



REPUBLIC OF KENYA



KENYA LAW
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**Njeri v Kenya Commercial Bank Limited & another (Environment & Land
Case E10 of 2020) [2022] KEELC 2840 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E10 OF 2020
FM NJOROGE, J
JULY 25, 2022**

BETWEEN

JANE NJERI PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

GREAT RIFT INVESTMENT LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant's Chamber Summons application dated 13/10/2021 which seeks the following prayers:
 - a. That this Honorable court be pleased to set aside the decision of the taxing officer delivered on the 29th day of September 2021 in its entirety as far as the same relates to taxation of the party and party Bill of Costs dated 20th April 2021 as the orders given are inconsistent with the provisions of the Advocates (Remuneration) (amendment) Order, 2014 and the [Advocates Act](#);
 - b. That this Honorable court be pleased to re-tax the said Advocate/Client Bill of Costs;
 - c. That in the alternative to prayer 2 above, this Honorable Court be pleased to remit the party to party bill of costs dated 20th April 2021, for re-taxation before a different taxing officer with appropriate directions thereof;
 - d. That the costs of the application be provided for.
2. The application is supported by the sworn affidavit of Philip Mburu filed on 13/10/2021. The grounds on the face of the application and supporting affidavit are that the applicant filed its party and party bill of costs on 20/04/2021 that was drawn at Kshs. 1, 124, 455/=; that on 29/09/2021 the taxing officer delivered her ruling and taxed the party and party bill of costs at Kshs. 139,005/=; that after the ruling was delivered, the applicant wrote the letter dated 5/10/2021 to the Deputy Registrar requesting for



the reasons for her ruling; that being dissatisfied with the taxation, the applicant filed the reference herein; that the value of the subject matter was indicated by the plaintiff in her amended plaint dated 30/10/2020 to be Kshs. 35,000,000/=; that the taxing master misdirected herself by failing to take into account the value of the subject matter in calculating the instruction fees as it was ascertainable from the pleadings; that the taxing master misdirected herself by reducing the amounts for items 42, 43, 44 and 45 of the applicant's bill of costs despite counsel waiting in court for more than two hours before the matter was called; that the taxing master erred in law and principle by failing to take into account the proviso under Schedule 6 of the Advocates (Remuneration) Order, 2014 which required the taxing officer to take into consideration the nature and importance of the matter, the amount involved, the interests of the parties as well as the general conduct of the proceedings; that the taxing master therefore erred in principle by awarding Kshs. 139,005/= as she failed to appreciate the provisions of the law on taxation; that it is in the interest of justice that the applicant be rewarded fairly for the work done.

3. The plaintiff filed a replying affidavit sworn on 22/11/2021 on the same date. She deposed that the Deputy Registrar taxed the 1st defendant's bill of costs on 29/09/2021; that if at all the 1st defendant was aggrieved by the said decision, then under paragraph 11(1) of the Advocates Remuneration Order, 1962, it ought to have given notice in writing to the taxing officer of the items of taxation which it objected to within fourteen (14) days after the decision; that the fourteen days within which the 1st defendant was to give notice lapsed on 13/10/2021; that the letter dated 5/10/2021 annexed to the supporting affidavit merely requested for the ruling and the reasons for taxation without identifying any item of taxation to which the 1st defendant was objecting to; that the letter dated 5/10/2021 does not pass for purposes of a reference as it is not the Notice of Objection envisaged by paragraph 11(1) of the Advocates Remuneration Order; that the 1st defendant did not file and serve any Notice of Objection to Taxation within the appointed time; that therefore the instant reference is incompetent for want of a valid Notice of Objection to Taxation; that the 1st defendant has therefore not properly invoked the jurisdiction of this court; that the 1st defendant is challenging the taxation of its bill of costs without annexing the ruling or the reasons for the impugned decision; that the purported reference herein is misconceived and it has been prematurely brought.
4. In response to the plaintiff's replying affidavit, the 1st defendant filed a further supporting affidavit sworn on 11/02/2022 and filed on 14/02/2022 by Philip Mburu. He deposed that it is true that paragraph 11(1) of the Advocates (Remuneration) Order provides for the issuing of a Notice of Objection to the taxing officer within fourteen days but the provision does not make it mandatory to request for the reasons or file notice of objection especially when the reasons are provided in the ruling; that the applicant was sufficiently informed of the reasons for taxation and consequently proceeded to file a reference within the prescribed statutory period; that there was no need of filing any notice of objection to taxation and yet the reasons for taxation were sufficiently provided by the Deputy Registrar in her ruling and that the failure to file the notice of objection to taxation does not render the taxation incompetent. He annexed a copy of the ruling issued on 25/10/2021 to his affidavit.
5. The application was canvassed by way of written submissions. The 1st defendant filed its submissions dated 25/03/2022 on 04/05/2022. The 1st defendant relied on the case of *First American Bank of Kenya vs Shab and Others [2002] IEA 65* and submitted that the taxing master failed to consider the relevant factors in determining various items of the bill of costs.
6. On instruction fees the 1st defendant submitted that the taxing master stated that the subject matter of the suit could not be ascertained and for that reason awarded instruction fees without considering the value of the subject matter; that however, the value of the suit property could be ascertained from the pleadings as the plaintiff in her amended plaint dated 30/10/2020 had indicated the value to be Kshs.



