



REPUBLIC OF KENYA



County Government of Trans Nzoia v Sifuna & Sifuna Advocates (Miscellaneous Reference Application E005 of 2022) [2022] KEELC 3788 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
MISCELLANEOUS REFERENCE APPLICATION E005 OF 2022**

FO NYAGAKA, J

JULY 26, 2022

BETWEEN

COUNTY GOVERNMENT OF TRANS NZOIA APPLICANT

AND

SIFUNA & SIFUNA ADVOCATES RESPONDENT

(Being a Reference against the entire Ruling on Taxation delivered ex parte on 03/08/2021 by Hon. C. M. Kesse, Deputy Registrar/Taxing Officer in Kitale Environment and Land Court Miscellaneous Application No. 6 of 2021 on the Advocate - Client Bill of Costs of Sifuna & Sifuna Advocates against their client the County Government of Trans Nzoia)

RULING

1. The instant Reference instituted by Summons in Chambers is dated February 28, 2022. It was filed on March 07, 2022. It sought the following reliefs:
 - a. ...spent
 - b. This Honorable Court be pleased to set aside in its entirety the Ruling delivered *ex parte* in Kitale Environment and Land Court Miscellaneous Application No 6 of 2021 on the Advocate-Client Bill of Costs of Sifuna & Sifuna Advocates against the County Government of Trans Nzoia, the Applicant herein.
 - c. Upon setting aside the same, this Honorable Court be pleased to tax the said Advocate-Client bill of costs dated March 26, 2021 or order it to be re-taxed.
 - d. Costs of this Reference as well as those of the Taxation proceedings be awarded to the Applicant.
2. The Application was supported by the grounds on its face as well as the Affidavit of one Charles Wabwoba, the Applicant's County Attorney. It was not disputed that the Respondent firm was



retained by the Applicant to represent its interests in Kitale ELC No 136 of 2014 consolidated with Petition No 4 of 2015. Upon consolidation, the trial court rendered a single judgment.

3. It appears that the Respondent's fees were not paid thereby prompting the filing of its Advocate-Client Bill of Costs in Kitale ELC Misc App No 6 of 2021. The Taxing Master awarded Kshs 10,745,347.00, the bill of costs being taxed as drawn on August 03, 2021. This was after in Kitale HC Misc App No 1 of 2019, the Respondent similarly filed taxation proceedings herein in respect to Kitale ELC No 136 of 2014 where the Respondent was awarded Kshs 4,294,010.00. The Certificate of Costs was annexed to the Affidavit and marked as 1.
4. The Applicant was aggrieved by the Taxing Master's award citing that it was unjustifiable, inordinate and excessive as nothing untypical justified her award of more than Kshs 4,294,010.00. Further, the Applicant's argument was that since two matters were consolidated, the Respondent was entitled to half the amount awarded in the lead file in Kitale ELC Misc App No 6 of 2021. Additionally, since the value of the subject matter was discernable from the pleadings being Kshs 185,000,000.00, the award of Kshs 10,000,000.00 on instruction fees was excessive.
5. It was added that the Taxing Officer erred in law and principle in failing to apply the settled applicable cardinal legal principles and provisions hence arriving at a per incuriam decision. The Applicant further challenged the item of interest finding that the taxing master failed to make a finding on its merit. It urged this Court to vary the Taxing Master's decision.

