



**Munge v Munge (Civil Case 560 of 2014) [2022] KEELC 3078 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE 560 OF 2014**

**JO MBOYA, J**

**MAY 26, 2022**

**BETWEEN**

**PATRICK KARIGE MUNGE ..... APPLICANT**

**AND**

**RAPHAEL ARC MICHEAL MUNGE ..... RESPONDENT**

**RULING**

1. Vide Chamber Summons Application dated the 19<sup>th</sup> January 2022, the Applicant herein sought for the following Orders:
  - a. ....(Spent)
  - b. The Honourable court be pleased to vary and/or set aside the Decision of the Taxing Master vide the Ruling dated 12<sup>th</sup> March 2020, relating to items 1 and 41 of the Party and Party bill of costs (erroneously styled Advocates/Client bill of costs) dated the 19<sup>th</sup> September 2019.
  - c. The Honourable Court be pleased to re-assess the Fees due in items 1 and 41 of the Party and Party bill of costs dated 19<sup>th</sup> September 2019.
  - d. In the alternative and without prejudice to the foregoing, this Honourable court be pleased to remit items 1 and 41 of the Party/Party bill of costs dated 19<sup>th</sup> September 2019 for Taxation before a different Taxing Master.
  - e. The Costs of this Application be awarded to the Applicant.
2. The Reference vide Chamber summons Application herein is premised on the various grounds contained in the body thereof and same is further supported by the affidavit sworn by Patrick Karige Munge, namely, the Applicant herein on the 19<sup>th</sup> January 2022 and to which the deponent has annexed three sets of documents.



3. Being a Reference, which is akin to an appeal, the Respondent is ordinarily not obliged to file any Responses thereto. For clarity, the response is argued on the basis of the law applicable to the taxation at the material point in time.

#### **Deposition by the Applicant:**

4. Vide Supporting Affidavit sworn on the 19<sup>th</sup> January 2022, the deponent, namely, the Applicant, has averred that same filed and/or lodged the subject suit wherein same sought a declaration based on acquisition of Adverse possessory rights over and in respect of one property, which had however, been subdivided into six units.
5. Further, the deponent has averred that the suit was heard and determined vide Judgment rendered on the 6<sup>th</sup> December 2018, whereupon the court dismissed same with costs to the Respondent.
6. The deponent has further averred that following the dismissal of the suit, the Respondent proceeded to and filed Party and Party bill of costs dated the 19<sup>th</sup> September 2019, whereby the Respondent sought inter-alia, Instructions fees in the sum of Kshs. 7, 107, 200/= only, which claim was based on a Valuation report wherein the value of the suit property was purported to be Kshs.481, 000, 000/= only.
7. On the other hand, the deponent has further averred that subsequently, the Party and Party bill of costs, was taxed vide ruling rendered on the 12<sup>th</sup> March 2020 in the sum of Kshs.6, 755, 402/= only.
8. Besides, the deponent has averred that upon the taxation of the Respondent's Party and Party bill of costs, same felt aggrieved and/or dissatisfied and in this regard, same proceeded to and filed a Notice of Objection to taxation dated the 13<sup>th</sup> March 2020.
9. Further, the deponent has averred that despite filing the Notice of Objection to taxation, which was lodged with the court on the 13<sup>th</sup> March 2020, the reasons for taxation or copy of the ruling in respect of the taxation was never availed and/or supplied to same until the 12<sup>th</sup> January 2022.
10. Be that as it may, the deponent has further averred that upon receipt of the ruling on taxation, same found that the taxing master had erroneously taxed and awarded the sum of Kshs. 5, 000, 000/= only, in respect of instruction fees and Kshs.1, 666, 667/= only in respect of Getting up fees.
11. However, the deponent has averred that the taxation and award of costs in respect of Instruction fees and getting up fees, namely, items 1 and 41, respectively was arbitrary and erroneous.
12. Based on the foregoing, the deponent herein has thus implored the court to vary and/or set aside the decision of the taxing master rendered on the 12<sup>th</sup> March 2020 and particularly, as pertains to items 1 and 41 of the Party and Party bill of costs dated the 19<sup>th</sup> September 2021.
13. On the other hand, the deponent has also sought that upon the variation and/or setting aside of the Certificate of taxation in respect of items 1 and 41, the court be pleased to re-assess the costs due to and in favor of the Respondent.

#### **Submissions by the Parties:**

14. The subject Application came up for hearing on the 28<sup>th</sup> March 2022, whereupon the Parties herein agreed to canvass and/or dispose of the Reference by way of written submissions.
15. Pursuant to the foregoing, the Parties herein thereafter proceeded to and filed their respective submissions in support of and against the certificate of taxation.



