



**Adega & 2 others v Kibos Sugar and Allied Industries Ltd & 4 others;
Kenya Union of Sugar Plantation and Allied Workers (Interested Party)
(Petition 8 of 2018) [2022] KEELC 2534 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
PETITION 8 OF 2018**

A OMBWAYO, J

JULY 15, 2022

**IN THE MATTER OF ARTICLES 2(1),3 (1),10 (1),(2),A,B,&C,27 & 73 OF THE
CONSTITUTION OF KENYA AND IN THE MATTER OF ARTICLE 20 (1), (2), (3) A
& B,(4) A & B ,ARTICLE 21 (1),22 (1) , (2) & (3) A,B,C,D &E OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED
UNDER ARTICLE 27,28,32,40,42,43,47 AND 70 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE ENVIRONMENTAL AND CO-ORDINATION ACT,1999

AND

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT
ASSESSMENT AND AUDIT) REGULATIONS,2003**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (JURISDICTION,
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
INDIVIDUAL HIGH COURT PRACTICE RULES 2006 AS READ WITH
CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**TRANSITIONAL CLAUSES AND CONSEQUENTIAL
PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION**

BETWEEN

**BENSON AMBUTI ADEGA 1ST PETITIONER
ERICK OCHIENG 2ND PETITIONER
BETHER ATIENO OPIYO 3RD PETITIONER**



AND

KIBOS SUGAR AND ALLIED INDUSTRIES LTD 1ST RESPONDENT
KENYA POWER LIMITED 2ND RESPONDENT
KIBOS DISTILLERS LIMITED 3RD RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 4TH
RESPONDENT
COUNTY GOVERNMENT OF KISUMU 5TH RESPONDENT

AND

KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS INTERESTED PARTY

RULING

1. Kibos Distillers Limited has come to this court with references dated 20/12/2021 and filed on 22/12/2021 praying that:
 - a) The application be heard together with the 4th Respondent's application dated November 25, 2021 since the subject matter is the same.
 - b) The decision of the Taxing Master dated November 4, 2021 as regards the 3rd Respondent/Applicant's bill of costs dated April 19, 2021 be set aside wholly and the Honorable court be pleased to re-tax it.
 - c) In the alternative, this court to remit the bill of costs dated 19th of April 2021 for re-taxation by the taxing master on the courts guidelines on instruction fees.
 - d) Costs of this reference be borne by the Petitioners and the 4th Respondent.
2. The reference is based on grounds that:-
 - 1) The Taxing Master did not tax the 3rd Respondent/Applicant's bill dated April 19, 2021 at all.
 - 2) The amount awarded is extremely low to amount to an error in principle.
 - 3) The award in taxed costs is not commensurate with work done.
 - 4) The Taxing Master misapplied the law and principles of taxation.
 - 5) The Honorable Taxing Master failed to appreciate the complexity of the matter, industry put, time taken and work done as submitted under item 1 of the bill of costs.
 - 6) The award contradicts the spirit and principle of the Advocates Remuneration Order with regard to fair and reasonable remuneration of counsel in this matter.
 - 7) The Taxing Master misdirected herself in taxing instruction fees of Kshs. 3,000,000/= in view of the value and the weighty of the subject matter.
3. In the supporting affidavit of Wesley M. R. Gichaba, he states that the Petitioner filed the petition herein seeking a myriad of prayers against the applicant inter alia restitution of the land where the



