



REPUBLIC OF KENYA



KENYA LAW
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**Bhavasara Anadkumar t/a Sarax Enterprises v Beloilco Holdings Limited & 3 others
(Petition 23 of 2017) [2022] KEELC 12656 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12656 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 23 OF 2017
MAO ODENY, J
SEPTEMBER 27, 2022**

BETWEEN

BHAVASARA ANADKUMAR T/A SARAX ENTERPRISES PETITIONER

AND

BELOILCO HOLDINGS LIMITED 1ST RESPONDENT

REGISTRAR OF TITLES MOMBASA 2ND RESPONDENT

OFFICER, COMMANDING POLICE STATION, KILIFI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling is in respect of a chamber summons dated January 31, 2022 by which Messrs Koceyo & Company advocates, (the applicant / advocate) seek the following orders: -
 - 1) That the decision of the taxing master in this matter on the 1st respondent's party and party bill of costs dated August 21, 2019 delivered on January 26, 2022 be reviewed in terms of item number 1 of the said bill of costs and reduced from 3,000,000/- to kshs 100,000/- as provided for under schedule 6(A) 1(J) of the *Advocates Remuneration Order* [2014]
 - 2) That the certificate of taxation dated January 26, 2022 be set aside.
 - 3) That the costs of this application be provided for.
2. The reference was premised upon the *Advocates Remuneration order*, rule 11 (2) and (4), *Advocates Act*, and article 159 of the *Constitution of Kenya* and the inherent powers of the court; and was supported by the affidavit sworn by Titus Koceyo an advocate of the High Court of Kenya who deposed that the honourable deputy registrar delivered her ruling on the 1st respondent's bill of costs on January 26,



- 2022 and taxed the bill at kshs 3,589,341.40. Dissatisfied with the taxation and particularly item No 1 thereon, he filed the instant application.
3. Messrs Kinyua Muyaa & Co advocates for the 1st respondent opposed the reference through the replying affidavit sworn by D Muyaa advocate on April 21, 2022 who deposed that the reasoning behind the taxing master's decision was sound and that she took into account the nature and importance of the matter, the complexity of the issues raised, the time expended and the value of the subject matter.
 4. The reference was canvassed by way of written submissions whereby the applicant / advocate filed submissions on April 5, 2022 whilst the respondent as at the time of writing this ruling had not complied.
 5. Counsel for the petitioner submitted that the taxing master made a monumental error in awarding 16% VAT on a party and party bill of costs yet there was no service rendered by one party to the other. In support of this argument, counsel relied on the cases of *Pyramid Motors Limited v Langata Gardens Limited* [2015] eKLR; *Amalo Company Limited v BN Kotecha & Sons Limited & another* [2022] eKLR; and *Eddie J Amadi v Titus O Kucheyo* HCCC No 257 of 2017 Milimani.
 6. Counsel further submitted that increasing the instruction fees from the basic kshs 100,000/- provided by the remuneration order to kshs 3,000,000/- was unlawful and unjustified and relied on the cases of *Republic v Minister for Agriculture & 2 others exparte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR; *DK Law advocates v Zhong Gang Building Material Co Ltd & another* [2021] eKLR; *Joreth Limited v Kigano & Associates* Civil Appeal No 66 of 1999 [2002] 1EA 92; *Jasbir Singh Rai & 3 others v Tarloacham Singh Rai & 4 others* [2014] eKLR; and APP No 393 of 2011 *Kyalo Mbobu & Associates v Jacob Juma* where the court reiterated the principles of taxation as set out by the Court of Appeal in *Premchand Reichand v Quarry Services of EA Ltd & others* EALR [1972] EA 162.
 7. Counsel submitted that since the bill of costs being taxed was party and party bill of costs, the question is whether VAT is legally supposed to be allowed in such a bill and cited the case of *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR where a Taxaing Officer had awarded 16% VAT on a party & party bill of costs, an objection was filed in respect of Vat on party & party bill of costs and Justice JL Onguto in his Ruling on Reference set aside the award of VAT and held that VAT is not applicable on party & party bill of costs since no services were rendered by one party to the other but a reimbursement of costs.
 8. Mr Koceyo further relied on the case of *Amalo Company Limited v BN Kotecha and Sons Limited & another* [2022] eKLR where a reference filed against a decision of the taxing master to disallow VAT on party & party bill of costs. Justice F Ochieng concurred that VAT is not allowable in a party and party bill of costs
 9. Counsel therefore submitted that the increase of instruction fees without reasons and justification as such should be reviewed and disallowed as it goes against the principle of Law on unjust enrichment by a winning party as a result of the taxing master's wrong interpretation and misapplication of the Law Applicable.

Analysis And Determination

10. The issues for determination is whether the taxing master's increase of instruction fees was without reasons and justification and whether 16% VAT is applicable in party and party bill of costs. Is there sufficient reason to interfere with the Taxing Master?



11. In the case of *Mbogo & Another v Shah* [1968] EA, p.15 the Court held that;
- “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.”
12. In the case of *First American Bank of Kenya v Shah and others* [2002] EALR 64 the court held that; -
- “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. It was further held in the case of *James v Nyeri Electricity* [1961] EA 492, at pages 492 – 293 that: -
- “Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of *Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim* (4) 1956, 23 EACA 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicial or on erroneous principles”.
14. The taxing master indicated in the ruling that the instruction fee for a defended constitutional petition is kshs 100,000/ but due to the nature and complexity of the matter increased it to kshs 3,000,000/ - and taxed off 5,000,000/ -.
15. These principles in the Court of Appeal case of *Joreth Ltd vs Kigano & Associates* (supra) cited by the applicant, where the court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.
16. The taxing master exercised her discretion correctly by taxing off kshs 5,000,000/ from the instruction fees and I find no sufficient reason to interfere with such discretion. What I have a problem with is the award of 16% VAT which is not applicable in a party and party costs as was held in the case of *Pyramid Motors Limited v Langata Gardens Limited* (20150 eKLR (supra) as follows: -
- “The bills herein concerned party and party costs and VAT could then not apply as neither party fetched nor supplied services to the other.
- The master could only have awarded VAT if the bills were advocate-client bills or if there was tendered evidence before the master that the plaintiff paid VAT and was consequently entitled to indemnity.”
12. I am persuaded that that was an accurate exposition on the issue, and therefore I find that the learned taxing officer was right to have disallowed the claim for VAT.”



17. From the record there was no evidence that the party paid VAT and was entitled to indemnity. Further in the case of Eddie J Amadi v Titus O Koceyo HCCC NO 257 of 2017 Milimani, the taxing master stated that VAT in party bill of costs is not applicable and held that:

“and 16% VAT is not applicable since there was no taxable services during the hearing of the suit and the item is taxed off”

18. I therefore find that the taxing master erred in awarding 16% VAT and the same is set aside.

19. In the East Africa Court of Appeal case of Steel Construction & Petroleum Engineering (EA) Ltd v Uganda Sugar Factory Ltd [1970] EA 141 per Spry JA at page 143, stated: -

“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.”

20. I therefore remit the bill to the taxing master to correct the anomaly identified on the inclusion of 16% VAT. The costs of this reference to be borne by the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public order No. 2 of 2021 and subsequent circular dated 28th March, 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.