16. On the part of the Applicant, it was submitted that the pleadings that originated the subject suit did not contain and/or allude to any specific value in respect of the subject property. In this regard, the Applicant submitted that to the extent that no value was alluded to in the pleadings, the taxing master could therefore not premise the assessment of the Instruction fees on any value or at all.
17. Secondly, the Applicant further submitted that the suit having been dismissed, it is imperative to note that the court therefore did not make any monetary award in the judgment or at all, that could be utilized to ascertain and/or authenticate the value of the suit property for purposes of ascertainment or computation of the Instruction fees.
18. Thirdly, the Applicant also submitted that despite the taxing master making reference to the complexity of the subject matter, as well as taking account of the location and acreage of the suit properties, the taxing master does not appear to have indeed considered the necessary ingredients as provided for and/or captured in the Advocates Remuneration Order, 2014.
19. Premised on the foregoing, the Applicant therefore contended that the assessment and/or taxation of the Instructions fees and by extension the Getting up fees, was therefore erroneous and thus ought to be varied and/or set aside.
20. On his part, the Respondent herein has supported the assessment and/or taxation of the Instruction fees as well as the getting up fees and has contended that the Taxing Master applied the correct principle in arriving at the amounts that was taxed and certified.
21. On the other hand, the Respondent has further submitted that the Applicant has not shown and/or established that there was an Error in principle, in arriving at the figures that were awarded by the Taxing master.
22. In the premises, the Respondent has implored the court to find and hold that the Taxing Master relied on and applied the correct principles in the taxation and award of costs in terms of items 1 and 41 of the Party and Party bill of costs.

**Issues for Determination:**

23. Having reviewed the Chamber Summons Application dated the 19<sup>th</sup> January 2022, the supporting affidavit in support thereto and having similarly considered the ruling on taxation as well as the submissions filed on behalf of the respective Parties, the following issues do arise and are germane for determination;
  - a. Whether the Taxing Master applied the correct Principles in the taxation and award of the Instructions Fees.
  - b. Whether this court should proceed to re-assess the Instruction Fees as well as the Getting up fees or refer the matter to a different Taxing Master for such re-assessment/taxation.



## Analysis and Determination:

### Issue Number 1

#### Whether the Taxing Master applied the correct Principles in the taxation and award of the Instructions Fees.

24. Before venturing to address and/or answer the 1<sup>st</sup> issue herein, it is imperative to note that the subject suit was filed in the year 2014 and therefore the applicable regime for taxation was/is the *Advocates Remuneration Order* 2014.
25. On the other hand, it is also important to take note of the contents of Schedule 6 paragraph 1 (a) & (b) of the [Advocate Remuneration Order](#) 2014, which provides as hereunder;
- a). To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and—
- That value exceeds But does not exceed
- Kshs Kshs. Kshs.
- 500,000 45,000
- 500,000 750,000 65,000
- 750,000 1,000,000 75,000
- 1,000,000 20,000,000 fees as for Kshs. 1,000,000 plus an additional 1.75%
- Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.
- (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—
- That value exceeds But does not exceed
- Kshs. Kshs. Kshs. –
- 500,000 75,000 500,000
- 750,000 90,000 750,000
- 1,000,000 120,000 1,000,000 20,000,000 fees as for Kshs.1,000,000 plus an additional 2%.
- Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.
26. From the provisions which have been reproduced vide the preceding paragraph, it is evident and/or apparent that the value of the suit property can only be used and/or relied upon on the ascertainment on instruction fees, if such value is evident from the pleadings, judgment or settlement between the Parties.



27. In respect of the subject matter, it is common ground that the Originating pleadings which anchored and/or premised the subject suit did not contain and/or allude to the value concerning the suit property.
28. To the extent that no value was captured and/or alluded to in the pleadings, it was not open for the Respondent herein to carryout and/or undertake any valuation in respect of the suit property post the delivery of the judgment and seek to rely on same in the taxation of Party and Party costs.
29. In my humble view, the valuation report which the Respondent availed and/or supplied to the Taxing master during and in the course of the taxation of the Party and Party costs could therefore not be used and/or relied upon for purposes of ascertainment and/or taxation of the Instruction fees.
30. Be that as it may, it is important to point out that the Taxing master proceeded to and disregarded the said valuation report, albeit for other reasons, namely, that same related to separate and distinct properties other than the properties, which were the subject of the suit.
31. Nevertheless, despite having disregarded the valuation report on the basis of the reasons stated, it appears that the value that had been contained in the valuation report influenced and/or colored the judicial mind of the taxing master in arriving at and/or ascertaining the instruction fees.
32. Other than the foregoing, it is also evident that while proceeding to tax and certify the Instruction fees in respect of the subject matter, the taxing master does not appear to have appreciated the relevant clause, of the Advocate Remuneration Order, which ought to have been relied upon and/or applied in the taxation of Instruction fees in respect of the subject matter.
33. It is important to recall that the originating pleadings upon which the subject suit was anchored did not contain and/or allude to any value. Consequently, the taxation and/or ascertainment of Instruction fees could only be premised under the clause which relates to other matters.
34. For clarity, the relevant clause provides as hereunder;

