



Nzei & Co. Advocates v Export Processing Zones Authority (Environment and Land Miscellaneous Application E064 of 2022) [2023] KEELC 22332 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E064 OF 2022**

**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**

**ARISING FROM ENVIRONMENT AND LAND
COURT AT NAIROBI ELC CASE NO. 351 OF 2015**

WATER RESOURCES MANAGEMENT AUTHORITY.....PLAINTIFF

VERSUS

EXPORT PROCESSING ZONES AUTHORITYDEFENDANT

**(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)**

BETWEEN

NZEI & CO. ADVOCATES ADVOCATE

AND

EXPORT PROCESSING ZONES AUTHORITY CLIENT

(In respect of the Client’s Amended Application dated 2nd March, 2023)

RULING

Background

1. Before me is a Chamber Summons dated December 6, 2022 amended on the June 2, 2023. The application is brought pursuant to the provisions of Rule 11 of the *Advocates Remuneration Order*, and all enabling provisions of the Law, whereby the Applicant seeks for orders that: -



- a. That the Ruling and/or decision delivered on November 22, 2022 by the Honourable Taxing Officer on the Advocate-Client Bill of Costs dated April 4, 2022 be set-aside/vacated.
 - b. That the Advocate-Client Bill of Costs dated April 4, 2022 be remitted back for taxation by a different Taxation Officer.
 - c. That costs of this Application be provided for.
2. The application is premised on the grounds that the Taxing Officer erred in awarding instruction fees in the sum of Kshs. 3,000,000/= which amount was inordinately high, excessive and unjust in the circumstances of the case. The Client faults the Taxing Officer for failing to consider the laid down principles in exercise of her discretion. The principles include that an Advocate's pay must be commensurate to the work done and that Taxation of a Bill of Costs should not lead to unjust enrichment.
 3. The Client argues that the Taxing Officer erred in failing to award Instructions fees commensurate to work done considering that the matter did not go through the vigour of litigation. The Applicant only filed a Memorandum of Appearance, a Preliminary Objection, a Replying Affidavit as well as an Application. In any event, the matter was never set down for hearing and was subsequently withdrawn in 2021.
 4. The Client avers that the Taxing Officer erred in failing to consider the incomplexity of the matter and the ordinary nature of the litigation. The Client states that the Taxing Officer erred in failing to consider that Items No. 42, 43, 47 and 48 were filed online and that there was neither physical attendance at the registry nor the need to make the 3 copies thereof.
 5. The application is further supported by the Affidavit of Winnie Sang, the Assistant Manager Legal and Corporate Services of the Client/Applicant. The deponent restates the averments contained on the face of the application.

Replying Affidavit

6. The application is opposed by the Advocate vide the Replying Affidavit deposited by Benjamin M. Nzei on the July 21, 2023. The Advocate avers that the application is misconceived, bad in law and tainted with false statements intended at denying him his legal fees for representing the Applicant in Nairobi ELC No. 351 of 2015.
7. The Advocate deposes that the Client/Applicant has not complied with the mandatory requirements of the law by not issuing an objection in writing to the Taxing Officer of the items which it objects to as required by Rule 11(1) of the *Advocates (Remunerations) Order*.
8. Further, the deponent deposes that the client duly instructed him in Nairobi ELC No. 351 of 2015 {*Water Resources Management Authority -vs- Export Processing Zones Authority* (Formerly High Court Petition No. 174 of 2015)}. The value of the subject matter in the said suit was acknowledged by the Client vide the Letter dated May 5, 2014. The Client vide the said letter acknowledged the existence of Machakos ELC 35 of 2010 since the subject matters therein were related. The outcome of the matter in Machakos had an effect on the subject of the instant proceedings.
9. The Advocate asserts that in view of the pleadings in Machakos ELC No. 35 of 2010 having been imputed into the proceedings in Nairobi ELC No. 351 of 2015, the subject matter is therefore ascertainable at Kshs. 700,000,000/= as per the pleadings in both the instant petition and Machakos ELC No. 35 of 2010.



