that the learned taxing master correctly appreciated the nature of the pleadings that were filed in the primary suit and thereafter correctly came to the conclusion that there was a statement pertaining to the value of the suit property, which was under dispute.

20. Furthermore, Learned counsel for the Respondent has invited the Honourable court to take cognizance of paragraphs 8, 22, 27 and 29 of the Plaint in respect of the primary suit, wherein the advocate/ Respondent herein was instructed to defend on behalf of the current Applicant/Client.

21. Having referred to the various paragraphs, (details in terms to the preceding paragraph herein), Learned counsel for the advocate has thereafter contended that the suit property, which was the subject of the proceedings in the primary suit was stated to be worth Kes 375, 000, 000/= only. For coherence, Learned counsel has added that the said value is apparent and evident on the face of the Plaint which was filed

22. To the extent that the suit property, which formed the basis of the primary suit, had a known and/or disclosed value, Learned counsel for the advocate has submitted that the Learned taxing master was

therefore at liberty to take cognizance of the pleaded value and to use same for purposes of arriving at the Instruction fees.

23. On the other hand, Learned counsel for the advocate has also contended that other than the value of the suit property which was evident and apparent on the face of the Plaint, the Learned taxing master also took cognizance of various factors, inter-alia, the complexity of the matter, the interests of the Parties; and the labor expended by the Advocate/ REspondent Whilst defending the primary suit, before awarding Instruction fees in the sum of Kes 2, 500, 000/= only.

24. Owing to the foregoing, Learned counsel for the advocate has thus submitted that the learned taxing master correctly apprehended, appreciated and understood the nature of the suit, which was defended by the advocate herein and thereafter proceeded to and exercised her discretion in accordance with the provisions of the Advocates Remuneration Order.

25. Further and at any rate, Learned counsel for the Advocate has contended that no basis has been laid and/or established by the Applicant herein to warrant interference with the discretion of the taxing master or at all.

26. Additionally, Learned counsel for the advocate has further contended that this court should be slow to interfere with the discretion of the taxing master and in any event, any interference should only be undertaken where it is demonstrated that there was an error of principle, which thus affected the proper exercise of the discretion by the taxing master.

27. Nevertheless, counsel has pointed out that in respect of the matter beforehand, no error of principle or improper exercise of discretion has been established and/or shown by the Applicant either as required under the Law or at all. Consequently and in this regard, counsel for the advocate has invited the court to find and hold that the reference is devoid of merits.

28. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on, *inter-alia*, the case of F*irst American Bank of Kenya v Shah & Others* (2002) 1 EA 64 and *Republic v Kenyatta University & Another Ex-parte Welington Kihato Wamburu* (2018) eKLR, respectively.

Issues for Determination:

29. Having reviewed the Application/Reference and the Response thereto; and upon taking into account the written submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination.

    i. Whether the Taxing Master properly exercised her Jurisdiction whilst taxing the Advocate-Client Bill of costs; and arriving at the amount Certified or otherwise.

    ii. Whether this Honourable Court is seized of Jurisdiction to tax the bill of costs afresh, either as sought by the Applicant or otherwise.

Analysis and Determination:

Issue Number

Whether the Taxing Master properly exercised her Jurisdiction whilst taxing the Advocate-Client bill of costs and arriving at the amount certified of otherwise.

30. The crux and/or substratum of the complaint by the Applicant herein touches on and/or concerns whether or not the Learned taxing master properly appreciated the nature of the dispute which was at the foot of the primary suit and in respect of which the advocates herein were retained.

31. According to the Applicant, the primary suit and in respect of which the advocate were retained did not stipulate and or enumerate in the body thereof any monetary in respect of the Suit Property or otherwise.

32. To this end, Learned counsel for the Applicant has thereafter proceeded to and reproduced (sic) the reliefs which were sought at the foot of the Plaint, underpinning the Original/Primary suit.

33. Having reproduced the reliefs sought at the foot of the Plaint anchoring the primary suit, Learned counsel for the Applicant has thereafter ventured forward and submitted that insofar as there was no known monetary value contained in the body of the Plaint, the Learned taxing master was therefore in error in using the sum of Kes 375, 000, 000/= only, as the basis/ benchmark for assessing Instruction fees.

34. Furthermore, Learned counsel for the Applicant has contended that by adopting and applying the sum of Kes 375, 000, 000/= only, as the bench mark for assessing the Instruction fees, the Learned taxing master committed an error of principle which thus vitiates the exercise of Discretion and rendering her decision erroneous.

