



Nzei & Co Advocates v Export Processing Zones Authority (Environment and Land Miscellaneous Application E059 of 2023) [2023] KEELC 22478 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22478 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E059 OF 2023
MD MWANGI, J
DECEMBER 8, 2023
IN THE MATTER OF ADVOCATES-CLIENTS BILL OF COSTS
UNDER THE ADVOCATES REMUNERATION ORDER OF THE
ADVOCATES ACT (CAP. 16 LAWS OF KENYA)

BETWEEN

NZEI & CO ADVOCATES ADVOCATE

AND

EXPORT PROCESSING ZONES AUTHORITY CLIENT

(Being a reference from the Ruling on Taxation of the Advocates- Clients Bill of Costs dated 4th April, 2022 by Hon. Diana Orago (Deputy Registrar) dated 22nd November, 2022)

RULING

Background

1. This ruling is in respect to the Advocate/Applicant's Chamber Summons application dated 21st February, 2023. The said application is expressed to be brought under rules 11 of the [Advocates Remuneration Order](#), sections 1A, 1B and 3A of the [Civil Procedure Rules](#) and article 159 of the [Constitution](#).
2. The application seeks the following orders:
 - a. Spent
 - b. The Honourable Court be pleased to set aside the decision by the taxing officer dated 22nd November, 2022 with respect to the Bill of Costs dated 4th April, 2022.



- c. That this Honourable Court be pleased to hear, determine and allow the Advocate/ Applicant's objection dated 28th November, 2022.
 - d. That this Honourable Court be pleased to tax the Advocate/ Client Bill of Costs dated 4th April, 2022 afresh.
 - e. That subject to granting prayer 4 hereinabove, this Honourable Court be pleased to enter judgement in terms of the taxed amount in favour of the Advocate/ Applicant herein.
 - f. That in the alternative to prayer 4 hereinabove, this Honourable Court be pleased to remit the Bill of Costs dated 4th April, 2022 back for taxation by a different taxing officer.
 - g. That costs of this application be provided for.
3. The application is supported on the grounds on the face of the application and the supporting affidavit of Benjamin M. Nzei sworn on 21st February, 2023. The Advocate avers that his firm was duly instructed by the Client/Respondent in Nairobi Elc No. 351 of 2015 in which the cause of action was connectivity, treatment and discharge of effluents. He depones that vide the Letter dated 5th May, 2015, the Client acknowledged the existence of Machakos Elc 35 of 2010. This showed that the subject matters in the two causes of action were related if not the same.
 4. The deponent avers that upon termination of the Advocate-Client relationship, the Advocate filed the Bill of Costs dated 4th April, 2022 which was taxed at Kshs. 5, 320, 072.04/=. He depones that he filed a notice of objection dated 28th November, 2022 to the said ruling and requested for reasons of the ruling pursuant to rule 11 (1) of the *Advocates (Remuneration) Order*.
 5. He states that he made numerous visits to the court seeking a copy of the ruling but the same was not availed to him. He avers that the Taxing Officer only reverted back vide the Letter dated 8th February, 2023 intimating that the reasons for the decision were contained in her ruling. The instant application was therefore filed within the timelines set in rule 11 of the *Advocates (Remuneration) Order*.
 6. He faults the Taxing Officer for not awarding the instruction fees based on the value of the subject matter despite the same being discernible from the pleadings; the value of the subject matter was elaborated in the affidavit in support of the Bill of Costs sworn on 9th June, 2022.
 7. The advocate therefore faults the Taxing Master for failing to apply the said value for purposes of assessing the instruction fees while taxing the Bill of Costs filed herein.

The Response

8. The Application was opposed. The Client/Respondent did so through a Replying Affidavit sworn on 12th June, 2023 by Winnie Sang, the Assistant Manager Legal and Corporate Services of the Client. The deponent avers the Taxing Officer was justified in finding that the value of the subject matter in question could not be identified and discerned from the pleadings. She states that the Taxing Officer was right in finding that the suit in Machakos ELC 35 of 2010 was different from the suit herein, and which matter was still pending in a different court. She could therefore not make a finding on a Bill not before her.
9. The deponent deposes that the Client is a public body and the court should stop any unjust enrichment out of public funds.



Court's directions

10. The Court directed that the application be canvassed by way of written submissions. The Client filed its submissions dated 11th July, 2023 and the Supplementary submissions dated 26th July, 2023. The Advocate on the other hand filed his submissions dated 21st July, 2023.

Issues for Determination

11. I have considered the application and the submissions by the Counsel for both parties. In my view the issues that arise for determination are the following:
 - A. Whether the decision of the taxing master was based on settled principles of law;
 - B. Whether this court can grant the orders sought by the Applicant.