The Response

6. The Reference was opposed. The Respondent file a Replying Affidavit on April 11, 2022 sworn by Prof Nixon Sifuna on the date it was filed. He stated that the impugned award emanated from his Bill of Costs arising out of instructions from the Applicant to protect its interest in Kitale ELC No. 136 of 2014; *Penrose Shilasala Namisi vs Benjamin Nyamumbo Oonge, Ratilal Gosar Dodha, Vipul Ratilal, Avir Kanti Shah and the County Government Trans Nzoia (the Applicant herein)*. He annexed his Bill of Costs that was marked NS 1.
7. Kitale ELC No. 136 of 2014 was dismissed for want of prosecution on February 07, 2018. In response to the consolidation, as stated by the Applicant, the Respondent submitted that the two matters were different, one being in the nature of a Complaint (ELC No 136 of 2014) and the other a Petition (HC Pet No 4 of 2015). To the Reply was annexed the copies of both the Complaint and Petition that were marked NS 2a and NS 2b respectively. It added that the two suits were sui generis. Furthermore, they were filed by two (2) different persons hence proceeded separately. He accentuated that they were never consolidated having been heard by two (2) idiosyncratic courts of equal status. Finally, on the distinction between the two matters, the Respondent deposed that the Petition was heard on its merits with its judgment delivered on June 23, 2016, annexed NS 3 vis-à-vis the dismissal of the suit, the subject of the present taxation proceedings, for want of prosecution.
8. It was justified that the taxation in the sum of Kshs 4,294,010.00 in Kitale HC Misc App No 1 of 2016 arose out of a Constitutional Petition while the taxation the subject of the reference proceedings herein was considered against the value of the subject matter at Kshs 185,000,000.00. He annexed the Certificate of Costs and the Bill of Costs in Kitale HC Misc App No 1 of 2016 and the taxing master's certificate of costs, the subject of these proceedings as NS 4a, NS 4b and NS 5 respectively.
9. In light of the above, the Respondent accused the Applicant of approaching this court with unclean hands and thus undeserving of the orders sought. He added that the comparison laid by the Applicant to the Constitutional Petition was unjustifiable, emotive, illogical and baseless. He pitted it out against that if indeed the suits as mentioned by the Applicant had been consolidated, then the Applicants



ought to have argued that there can only be one taxation in the stead of holding that the present taxed costs ought to have been similar or less than Kshs 4,294,010.00. The Respondent urged this court to dismiss the Reference as it lacked merit with costs in the sum of Kshs 50,000.00.

Supplementary Affidavit

10. The Applicant's Supplementary Affidavit filed on April 18, 2022 deposed that it remained undisputable that in the two (2) matters, that is Kitale ELC No 136 of 2014 and Kitale HC Petition No 4 of 2015, it revolved around parcel number Kitale Municipality Block 7/120 who's value stood at Kshs 185,000,000.00. In the circumstances, it was rehashed that the Taxing Master ought to have assessed instructions fees pegged on this amount and ought to have been assessed at Kshs 2,980,000.00 and not Kshs 10,000,000.00. The contents in the Application and Affidavit in support were reiterated to the effect that the Taxing Master's decision be disturbed. They further lamented that as at the date of swearing the Affidavit, the Taxing Master was yet to furnish her reasons for the award in response its request dated September 06, 2021.

Submissions

11. When the matter was placed before me on June 22, 2022, the Respondent in attendance, and in the absence of the Applicant, requested for and was granted leave to file submissions. According to his submissions filed on July 05, 2022, its Bill of Costs was drawn to scale. He submitted that in fact, the Respondent had discounted the figure that would have, on getting up instructions fees alone, sky rocketed to a sum of Kshs 8,413,747.00. He further resubmitted on his disposition. He dismissed the Applicant's proposition to cap instruction fees at Kshs 2,980,000.00 as baseless. He urged this court to uphold that an Advocate-Client Bill of Costs attracts an increase in instruction fees by half and an additional 16% VAT on the total amount of taxed costs and not only on instruction fees. He submitted that a Taxing Master's decision should not be interfered with except where there is an apparent error or abrogation in principle. According to the Respondent, the Applicant only ought to apply to set aside the assessed costs merely on the amount awarded. That was not the case herein.

Analysis And Determination

12. I have considered the Reference, the respective rival Affidavits and the Respondent's submissions. The issue for determination is whether this court ought to interfere with the findings of the Taxing Master and to what extent if so. *In First American Bank of Kenya vs Shab and Others [2002] 1 E A 64* at 69, Ringera J (as he then was) 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”.