Other Matters:

To sue or defend in any case not provided for above; such sum as may be reasonable but not less than—

- (i) If undefended 45,000
- a. (ii) If defended 75,000

35. In respect of the subject matter, prior to and or before taking into account the complexity of the matter, the level of interests of the parties and the time taken in prosecution of the matter, which are factors that will impact on the ultimate award of the Instruction fees, it was incumbent upon the taxing master to appreciate and underscore the statutory bench mark, namely, the Scale Fees, upon which the discretion will be applied.
36. Based on the fact that the scale fees was stipulated vide the Advocates Remuneration Order, which I have alluded to herein before, it is difficult, nay impossible to see how the Taxing master arrived at and awarded Kshs.5, 000, 000/= Only, on account of Instruction fees.
37. Suffice it to note that the relevant Basic fee is important and/or pertinent and acts as the benchmark which must be relied upon before the taxing officer ventures to consider whether to increase and/or decrease of Instruction Fees.



38. In support of the foregoing statement, it is sufficient to take cognizance of the decision in the case of *DK Law Advocates v Zhong Gang Building Material Co. Ltd & another* [2021] eKLR, where the court observed as hereunder;
33. As was held in *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64, the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. In *Opa Pharmacy Ltd vs. Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU)* [1972] EA 233, it was held:
- “Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer’s mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one’s discretion.”
39. In the premises, it is my finding and holding that the award of Kshs.5, 000, 000/= Only, in respect of instruction fees constitutes and/or reflects an Error in principles and hence same is amenable to variation and setting aside by this court.
40. Similarly, having found and held that the ascertainment and award of Instructions fees was erroneous, it therefore follows that the computation of the Getting up fees, which is ordinarily one third (1/3) of the Instructions fees, was Erroneous.

## Issue Number 2

### **Whether this court should proceed to re-assess the Instruction Fees as well as the Getting up fees or refer the matter to a different Taxing Master for such re-assessment/taxation.**

41. Having found and held that the decision of the Taxing master was manifestly erroneous and that same applied a wrong principle in the computation and award on Instruction fees, the question that remains outstanding is whether this court should proceed to re-assess the impugned items or refer the matter for re-assessment by the same taxing master or another taxing master.
42. Whereas this court is possessed and/or seized of jurisdiction to undertake the re-assessment of the impugned items, it is established practice that where the court has varied and/or set aside the certificate of taxation, it is ordinarily imperative for the court to refer the impugned items to either the same taxing master or another taxing officer for purposes of taxation.
43. The foregoing position has been held and applied in various decisions, inter-alia *Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd* (1970) E.A. 141 per spry JA at page 143:

“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 Judge 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 proper 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."

44. Other than the foregoing decision, the same position was restated and underscored in the case of Joreth Limited v Kigano & Associates [2002] eKLR, where the Court of Appeal stated as hereunder;

"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".

45. Based on the foregoing established practice, I am of the humble opinion that the best course of action is to remit the impugned items for purposes of re-taxation by a different taxing officer, albeit with appropriate directions on how the taxation of the impugned items should be carried out and/or undertaken.

#### **Final Disposition:**

46. Having reviewed the issues for determination, which were itemized and/or outlined herein before, it is worthy to note that in arriving at and/or computing the instruction fees and the consequential Getting up fees, the taxing officer did not apply the appropriate clause provided for in the Advocates Remuneration Order, 2014.

47. On the other hand, it is also apparent and evident that in arriving at the Instructions fees, the judicial mind of the taxing officer was unduly influenced and/or colored by extraneous factors, which therefore culminated into the excessive award in respect of Instructions fees.

48. Consequently and in the premises, the Reference vide Chamber Summons Application dated the 19<sup>th</sup> January 2022 is meritorious and same is hereby allowed.

49. For the avoidance of doubt, the impugned items, namely items 1 and 41 of the bill of costs dated the 19<sup>th</sup> September 2019, be and are hereby referred for re-assessment/taxation by a taxing officer other than Hon I. N Barraza, Principal Deputy Registrar of The Environment & Land Court, on a Date to be fixed by the New Taxing Officer.

50. Each party to bear own costs of the reference.

51. It so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Inyangu for the Applicant.

No appearance for the Respondent.