35,000,000/=. The 1st defendant relied on the case of *Joreth Limited v Kigano & Associates [2002] 1EA 92* at 99 on this issue.

7. The 1st defendant also submitted that it is challenging the taxation of items 42, 43, 44 and 45 of the bill of costs. That the taxing master taxed the said items at Kshs. 1,100 each and yet paragraph 7 (d) of Schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014 provides for the amount taxable at Kshs. 3000 on higher scale. In support of this plea, the 1st defendant submitted that they had attended court and waited for more than an hour before the matter was called.
8. The 1st defendant submitted that the plaintiff had sought that the reference be dismissed on the ground that there were no reasons for taxation filed and that there was no Notice of Objection of Taxation. That the said ruling had reasons for taxation and there was no need of applying for the same. The 1st defendant relied on the case of *National Oil Corporation Limited v Real Energy Limited & another [2016] eKLR* on this issue.
9. The 1st defendant concluded its submissions by stating that the taxing master erred in principle by failing to consider the relevant factors in taxing its bill of costs and sought that their application dated 13/10/2021 be allowed as prayed.
10. I have perused the file record and I have found no submissions filed by the plaintiff.

Analysis and Determination

11. After considering the application, the response thereto and the submissions, the two main issues that arise for determination are whether the reference before the court is competent for lack of the Notice of Objection to Taxation and whether there are sufficient grounds to interfere with the taxing officer's ruling delivered on 29/09/2021.
12. On the first issue, the plaintiff stated that the reference before the court is incompetent for lack of the Notice of Objection as provided for under paragraph 11(1) of the Advocates Remuneration Order, 1962. The 1st defendant on the other hand stated that the above mentioned provision does not make it mandatory to request for the reasons or file a notice of objection.
13. Rule 11 of the *Advocates (Remuneration) Order* provides as follows:
 - a) 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.
 - b) 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.”
14. Upon perusal of the court record, I find that there is a letter dated 5/10/2021 written by counsel for the 1st defendant addressed to the Deputy Registrar requesting for a copy of the said ruling and the reasons for taxation and expressing its intention to file a reference in the matter.
15. The court in the case of *Lubullela & Associates, Advocates v Kenyatta National Hospital [2012] eKLR* stated as follows:

“...I have carefully considered Rule 11(1) of the Advocates (Remuneration) order. Whilst it requires a party objecting to the decision of the taxing master to issue a notice within 14



days, the sub rule does not specify the format of such notice. In my view, the letter of 6th January 2010 was compliant with the sub-rule.”