10. The deponent further states that the suit in Nairobi ELC No. 351 of 2015 was actually withdrawn by the Petitioner as the issues in dispute therein were conclusively determined in the Machakos matter.
11. Upon entry of Judgement in the matter at Machakos, the Advocate in that case filed a Bill of Costs which was taxed after the Taxing Master therein determined that the value of the subject matter was Kshs. 700,000,000/=. The Client/Applicant being aggrieved by the Taxing Master's Ruling, challenged it by way of a Reference wherein the Learned Judge upheld the Value of the Subject as Kshs. 7,000,000/=.

Further Affidavit

12. The Client/Applicant filed a Further Affidavit deponed on the July 10, 2023 by Winnie Sang. She avers that ELC 351 of 2015 was a Constitutional Petition seeking prerogative orders only. It had therefore not pleaded the value of the subject matter. She states that since ELC Suit was never set down for hearing and was withdrawn in 2021, Schedule 6B (6A, 1(c) & 2(J)(II) of the [Advocates Remuneration Order](#) 2014 is what is applicable. The provision provides for 85% of instruction fees.
13. The Taxing Officer's award on instruction fees herein², according to the Client lacked transparency. It was irregular, unreliable and lacked a lawful and just criterion. No reason was given by the Taxing Officer for the award of the inordinately high instruction fees herein. Therefore, there is an error of principle.
14. The deponent maintains that ELC 351 of 2015 is totally different from Machakos ELC 35 of 2010. There was no consolidation at all hence this court has no jurisdiction over the matter in Machakos. She states that the Elc suit herein had no unique marker to identify it as complex and novel. The documentation and the attendances were also minimal.
15. The deponent faults the Taxing Master for failure to give the reasons for the inordinately high instruction fees awarded. In the said circumstances, the instruction fees as awarded amount to an error of principle and the ruling should be set aside and re-taxed afresh in regard to the instruction fees and the items identified.
16. She avers that the Advocate is inviting this court to re-write pleadings for parties by referring to the pleadings in Machakos ELC 35 of 2010; an invitation which is outside the jurisdiction of this court. She argues that the court should make its own assessment of the matter herein and be guided independently to avoid errors of principle that might have been done in the other Bill spilling over to this Reference. The Bill for the suit in Machakos was taxed at a sum of Kshs. 27,140,844.00 in favour of the Advocate, which cost the Client has settled in full.
17. In the circumstances, the deponent states, that basing instruction fees in this suit on the other ELC suit in Machakos will not only be unlawful but would amount to double payment and unjust enrichment which is against the principles of taxation of costs. As such, this court should re-tax the instruction fees.

Court's directions

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



Issues for Determination

19. Having considered the Amended Chamber Summons Application, the supporting affidavit thereto as well as the further affidavit, the Replying affidavit and the written submissions filed on behalf of the parties, it is my view that the following issues arise for Determination;
- i. Whether the Applicants herein filed and/or lodged the requisite Notice of objection to taxation, either in accordance with the Statutory Provisions of the Law or at all.
 - ii. Whether the Honourable Taxing Officer erred in principle in the assessment of Instruction Fees.
 - iii. Who should bear costs of this application

A. Whether the Applicants herein filed and/or lodged the requisite Notice of objection to taxation, either in accordance with the Statutory Provisions of the Law or at all

20. Rule 11 of the [Advocates Remuneration Order](#) makes provision for the procedure an aggrieved party must adopt. It provides:

- “(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.
- (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 subsection (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 already expired.”

21. From the above provisions, a party who is aggrieved by the decision of a taxing master, is obliged to file and/or lodge a notice of objection to taxation against the decision of the taxing master within 14 days from the date of such taxation. The filing of the notice of objection is therefore mandatory.