Analysis and determination

a. Whether the decision of the taxing master was based on settled principles of law:

12. The provisions of paragraph 11 of the [Advocates \(Remuneration\) Order](#) provide 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 which he objects
 - (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.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have expired.
13. In the present case, it is clear that the taxing master delivered the Ruling on 22nd November, 2022. The Advocate wrote letter on 28th November, 2022 indicating that he is dissatisfied with the taxation of the Bill in its entirety. He also requested for reasons for the ruling in the very letter. The advocate also expressed his frustrations in obtaining a copy of the Ruling. From the Record, the Taxing Master responded to the said Letter on 8th February, 2023.
14. Although the reasons for the taxation were contained in the Ruling, I note that the Advocate had not obtained a copy of the Ruling on time despite his requests. The Reference was filed on the 21st February, 2023, within 14 days of receipt of the Letter from the Taxing Master and the Ruling. It is my finding that the Advocate duly complied with the provisions of paragraph 11 of the [Advocates \(Remuneration\) Order](#). I will therefore proceed and consider the Reference on its merits.
15. In the old case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others* (1972) EA 162, the court of Appeal set out some of the principles of taxation as follows:



- i. That costs allowed should not rise to such a level as to confine access to the court to the wealthy.
 - ii. That a successful litigant ought to be fairly reimbursed for the costs that he had to incur.
 - iii. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - iv. That so far as practicable there should be consistency in the awards made.
16. The main bone of contention in the reference before me is on the item of instruction fees. Under item 1 of the Advocate's/Client Bill of Costs dated 4th April, 2022, the Advocate sought instruction fees in the sum of Kshs. 30,000,000. In support thereof, it is the Applicant's case that the subject matter was related to another matter being Machakos ELC Case No. 35 of 2010 whose value was held as Kshs. 700,000,000/=. Hence the same amount should have been used in calculating the instructions fees in the instant matter.
17. The Taxing Officer indicated in her ruling that the alleged amount was neither indicated in the pleadings nor a valuation report adduced to that effect. The Taxing Officer further stated that she could not base her calculation of the instruction fees in a matter before another court more so when she had not seen the pleadings in the other matter in Machakos. She therefore held that the value of the property could not be ascertained. She exercised her discretion and granted Kshs. 3,000,000/= as instruction fees.
18. It is however trite that the value of the suit property is not the sole determinant of the amount to be charged as instruction fees. In *Joreth Limited v Kigano & Another* (2002) EA 92, the court stated that a number of factors need to be taken into consideration in determining the instruction fee. These include the importance of the matter, the general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the Parties.
19. In *Republic v Ministry of Agriculture & 2 Others Ex-Parte Muchiri W Njuguna & 6 others* (2006) eKLR Ojwang J (as he then was) stated that; the taxation of Advocates' instruction fee is to seek no more and no less than reasonable compensation for professional work done. In this regard it should avoid any prospect of unjust enrichment, for any particular party or parties.
20. In first *American Bank of Kenya v Shah and Others* (2002) 1EA 64 Ringera J (as he then was) outlined the circumstances under which a Judge of the High Court can interfere with the taxing master's exercise of discretion. These were clearly Spelt out as follows:
- i. The court cannot interfere with the taxing master's decision unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly so excessive as to justify an inference that it was based on an error of principle;
 - ii. It would be an error of principle to take into account irrelevant 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 officer discloses errors of principle, the normal practice is to remit it back to the taxing officer 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 mount awarded was high;



- iv. It is within the discretion of the taxing officer to increase or reduce the instructions fee and the amount of the increase or reduction is discretionary;
 - v. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;
 - vi. The full instruction fee to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees
21. I find the above principles quite wide and comprehensive and accordingly I proceed to use them as a guide to a determination of the matters herein.

b. Whether this court should grant the orders sought

22. It is the Applicant's submission that the amount awarded of Kshs. 3,000,000 as instruction fees is so outside reasonable limits so as to be manifestly low. It is the Applicant's position that this matter was related to Machakos ELC 35 of 2010 where the Instruction Fees was held as Kshs. 700,000,000/=. Further, that the matter was important and complex. The amount of Kshs. 30,000,000 should have been deservedly awarded as instruction fees. Accordingly, it is the Applicant's prayer that this court sets aside the award of the taxing master, tax the Bill afresh and enter judgement accordingly. In the alternative, remit the Bill of Costs for taxation before a different Taxing Officer.
23. As was said in *Paul Ssemogerere & Another v Attorney General* SCCA No. 5 of 2001, there is really no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes are against one another in order to arrive at the reasonable fee. Thus, while the taxing officer has to keep in mind that the successful Party must be reimbursed expenses reasonably incurred due to the litigation, and that the advocates remuneration should be at such level as to attract recruits into the legal profession, he/she has to balance that with his duty to the public not to allow costs to be so hiked that courts remain accessible only to the wealthy.
24. As earlier noted, the parent matter; Milimani ELC Case No. 351 of 2015 was withdrawn by consent with no orders as to costs. The value of the subject matter was not ascertainable. Faced with this scenario; the Taxing Officer exercised her discretion and granted a sum of Kshs. 3,000,000.
25. Taking all matters into consideration, I am unable to fault the decision of the Taxing Officer. She exercised her discretion within the laid down principles. As was stated in *Premichand and Ranichand Limited and Another v Quarry Services of East Africa Ltd & Another (Supra)*,
- “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 taxing officer, merely because it thinks the award is 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.
26. I concur that questions solely of quantum are matters with which the taxing officers are particularly suited to deal. This court will interfere only in exceptional circumstances and this case has not, in my view, raised such exceptional circumstances.
27. In my considered view and for the reasons given this court should not interfere with the Taxing Officer's decision for the reasons stated above.
28. Therefore, the Application dated 21st February, 2023 is hereby dismissed.



29. Each party shall bear its own costs.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF
DECEMBER, 2023.**

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms Juliah Omwamba holding brief for Mr. Bake for the client.

Mr. Nzei for the Advocate.