- factory stands, demolition of the factory and injunctive and declaratory orders. That faced with the scenario described above, as counsel for the Applicant he had no option but to fully attend to the matter and give it full time attention in view of its urgency, weight and its importance to the parties now that the factory was closed despite huge investment on it.
4. That the petition proceeded to full hearing and judgment was delivered against the Applicant and the counsel appealed on behalf of the Applicant being Kisumu Court of Appeal Civil Appeal No. 153 of 2019; which appeal succeeded whereupon the petitioners and the 4th Respondent were condemned to pay costs of the petition subject of this reference. That the counsel for the applicant lodged before this court a Party and Party bill of costs dated April 19, 2021 on November 21, 2021 for Kshs. 71,470,476.12.
 5. That the Honorable Taxing Master delivered her ruling on the aforesaid bill of costs dated 10.04.2021 on November 4, 2021 where she taxed the Applicant's costs at Kshs. 4,344,567/=.
 6. That after going through the ruling on the bill of costs, The counsel realized
 - i. That the Honorable Taxing Master did not actually tax the Applicant's bill of costs.
 - ii. That even if one was to assume the amount shown to be taxed on the Applicant's itemized bill of costs on instruction fees, as an example, was extremely low to amount to an error in principle.
 - iii. That the taxing Master misapplied the law on the principles of taxation.
 - v. That the Honorable Taxing Mater failed to appreciate the complexity of the matter, industry put, time taken and work done.
 - v. That the award contradicts the spirit and principle of the advocates Remuneration Order with regard to fair and reasonable remuneration of counsel in this matter, and
 - vi. That the taxing Mater misdirected herself in taxing instruction fees at Kshs. 3,000,000/= in view of the value and the weighty of the subject matter.
 7. That on November 18, 2021 well within the prescribed timelines, he wrote to the taxing Master raising objections to the taxation and sought reasons for taxation of the Applicant's bill of costs.
 8. That after writing the letter requesting for reasons for the taxation of the Applicant's bill of costs, and before he could get the same, he was served by the 4th Respondent's reference dated November 25, 2021 and noted from an annexure marked 'MM2 (b)' to the affidavit of Mamo B. Mamo, that the Taxing Master informed them that the reasons are in the ruling itself.
 9. That in view of the information contained in the annexure now marked "KDL4" the counsel for applicant proceeded to file the instant application for reference.
 10. According to the applicant, this is a good case for the court to interfere and set aside wholly the taxation of the Honorable Taxing Master dated November 4, 2021 and re-tax it or remit the same for taxation on the court's guidelines especially on instruction fees.
 11. The 3rd respondent/applicant submits that the various items in the bill of costs relates to the instructions to defend the petition which sought several prayers including demolition of the factory, compensation of Kshs.100, 000,000/=, restitution, which meant returning or reversing the land to its original position, mandatory orders of closure of factory, which were granted as interim orders, several declarations, injunction and prohibitory orders, among others.



12. The 3rd Respondent, by virtue of interim orders issued against her for the closure of factory, had to obtain stay of execution of the said orders in the Court of Appeal as a matter of urgency which prompted the Petitioners to withdraw the application subject of the interim orders to pave way for hearing of the main petition.
13. The petitioners other than injunctive orders and declaration, sought monetary awards which are in their pleadings and submissions as aforesaid above.
14. The petitioners also filed submissions and justified its plea for the monetary awards it sought though not granted by this court. The petitioner had also sought declaratory orders and injunctive orders without attaching a monetary value.
15. Given that the subject matter of the petition herein was closure of the factory whose value is in excess of Kshs. 6 billion, the 3rd applicant submits that taking into account to the 3rd Respondent's replying affidavit to the petition (pleading) and the value of the subject matter of the suit property as well as the monetary awards sought in the petition the total value is easily discernible from the pleadings, that is over Kshs. 6,000,000,000/= billion.
16. The 3rd Respondent, in its bill of costs sought an award of costs in the total sum of Kshs. 71,470,476.12 for the work done in opposition to the petition and has summarized the items in its submissions into instruction fee, fees in respect of other documents, and court attendances.
17. The 3rd Respondent argues that that the Taxing Master failed to take into account the magnitude, complexity, urgency and the nature of the matter in awarding various amounts in the itemized bill of costs. Further that the taxing master did not at all tax the 3rd Respondent's bill of costs as the Honorable Taxing Master, though in the introduction at page 3 of the ruling of the court sought to tax the 3rd Respondent's bill of costs dated April 19, 2021, but the Taxing Master at page 4 of her ruling, addressed and full considered the 5th Respondent's itemized bill of costs.
18. Clearly when the Taxing Master engaged herself in this exercise, she indicated that the 3rd Respondent has sought Kshs. 40,000,000/= as instruction fees whereas the 3rd Respondent's sought in her bill Kshs. 45,000,000/=. According to the applicant, the 3rd Respondent's bill of costs dated April 19, 2021 was simply not taxed.
19. I have considered the application and do find that the application is competent as the applicant sought for reasons from the Taxing Master but none was forthcoming within the expectation of the 3rd respondent/applicant, but the reasons for taxation were discerned elsewhere, hence the reference.
20. The third applicant herein who were the 3rd respondents in the petition sought a sum of ksh 45,000,000 as instructions fees where the petitioners sought orders declaring the operation licences of applicant unconstitutional, illegal and in contravention of the law. Moreover, the petitioners sought demolition of the applicant's factory and compensation of Ksh 100,000,000, restitution, closure of factory. The applicant sought a sum total of Ksh 71,470,476 for the complete work done in opposition of the petition.
21. The taxing master found that the 3rd Respondent sought for a sum of Kshs. 40,000,000 because he defended a petition seeking orders for the closure and or the discontinuation of operations of the 1st, 2nd and 3rd Respondents factory and where the claim was vehemently defended and taking into account the labour required, the number and length of the papers to be perused, the nature, magnitude, complexity and importance of the matter to the client in terms of the adverse economic, social and political effects of shutting the 1st, 2nd and 3rd Respondents on the client, the county and the public in general and the



fact that the orders sought if granted could have prejudiced the client since they would lose the revenue collected from the 1st, 2nd and 3rd Respondents, occasion job losses to thousands of people within the county and the surrounding areas to lose their only means of livelihood and adversely affect, if not entirely stall its economic agenda for the county of Kisumu with the pecuniary value of the 1st, 2nd and 3rd Respondents being approximately Kshs. 2 billion.