35. On the contrary, Learned counsel for the advocate has pointed out to various paragraphs in the Plaint underpinning the primary suit and wherein the Plaintiff had intimated that the suit property for which same (Plaintiff) sought to protect her interest in, was substantially developed; and the value of the development was provided for in the sum of Kes 375, 000, 000/= only.

36. On the other hand, Learned counsel for the Advocate has contended that insofar as the value of the suit property was evident and discernable from the body of the Pleadings filed by the Parties, the Learned taxing master was therefore at liberty to take into account the stated value as a basis and/or bench mark for arriving at the Instructions fees.

37. Having taken into account the rivalling submissions, I take the position that the Plaint which was filed in the primary suit; and wherein the Advocates/ Respondent was instructed to act on behalf of the Applicant herein related to a specific and designated property, whose details were well spoken to in the Plaint.

38. Furthermore, it is also important to underscore that at the foot of paragraph 8 of the Plaint which underpinned the primary suit, which was defended by the advocates herein, a monetary pertaining to and in respect of the suit Property was shown/ alluded to.

39. For brevity, it is imperative to reproduce the contents of paragraph 8 of the Plaint.

40. Same is reproduced as hereunder;

> " The Plaintiffs have developed the said parcel of land with 41 residential units at a costs of Kes 250, 000, 000/= only and the Plaintiff's investment in the property therein is Kes 375, 000, 000/= only".

41. Pertinently, the value of the suit property which anchored the proceedings in the primary suit is expressly and explicitly alluded to and reflected in the body of the Plaint. Consequently and in this regard, there is no gainsaying that a taxing officer chargeable with the taxation in such a matter, would be called upon and/or obligated to take into account, such pleaded value, whilst taxing the Instruction fees.

42. To my mind and taking into account the foregoing, the Learned taxing master therefore did not err in making reference to and taking cognizance of the value of the suit property, which was the subject of the proceedings in the primary suit.

43. For coherence, the Learned taxing master fully and properly appreciated the issues at play in the body of her Ruling and thereafter proceeded to and exercised her discretion taking into account, inter-alia, the complexity of the suit, the Interest of the Parties and the labor deployed/expended by the advocate in defending the interests of the Applicant herein.

44. Consequently and in my humble view, the manner in which the Learned taxing master exercised her discretion in taxing and awarding Instruction fees, accords with the established principles enunciated in the decision in the case of *Joreth Ltd & Another Kigano & Associate* (2002) eKLR, where the Court of Appeal stated and held thus;

> "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.

45. The foregoing position, namely, that instruction fees is dependent on the value of the suit property, where same is discernable from the pleadings, settlement and/or Judgment, was re-visited and emphasized by the Court of Appeal in the case of *Peter Muthoka v Ochieng & 3 Others* (2018) eKLR, where the court stated and held thus;

> "It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive".

46. Arising from the legal principle enunciated and elaborated upon in the decisions (supra), I am unable to discern, comprehend or otherwise decipher any improper exercise of discretion by the Learned taxing master, either as alleged or at all.

47. To the contrary and having examined the ruling of the Learned taxing master, I come to the conclusion that same fully appreciated the various ingredients and factors that were necessarily, before arriving at and taxing the Instruction fees at Kes 2, 500, 000/= only, which amount was indeed reasonable, just and fair taking into account the monetary value of the suit property, which was the subject of dispute at the foot of the Primary suit.

48. Nevertheless and before departing from this issue, its instructive to underscore that whereas the court has the requisite Jurisdiction to interfere with the discretion of a taxing officer, it is imperative to

reiterate that such Jurisdiction must be exercised sparingly and with necessary circumspection; and only in clear cases where it has been shown/proved that there was an error of principle, which vitiates the discretion of the taxing master, culminating into either an excessive/ inordinately high award, or better still, an inordinately low award.