13. In order to establish whether the Taxing Master based her decision on an error of principle, I will have to scrutinize the impugned items against the relevant Advocates Remuneration Order. The Applicant has challenged the entire taxation. However, the crux of the Reference centers on the instruction fees.
14. Before I proceed to analyze the Respondent's Bill of Costs, I take note that the Applicant abandoned the allegation that Kitale ELC No 136 of 2014 and Kitale HC Petition No 4 of 2015 were consolidated. The outcome of the taxation, the subject of the Reference proceedings will thus not be affected by the Taxing Master's decision in Kitale HC Misc App No 1 of 2016. Resultantly, my analysis is that



the Respondent was well within its rights to file his Bill of Costs, the subject of the present Reference, separate and distinct from Kitale HC Misc App No 1 of 2016.

15. I note that it is not disputed that the suit, the subject matter of taxation proceedings was instituted in 2014. It appears ostensibly that the Respondent was soon thereafter instructed to come on record for the Applicant. In those circumstances, the applicable Advocates Remuneration Order is that of 2014. It is not gainsaid that the value of the subject matter of the dispute was to the tune of Kshs 185,000,000.00. I will now import the relevant provisions appurtenant to the present Bill of Costs on instruction fees as hereunder:

SCHEDULE 6 Costs of proceedings in the High Court

A-Party and party costs

1. Instruction fees

Subject as hereinafter provided, the fees for instructions shall be as follows-

- (a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the *Civil Procedure Rules* where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).
- (b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).
- (c) 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.

The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it-

- (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%.

- (c) To defend proceedings where the defendant substantially adopts the defence of another defendant; an instruction fee calculated under subparagraph 1(a).

16. From the above provision, where the value of the subject matter is Kshs 185,000,000.00, instruction fees shall be calculated as hereafter. But before I do so I must add that I have looked at the Petition and judgment and the issues involved. I am of the opinion that the issues therein were fairly complex and of public importance hence I exercise my discretion, under Schedule 6 of the Advocates Remuneration Order and certify that the instructions fees be increased by Kshs 500,000/=. Hence the total sum payable under the Bill is as follows:

Kshs 120,000.00 (on the first 1 million) + (120,000.00 + (2% of 19 million) = Kshs 380,000.00) + (Kshs 380,000.00 + (1.5% of 164 million) = 2,475,000.00.

Based on the foregoing, instruction fees ought to sum up to Kshs 2,975,000.00 to which a sum of Ksh 250,000.00 is added to give a total of Kshs 3,225,000.00.

17. It is not disputed that the Respondent was entitled to getting up fees which is sum is obtained from $\frac{1}{3}$ on the instruction fees. The same was thus ought to have been capped at Kshs 1,075,000.00.

18. The items listed in 3 - 9 in the Bill of Costs were not disputed. Be that as it may, they were drawn to scale. On disbursements, I find that the Respondent did not attach any documentary evidence in the form of receipts. That prayer ought then to have been disallowed in their absence thereof. I find that the Respondent was also entitled to a 50% increase on the amount in the bill and a 16% VAT.

19. In the foregoing analysis, I find that the Taxing Master failed to justify the reason as to why she increased the instruction fees to Kshs 5,000,000.00. Without any advanced reason to justify an increase, the instructions fees ought to have been calculated to scale. But as I have indicated above the sum is increased now by only Kshs 250,000/=. In light of the above, I do exercise my discretion and interfere with the decision of the Taxing Master as is shown below. I calculate the taxed costs follows:

Total amount in the bill: Kshs 4,300,000.00

Increased by half as per schedule B: Kshs 2,150,000.00

Total: - 6,450,000.00

Add VAT @ 16% - 1,032,000.00

GRAND TOTAL - 7,482,000.00

Orders And Disposition

20. The upshot of the foregoing is that I find that the Reference succeeds to the extent that the Taxing Master's assessment of costs in the Respondent's Advocate-Client Bill of Costs dated March 26, 2021 in Kitale ELC Misc App No 6 of 2021 arising out of Kitale ELC No 136 of 2014 is hereby set aside and substituted with an award in the sum of 7,482,000.00 The Respondent shall meet the costs of the Applicant in this Reference.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 26TH DAY OF JULY, 2022.



DR. IURFRED NYAGAKA
JUDGE, ELC, KITALE.