22. In the case of [Twiga Motor Limited -vs- Hon. Dalmas Otieno Anyango](#) (2015) eKLR, the Court stated that:

“The time limits in Rule 11 of the [Advocates Remuneration Order](#) have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.” [own emphasis]



23. Imperatively, the notice of objection to taxation must stipulate and/or contain the particular items, which the Applicant objects to. It is upon filing of the Notice of Objection that the taxing master is required to avail the reasons for arriving at the decision in respect of those items, which are the basis of the objection.
24. Where a Notice of Objection to taxation is lodged, the same must be specific and must not be omnibus. For clarity, an omnibus notice if any, would be incompetent and incapable of grounding a Reference before this Honourable Court.
25. In the instant case, the Advocate contends that the Client has not complied with the mandatory requirement of filing a Notice of Objection. The Client on its part asserts that the competence of a reference is not pegged on the Notice of Objection. It argues that the purpose of the notice is not to initiate the court's jurisdiction, but rather its purpose is to obtain reasons for the taxation.
26. In the case of *Machira & Company Advocates -vs- Arthur K. Magugu & Another* (2012) eKLR, the court considered the legal effects of an omnibus Notice of Objection to taxation. The court observed that a non-compliant Notice of Objection, cannot anchor a valid Reference. The Court held that;

“As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of August 1, 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.”
27. I have perused the court record and indeed confirm that no Notice of Objection to taxation was ever filed by the Client. The letter dated November 22, 2022 by the then Advocate for Client sought reasons for the Ruling and requested for a certified copy of the Ruling. It was not an objection as contemplated under Rule 11.
28. In the absence of a compliant Notice of Objection to taxation, properly identifying the items objected to and filed within the statutory timeframe, the Reference before Court is incompetent.
29. On this ground alone, the entire Application fails.
30. However, there are two other issues that have been enumerated. As good practice demands, I am enjoined to address them and render a determination on them.

B. Whether the Honourable Taxing Officer Erred in Principle in the Assessment of Instruction Fees.

31. The often-cited case of *First American Bank of Kenya vs. Shab and Others* [2002] 1 EA 64 sets out the circumstances under which a Judge can interfere with the Taxing Officer's exercise of discretion. The Principles were also aptly stated in *Premchand Raichand Ltd and Another -vs- Quarry Services of East Africa Ltd and Others* No. 3 (1972 EA 162) where the court noted as follows on the principles on taxation:

- “(a) successful litigant ought to be fairly reimbursed for costs he has had to incur
- (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as



practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

32. In *Republic -vs- Ministry of Agriculture & 2 Others Exparte Muchiri* (2006) eKLR, it was further stated that the jurisdiction by the High court to interfere with the decision of a taxing officer must only be on the basis that there were mis-directions amounting to errors of law.
33. The client’s contention is that the Taxing master herein erred in law and principle when she assessed the instruction fees at Kshs. 3,000,000/=. It is their argument that the Taxing Master failed to apply established taxing principles.
34. The principle applicable for purposes of taxation of instruction fee was established in the case of *Jorertb Ltd -vs- Kigano Advocates* 2002 IEA 92 where the court held *inter alia* that:

“The instructions fee is an independent and static item it is charged once only and it is not affected or determined by the stage the suit has reached.”
35. The gist of the Applicant’s argument is that the Taxing Master failed to note that the matter was not complex and that it was withdrawn before proceeding to hearing. There is therefore a clear error of principle as the sums awarded are manifestly high as to lead to an injustice.
36. The Taxing Officer in her ruling delivered on November 22, 2023, indicated that the value of the subject matter could not be ascertained from the pleadings; neither was a Valuation Report availed. She therefore exercised her discretion and granted a sum of Kshs. 3,000,000/= as instructions fees after considering the importance of the subject matter to parties and the length of the time the matter has been in court.
37. The Court of Appeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* Nrb CA Civil Appeal No. 220 of 2004 [2005] eKLR stated that:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
38. This is also the holding by Ringera J. (as he then was) in the case of *First American Bank of Kenya vs Shab and Others* [2002] 1 EA 64 at 69 where he stated as follows:

“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”.
39. I have carefully considered the reference and the amount the taxing officer allowed on item 1 and the reasons given to support her decision. I have also considered the applicant’s grievances and the arguments advanced. I do not find merit in the arguments.



40. The Taxing Officer considered the Bill of Costs before her and exercised her discretion in making the determination. It is not open for this court to interfere with that discretion unless it is shown that the Taxing Officer misapprehended the applicable principles and as a result reached an unlawful decision.
41. Flowing from what I have stated above, I am unable to uphold the Applicant's argument that the Taxing Officer committed an error of principle or law in her decision. Consequently, it is the court's finding that the application is not only incompetent but also unmerited. It is therefore dismissed.
42. 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.