49. To buttress the position (supra), it suffices to adopt and reiterate the dictum of the Supreme Court of Uganda in the case in the case of *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No. 23 of 1999; where the court stated thus;

> " 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 in which he has more experience that 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.
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> Secondly, an exceptional case is where it is shown expressly or by inference in assessing or 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 of an award of an amount which is manifestly excessive or manifestly low"

50. Furthermore, the circumstances under which the court can interfere with the discretion of the Taxing master was also highlighted, amplified and elaborated upon in the case of *Violet Ombaka Otieno & 12 others v Moi University* [2021] eKLR, where the court stated thus;

> 30. In determining the second issue as to whether the taxing officer exercised her discretion judiciously, the starting point is to identify the legal parameters within which this Court can interfere with a taxing officer's discretion. In the case of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* [1972] EA 162 it was held that:
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> > "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, and 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 so high or so low as to amount to an injustice to one party or the other."
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> 31. Further, in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR it was held that:
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> > "It has long been the law as was stated in Arthur -v-Nyeri Electricity (Supra), that where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional cases."
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> 32. Additionally, in *First American Bank of Kenya v Shah & others* [2002] EALR 64, as cited in Lubelellah & Associates Advocates v Baranyi Brokers limited & 2 others [2014] eKLR, it was stated that:
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> > "First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle."

33. It is apparent from the cited authorities that the Court will only interfere with the discretion of the taxing officer where there is an error of principle or the sum awarded is either noticeably high or low as to lead to injustice to either of the parties to the dispute.

51. In a nutshell, my answer to issue number one [1] is to the effect that the Applicant herein has neither demonstrated nor established any scintilla of improper exercise of discretion by the taxing master in taxing and arriving at the instruction fees in the sum of Kes 2, 500, 000/= only.

52. Similarly, I also come to the conclusion that the Applicant herein has also failed to demonstrate the existence of any error of principle in the manner the Learned taxing master evaluated the various factors, captured at the foot of the Advocates Remuneration Order, prior to and before arriving at the named instruction fees.

Issue Number 2

Whether this Honourable court is seized of Jurisdiction to tax the bill of costs afresh, either as sought by the Applicant or otherwise.

53. Other than the contention by and at the instance of the Applicant herein that there was an error of principle in the taxation of the Instruction fees, Learned counsel for the Applicant thereafter proceeded to and invited the Honourable court to undertake the taxation of the advocates bill of costs afresh.

54. For coherence, Learned counsel for the Applicant made the following submissions;

> " Your Lordship, as alluded to herein above, the taxing officer failed to exercise her judicial discretion which is guided by principles. This constitutes an error of principle hence the client has approached this honorable court that same be amended. We urge the honorable court to set aside the ruling of the taxing officer and to procced to assess the advocate bill of csts afresh on the specifi items in the notice of objection to taxation of costs.

55. Whereas the Honorable court is vested and conferred with the Jurisdiction to re-tax a bill of costs, subject to proof of an error of principle; or improper exercise of discretion, it is trite and established that such a Jurisdiction can only be exercised as a last resort and not otherwise.

56. Conversely, where a court finds and holds that an error of principle has been demonstrated by an Applicant, (which is not the case herein), the normal and usual case is to remit the bill of cost for taxation before Taxing master, other than the one, whose Certificate of taxation has been impugned.

57. In this respect, the position of the law was elaborated upon and/or clarified by the Court of Appeal in the case of J*oreth Ltd v Kigano & Associates* (2000) eKLR, where the court held thus;

> " 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 (E.A.) Ltd v Uganda Sugar Factory Ltd* (1970) EA 141 per spry JA at page 143:
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> > "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 ju dge 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."

58. Arising from the clear exposition of the law, (details in terms of the preceding paragraph), it is apparent that even if I had come to the conclusion that there was an error of principle or improper exercise of discretion, (which is not the case), I would still not have been disposed to undertake the taxation of the Advocate Bill of Cost, either in the manner contended by Learned counsel for the Applicant or otherwise.

59. Nevertheless, it is important to observe that whilst discussing issue number one [1] herein before, the court has come to the conclusion that the Applicant herein has failed to establish and demonstrate any scintilla of improper exercise of discretion; or error of principle, to warrant interreference with the Certificate of taxation issued by the taxing master.

Final Disposition:

60. Flowing from the discourse, (details in terms of the preceding paragraphs), it is apparent that the Applicant/ Client herein has failed to establish and/or demonstrate any iota of improper exercise of discretion by the Learned taxing master.

61. Consequently and in the premises, I come to the conclusion that the Application/Reference dated the 2nd May 2023; is devoid and/or bereft of merits. In this regard, same be and is hereby Dismissed with costs to the Advocate/Respondent.

62. Furthermore and to avoid the filing of Supplementary bill of costs, the costs in respect of the Reference herein be and are hereby assessed and certified in the sum of Kes 50, 000/= only, which shall be borne by the Applicant/Client.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Dickson Khisa for the Applicant/Client.

Mr. E. Owiti for the Advocate/Respondent