22. The Taxing Master found that the the 4th Respondent objected to this amount as the same was not in accordance with the provisions of Schedule 6, Part A. Paragraph (j) of the [Advocates Remuneration Order](#). According to the 4th respondent, it was impossible to ascertain the value of the subject matter of the Petition from the pleadings or the Judgment and that the sum of Kshs. 40,000,000 was unrealistic and that part 1 (a) only refers to ordinary suits and not constitutional petitions such as the present one.
23. Before the taxing master, the 4th Respondent submitted that the amount he was ready to accept and pay under this item is the minimum of Kshs. 45,000 as outlined in the Order at 1 (j).
24. The learned taxing master relied on the case of *Thomas James Arthur v. Nyeri Electricity Undertaking* [1961] E.A 492 the Court of Appeal (Could, J. A at p. 494) had remarked:

a taxing officer, when he had decided that the scale should be exceeded, does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.”

25. The Taxing Master also relied on R. Kuloba’s work, [Judicial Hints on Civil Procedure](#), Vol. 1; the learned author thus states (page 138):

“Nature and importance of the cause or matter. The taxing officer must take into consideration the nature and importance of the cause or matter...As regards ‘importance of the cause’, all suits are obviously of importance to both the plaintiff and to the defendant; but whether a particular case is important in the wide sense (e.g., that it involves matters of law of importance to the commercial community, or that serious points of practice arise, or that its decision will affect the community at large or a section of the community, or other matters of vital interest) is a matter on which the taxing officer has to decide on the particular facts of each case. Generally a suit under a mortgage is straightforward and involves no great study of the law applicable to mortgage suits; what have to be considered are the facts entitling the plaintiff to claim thereunder, and those facts must relate to the breaches of the covenants, such as failure to pay interest or capital on due date; there is nothing complicated or difficult about that – it does involve a close perusal of the mortgage deed but little..”

26. Noting that the bill of cost to be taxed before her emanated from a Petition heard and determined before the higher courts, the learned taxing master applied Schedule 6 (1) (j) (ii) of the [Advocates Remuneration Order](#) 2014 that provides for a reasonable sum but not less than Ksh. 100,000.
27. The taxing Master was guided by Prof. Justice J. B. Ojwang in the case of [Republic versus Ministry for Agriculture Ex parte Samuel Muchiri W’njuguna & 6 others](#) (2006) eKLR and state the reasons for my assessment on the instruction fees to be as follows:
 - (i) The proceedings in question were purely public-law proceedings...;
 - (ii) The taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
 - (iii) The taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;



- (iv) So far as opposite, comparability should be applied in the assessment of advocate's instruction fees;
 - (v) Objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
 - (vi) Where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;
 - (vii) Where responsibility borne by advocates is taken into account, its nature is to be specified;
 - (viii) Where novelty is taken into account, its nature is to be clarified;
 - (ix) Where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.
28. Ultimately, the Taxing Master assessed item 1 on instruction fees at a sum of Kshs. 3,000,000 and item 2 which is 1/3 of instruction fees shall be Kshs. 1,000,000.
29. I have considered the findings of the learned taxing Master and do find that she properly relied on the [advocates Remuneration Order](#) 2014, schedule 6 (A) Party and Party costs at paragraph 1 (b) that provides:-
- (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).”
30. In *First American Bank Ltd v Shah & Another* [2002] 1 EA 64 the court held:-
- 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... it would be an error of principle to take into account relevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge... not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him..”
31. This court has jurisdiction to interfere with the taxation if the award is inordinately high or low like in the instant case.
32. In [Republic vs Ministry of Agriculture & 20 Others Ex-parte Muchiri W' Njuguna](#) [2006] eKLR, Ojwang J. (Retired) stated as follows: -
- i. “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 a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award 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... The 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 manifestly excessive as to justify an inference that it was based on an error of principle.”



33. I do find that the learned Taxing Officer fell into error by failing to consider the fact that the petitioners sought compensation of Ksh 100,000,000 and restitution of the property and the complexity and the input of the parties in terms of research and therefore arrived at the wrong amount in terms of costs to be paid to the applicants on instruction fees. The taxing officer ought to have taken in consideration the complexity of the matter and nature of the prayers in awarding the bill of costs.
34. I do award Kshs. 12,000,000 as instruction fees and advocates getting up fees being 1/3 of the instruction fees. The court rejects a prayer for an award of 45,000,000 as instruction fees as this will be excessive and will discourage the members of public from coming in public interest matters. Therefore, item 1 and 2 are taxed at Ksh 16,000,000. Costs to the applicant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15th DAY OF JULY 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

