



Rand Investment Limited v Armando & 3 others (Miscellaneous Application 44 of 2021) [2022] KEELC 4741 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEELC 4741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 44 OF 2021**

**MAO ODENY, J
AUGUST 26, 2022**

BETWEEN

RAND INVESTMENT LIMITED PLAINTIFF

AND

COMMISSIONER OF LANDS 1ST DEFENDANT

TANZINI ARMANDO 2ND DEFENDANT

DIRECTOR OF SURVEY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated October 29, 2021 being a reference against the decision of the taxing officer delivered on September 23, 2021 on the following grounds;
 1. In assessing party and party costs the taxing officer erred in failing to appreciate the value of the suit premises had appreciated considering the case started 10 years after filing of the suit.
 2. That the taxing officer failed to appreciate the complexity of the matter in arriving at the instruction fees
 3. The taxing officer seriously misdirected herself in failing to grant the applicant instruction fees and getting up fees on the defendants' counter claim
 4. The taxing officer seriously misdirected herself by failing to consider that the case lasted for over 11 years hence the need to increase
 5. The taxing officer completely ignored the advocates remuneration in taxing the applicant bill of costs counsel agreed to canvas the application *vide* written submissions which were duly filed.



Applicant's Submissions

2. Counsel for the applicant filed a supporting affidavit whereby he deponed that the plaintiff's bill of costs was taxed at Kshs 440,951.84/- and being dissatisfied with the taxation, he wrote a letter to the Deputy Registrar requesting for reasons for the taxation but was dissatisfied with the reasons thus the instant application.
3. Mr Obaga submitted that the instruction fee was grossly undervalued as the taxing master only considered the value of the suit property only, but failed to go ahead to consider that the suit took 11 years to be finalized.
4. Counsel further deponed that the taxing master never considered the labour or industry and time put in place by counsel therefore failed to consider the agony that the applicant went through by being denied access to the plot. That to award Kshs 150,000/= for work done in 11 years is equivalent to paying an advocate Kshs 1,500/= per year for his labour and work hence grossly unfair and undermines an advocate's professional work.
5. Mr Obaga relied on the case of *Jeremiah Muku v Methodist Church In Kenya Trustees Registered & another* and submitted that the taxing master ought to have considered the labour, industry and time put in the case.
6. It was counsel's submission that the taxing master denied the applicant fees on counter-claim which the court had ordered that the plaintiff was entitled to the costs of the suit and the counterclaim and relied on the cases of *Ngurumani Limited v Kenya Civil Aviation Authority & 3 others* and *Kanyariri & Associates Advocates v Salama Beach Hotel Limited & 4 others* where the court stated that a counterclaim is in all respects a suit by the defendant.
7. Mr Obaga submitted that the advocate is therefore entitled to both the instruction fees for the counter claim and the getting up fees and invited the court to re-evaluate the bill of costs and direct the disputed items to be taxed as per our bill of costs.

1st Respondent's Submissions

8. Counsel for the 1st respondent Mr Gicharu filed a replying affidavit where he deponed that the taxing officer exercised her judicial discretion and applied the *Advocates Remuneration Order* in taxing the plaintiff's bill of costs and set out the reasons and legal basis for her decision on the contentious issues.
9. Mr Gicharu submitted that the reference was time barred having been filed over 14 days after delivery of the ruling and that the same was filed without any persuasive reason and/or justification of the delay. Counsel relied on paragraph 11 of the *Advocates (Remuneration) Order* which provides for time within which an objection is to be filed which is 14 days.
10. Counsel further relied on the case of *Nyakundi & Company Advocates v Kenyatta National Hospital Board* [2005] eKLR, *Twiga Motor Limited v Hon Dalmas Otieno Anyango* [2015] eKLR and *National Oil Corporation Ltd v Real Energy Ltd & another* [2016] eKLR and submitted that the reference is time barred and that the applicant has not established any justification for the court to interfere with the taxing officer's discretion.



Analysis And Determination

11. I have considered the application and the submissions by counsel, and the issues that arise for determination are whether the reference is time barred and whether there is sufficient reason to interfere with the discretion of the taxing officer.
12. Paragraph 11 of the *Advocates Remuneration Order* (ARO) stipulates as follows on the filing of reference objecting to the decision of the taxing officer; -
 - “ 11. Objection to decision on taxation and appeal to Court of Appeal.
 - 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 which he objects.
 - 2) The taxing officer shall forthwith record and forward to the objector the reasons or 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 subparagraph (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 expired.”
13. If a party is dissatisfied with the decision of the taxing officer, he or she must give notice in writing of such objection specifying, the items of taxation objected to, within 14 days after the decision.
14. The applicant first expressed his displeasure with the ruling after 7 days of its delivery *vide* a letter dated October 6, 2021 and the Deputy Registrar responded *vide* a letter dated October 7, 2021. This means that the applicant was compliant with the rules requiring a notice in writing within the stipulated period. The application is dated October 29, 2021, the court stamp is dated November 4, 2021 and the payment receipt is dated November 3, 2021. I would give the applicant the benefit of doubt as he had started the process which was within time.
15. On the second issue whether the applicant has given sufficient reasons for the court to interfere with the taxing officer’s discretion, in the case of *Mbogo & another v Shab* [1968] EA p 15 the court held on the issue of discretion as follows: -

“ An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

16. Similarly, in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the court observed; -

“On 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.”

17. In the case of *Opa Pharmacy Ltd v Howse & McGeorge Ltd Kampala* HCMA No 13 of 1970 (HCU) [1972] EA 233, outlined what the taxing officer must take into account and set out the basic fee before venturing to consider whether to increase or reduce it as follows: -

“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.”

18. The taxing officer gave reasons for arriving at the amount taxed in item 1 in her ruling dated September 29, 2021. The taxing officer stated that the value of the subject matter is discerned from the pleadings, judgment or settlement and in this case the applicant was seeking for declaratory orders similarly in the counterclaim which did not make a reference to the value. The application did also not make reference to the value.

19. Further principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in *Makula International v Cardinal Nsubuga & another* [1982] HCB 11 where the court pronounced itself as follows: -

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

20. The taxing officer gave reasons for the increase of basic fee of Kshs 8,400/ to Kshs 150,000/ which she stated that she had considered the nature of the suit which was a land matter and also based on the value of the matter. It is trite that the value of the subject matter is discerned from the pleadings, judgment or the settlement. The court cannot guess the value of the subject matter and cannot go on a fishing expedition to find out what value to assign to the property.



21. I am persuaded by the findings in the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 at 99 where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the 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.
22. The upshot is that I find no reason to interfere with the discretion of the taxing officer as she analyzed and gave a decision which was in compliance with the *Advocates Remuneration Order*. The application is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF AUGUST, 2022.

MA ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving order 21 [1] of the *Civil Procedure Rules*.