16. It is the opinion of this court that Rule 11 does not require the writer to copy the notice to the other party as is required in a notice of appeal, and it is not clear what profit the other side may gain by such copying. The notice is supposed to be issued to the Taxing master who, if she has not given any reasons, may be prompted to give reasons before a reference is filed. The taxing master in this case was rendered *functus officio* by the ruling of 29/9/2021. The ruling dated 29/9/2021 was already in place, and it gave reasons for taxation, before the letter dated 5/10/2021 was written. Indeed, no other or additional reasons were given after the letter of 29/9/2021 and the ruling dated 29/9/2021 and the respondent does not insist so. The letter in question was written within the 14 days of the giving of the decision of the taxing master.
17. Bills of costs are normally uncomplicated documents whose contents can be easily cross checked against the court record. Though any court would have preferred for good order to have matters simplified and less time taken on such technical or procedural objections as the one presently under discussion, I do not see any serious prejudice that would be occasioned to the respondents by the applicant’s failure to specifically mention the impugned items in a notice that expressly fits into a description of a notice under Rule 11; that is so especially in the context that the respondents must be given audience at the hearing of the reference. Moreover, Article 159(2(d) elevates the doing of substantive justice over technicalities. Therefore, though it is very helpful to identify with specificity the items whose taxation is to be challenged, I would not think that the failure to specify the items to be challenged is a fatal flaw in the letter dated 5/10/2021. Drawing on the *Lubullellah & Associates decision* (supra) this court is persuaded that in this matter the letter dated 5/10/2021 though not meeting the requirements in Rule 11 to the letter, is sufficient for the purposes of that rule.
18. The 1st defendant is challenging the taxation of item 1 on instructions fees. It submitted that the taxing master stated that the value of the subject matter could not be ascertained and exercised her discretion in taxing the instruction fees and yet the plaintiff in her amended plaint dated 30/10/2020 had indicated that the value of the suit property to be Kshs. 35,000,000/=.
19. The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 (supra)* in determining the issue of instruction fees stated as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose 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 ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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.”
20. The taxing officer in her ruling delivered on 29/09/2021 indicated that the value of the suit property could not be ascertained and she therefore exercised her discretion and awarded the 1st defendant Kshs. 100,000/= as instruction fees.
21. A wholistic construction of the plaint would show that the statement of the plaintiff to the effect that the suit property was worth about Kshs 35,000,000/= was meant to draw a contrast between the proposed actual value if the plot and the value at which it was actually it was disposed of. It is instructive that the suit never proceeded to full hearing and no proof was ever given that the property was worth that much. Furthermore, it must be stated here that the dispute before court was not one of title to land,



but the propriety of procedure employed in the exercise of a statutory power of sale by the 1st defendant over the suit property. The plaint in its prayers sought declarations and a permanent injunction.

22. The court in the case of *First American Bank of Kenya v Shab and others* [2002] 1 EA 64 at 69 by 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.”

23. The Taxing Master used Schedule 6 paragraph (j) of the ARO headed “other matters” and taxed the instruction fee at Kshs 100,000/= using Kshs 75000/= as the basic sum expressly provided for, as in a defended suit. In view of what I have stated in the two immediately preceding paragraphs herein and based on the principles of taxation, it is my view that the taxing master correctly applied Schedule 6 of the ARO and exercised her discretion when she stated as follows:

“Value of subject matter cannot be ascertained and considering the work done and effort put to prepare for hearing, Schedule 6 other matters applies and a fee of not less than Kshs. 75,000/= is provided for and as such I find Kshs. 100,000/= to be fair under this head.”

24. The 1st defendant is also challenging the taxation of items 42, 43, 44 and 45 on the grounds that the taxing master taxed the items at Kshs. 1100 each and yet paragraph 7 (d) of Schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014 provides for Kshs. 3000 for attendances for more than an hour on the higher scale.

25. Paragraph 50 of the ARO provides as follows:

“Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.”

26. Paragraph 22 of the ARO provides as follows:

“22. Liberty to advocate to elect Schedule 5; election to be communicated to client in writing

(1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.”

27. Paragraph 58 of ARO provides as follows:

“58. Costs in High Court may be restricted to subordinate courts’ scale



In causes or matters which, having regard to the amount recovered or paid in settlement or the relief awarded, could have been brought in a resident magistrate's or other subordinate court, costs on the scale application to subordinate courts only shall be allowed unless the judge otherwise orders."

28. The taxing officer in her ruling delivered on 29/09/2021 taxed items 42, 43, 44 and 45 at Kshs. 1,100/= for the reason that each session did not take more than half an hour. It is my opinion that the taxing officer correctly applied the lower scale under paragraph 7d of Schedule 6A in taxing the court attendances under items 42, 43, 44 and 45 of the bill of costs.
29. In conclusion, the applicant's Chamber Summons application dated 13/10/2021 lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU

