



Otieno, Ragot & Co Advocates v County Government of Kisumu (Miscellaneous Civil Application E007 of 2021) [2022] KEELC 15078 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E007 OF 2021
SO OKONG'O, J
NOVEMBER 24, 2022
IN THE MATTER OF AN APPLICATION TO
TAX AN ADVOCATE -CLIENT BILL OF COSTS**

BETWEEN

OTIENO, RAGOT & CO ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU RESPONDENT

*(Arising from professional services rendered by the Applicant
to the Respondent in KISUMU HCCC NO. 36 OF 2011)*

RULING

Background:

- 1 Kisumu County Council filed a suit against the Municipal Council of Kisumu on 22nd March 2011 namely, Kisumu HCCC No. 36 of 2011 seeking a permanent injunction restraining the Municipal Council of Kisumu, its employees, agents, representatives, assigns or any other person acting through their direction from trespassing, destroying fences, destroying property or in any way interfering with Kisumu County Council's parcels of land known as Kisumu/Municipality/I.R 15026, Kisumu/Nyalenda "B"/357 and Kisumu/Nyalenda "B"/546(hereinafter together referred to only as "the suit properties"). Municipal Council of Kisumu instructed the Applicant on 1st April 2011 to act for it in the matter. The Applicant filed a statement of defence on behalf of the Municipal Council of Kisumu on 10th May 2011 denying the claim by Kisumu County Council.
- 2 On 10th January 2019, the Applicant sent to the County Government of Kisumu an itemized invoice for a total sum of Kshs. 15,461,508.90 inclusive of 16% VAT. The Applicant's invoice was not settled. In July 2020, the Applicant instructed a valuer to value the suit properties. The valuer, Legend Valuers Ltd. valued Kisumu/ Municipality/I.R15026, Kisumu/Nyalenda"B"/357



and Kisumu/Nyalenda“B”/546 and assessed their open market value at Kshs. 170,000,000/-, Kshs. 550,000,000/- and Kshs. 80,000,000/- respectively.

- 3 On 20th August 2020, the Applicant filed advocate/client bill of costs (hereinafter referred to only as “the bill”) dated 19th August 2020 for taxation against the Respondent for services that the Applicant rendered to the Municipal Council of Kisumu in Kisumu HCCC No. 36 of 2011, Kisumu County Council *v.* Municipal Council of Kisumu (hereinafter referred to only as “the High Court suit”). It is not clear from the record why the bill was being taxed against the County Government of Kisumu while the services were rendered to the Municipal Council of Kisumu. The issue was however not raised before the taxing officer. The little said about it the better. In its 44 items bill, the Applicant claimed a total sum of Kshs. 21,581,010.90 inclusive of 16% VAT of which Kshs. 12,200,000/- was claimed as instruction fees. The instruction fees aforesaid was based on the value of the suit properties which the Applicant claimed to be the subject matter of the High Court suit and which the Applicant estimated to be Kshs. 800,000,000/-.
- 4 The Respondent was served with the bill but did not respond to it. The bill was argued by way of written submissions. In its submissions, the Applicant argued that the dispute in the High Court suit concerned the ownership of the suit properties. The Applicant argued that it had valued the suit properties and submitted valuation reports as evidence of the value of the subject matter of the High Court suit. The Applicant submitted that the taxing officer had power to call for documents such as valuation reports to assist her in determining the value of the subject matter on which the instruction fees was to be based. The Applicant cited three decisions of this court in support of this submission.
- 5 The taxing officer considered the Applicant’s bill and submissions and taxed the bill at Kshs. 1,697,880.10 all-inclusive in a ruling delivered on 24th June 2021. In the ruling, the taxing officer stated as follows in part:

“Item 1: on this item, the Applicant submitted that this court ought to rely on the Valuation report prepared by Legend Valuers Limited dated 10th July 2020. The report valued the parcels of land as follows;

Kisumu/Nyalenda”B”/357 Kasagam Area approx. 116.137 acres -Kshs. 550,000,000/-.

L.R No. 15026, I.R 63455, Migosi Estate approx. 9.5134 acres-Kshs. 170,000,000/-

Kisumu/Nyalenda “B”/546 Dunga Beach Area approx. 9 acres-Kshs. 80,000,000/-

...I shall rely on the case of Joreth Limited vs Kigano and Associates, where the Court of Appeal held that the value of the subject matter for purposes of taxation of a bill of cost ought to be determined from the pleadings, judgment or settlement and that if the same cannot be ascertained the taxing officer may use his discretion. Relying on the valuation report filed by the Applicant after the main suit had been determined would be a grave injustice. It will be introducing new facts in a suit at the taxation stage. As the taxing officer, I have discretion in this matter of taxation but I must exercise the discretion judiciously and not whimsically. I do find the instruction fee proposed by the Applicant in the instant to be exaggerated.

In the present case, the value of the subject matter is not clearly ascertainable from the proceedings and pleadings. Therefore, in the exercise of my discretion, I have considered



the importance of the case, the size and the year when the main suit was instituted, that is 2011. I will therefore use my discretion to value an acre of land at Kshs. 500,000/-I therefore calculate the instruction fees as follows:

Kisumu/Nyalenda”B”/357 Kasagam Area approx. 116.137 acres x 500,000/-=
58,068,500/-

L.R No. 15026, I.R 63455, Migosi Estate approx. 9.5134 acres x 500,000/-
=4,756,700/-

Kisumu/Nyalenda “B”/546 Dunga Beach Area approx. 9 acres x 500,000/-=
4,500,000/-

58,068,500+4,756,700+4,500,000=67,325,200

1,000,000 Kshs. 77,000/-

19,000,000 x 1.5% Kshs. 285,000/-

47,325,200 x 1.25% Kshs. 591,565/-

Kshs. 953,565/-”

The application before the court:

6. The Applicant was dissatisfied with the taxation of item 1 of the bill by the taxing officer and challenged the same through this reference that was filed on 5th July 2021 by way of Chamber Summons dated 2nd July 2021 under Rule 11 of Advocates Remuneration Order(ARO). In the application, the Applicant sought the following orders;
 1. The Learned Deputy Registrar’s decision dated and delivered on 24th June 2021 by which she taxed item 1 in the Applicant’s Bill of Costs dated 19th August 2020 at Kshs. 953,565/- be set aside.
 2. The decision of the Learned Deputy Registrar made on the 24th June 2021 be substituted with an order allowing item 1 of the Applicant’s Bill of Costs dated 19th August 2020 as prayed in the Bill or at least at such figure as this court may find proper and in accordance with the law.
 3. Costs of this Application be provided for.
7. The application was based on the grounds that the Deputy Registrar (hereinafter referred to only as “the taxing officer”) erred in law and in fact in ignoring the valuation reports tendered before her which contained the evidence that she required to establish the value of the suit properties for purposes of taxation. The Applicant contended that the taxing officer erred in law in holding that grave injustice would be occasioned to the Respondent if new facts were admitted at the taxation stage yet paragraph 13A of the *Advocates Remuneration Order* permits the admission of such evidence.
8. The Applicant contended that the taxing officer erred in fact and in law in failing to consider the fact that the Respondent was served with the bill but failed to appear to contest the bill without any explanation. The Applicant contended that the taxing officer also erred in law and fact in dismissing the expert evidence presented to her and adopting her own formula for determining the value of the subject matter of the suit when she had no power to do so.
9. The Applicant averred that the value of the suit properties set by the taxing officer for the purposes of taxation was arbitrary, whimsical and unverifiable. The Applicant contended that the taxing officer



made an error of principle in her decision on Item 1 of the bill. The Applicant averred that the taxing officer's award was manifestly low as to justify an interference by this court on a reference.

10. The Respondent was served with the Applicant's application but did not file a response. The Applicant's reference was heard by way of written submissions. The Applicant filed its submissions on 28th July 2022. The Applicant submitted that the dispute in the High Court suit concerned ownership of the suit properties. The Applicant submitted that it furnished the taxing officer with the valuation reports for the said properties. The Applicant submitted that the suit properties, Kisumu/Municipality/L.R15026, Kisumu/Nyalenda"B"/357 and Kisumu/Nyalenda"B"/546 were valued at Kshs. 170,000,000/=, Kshs. 550,000,000/= and Kshs. 80,000,000/= respectively which amounted to a total of Kshs. 800,000,000/=.
11. The Applicant submitted that the taxing officer's problem was with the valuation reports. The Applicant submitted that the taxing officer was of the opinion that relying on the said valuation reports as a basis for determining the value of the subject matter of the High Court suit would have amounted to introducing new facts at the taxation stage. The Applicant submitted that the taxing officer valued the suit properties at Kshs. 500,000/= per acre which she used to assess the instruction fees. The Applicant submitted that the taxing officer gave no explanation on how she arrived at the said value of Kshs. 500,000/= per acre which she used to assess the instruction fees at Kshs. 975,365/= which was increased by one half to Kshs. 1,463,047.50.
12. The Applicant submitted that Rule 13A of the *Advocates Remuneration Order* (ARO) gives power to the taxing officer to rely on matters not forming part of the original record for the purposes of taxing a bill before him. The Applicant submitted that courts have admitted evidence on values of properties to assist them in determining the value of subject matter in taxation proceedings. In support of this submission, the Applicant cited Nairobi Misc. Civil Application No. 373 of 2007 - *Muriu Mungai & Co. Advocates v. New Kenya Co-operative Creameries Ltd.* and the decisions of this court that were cited before the taxing officer.
13. The Applicant submitted that the decision by the taxing officer was founded on the mistaken belief that the valuation reports that the Applicant had relied on were fresh evidence being adduced at the taxation stage and as such inadmissible. The Applicant submitted that the said valuation reports were proper evidence before the taxing officer since the same were expert opinion which is normally used to assist the court when the case before it involves matters on which it does not have the requisite technical or specialist knowledge. In support of this submission, the Applicant cited *Radhabhai S. Bhanderi v Jyotibhala S. Desai & 3 Others* and *Mohamed Ali Baadi & Others v. Attorney General & 11 Others* [2018] eKLR.
14. The Applicant submitted that instruction fees is based on the value of the subject matter and since the subject matter herein were the suit properties, the taxing officer was required to use the expert evidence to establish the value of the suit properties for the purposes of taxation. In support of this submission, the Applicant placed reliance in *Joreth Ltd. v Kigano & Associates*, Civil Appeal No. 66 of 1999 [2002] eKLR. The Applicant urged the court to set aside the decision of the taxing officer and to tax the instruction fees at Kshs. 12,200,000/=.



Analysis and Determination:

15. In *Kipkorir, Tito & Kiara Advocates v. Deposit Protection Fund Board* [2005] eKLR the court stated as follows;

“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.”

16. In *Kamunyori & Company Advocates v. Development Bank of Kenya Limited* Civil Appeal No. 206 of 2006[2015]eKLR, the court stated as follows;

“.. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instruction fee is arrived at on the wrong principles, it will be set aside”

17. In *Joreth Limited v Kigano & Associates* (*supra*) the court stated that:

“C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

“Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1).”...

....In our view C.K. Njai quite correctly rejected the "opinions of value" as proffered by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos. 4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation...”

...We would at this stage point out that the value of the subject matter of a suit for the purposes 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 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 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...

...What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with



the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.”

18. I have considered the Applicant’s application together with its submissions. The Applicant had a duty to satisfy this court that the taxing officer made an error of principle warranting interference by this court. From the facts giving rise to the dispute before the court that I have set out above, it is my finding that the taxing officer erred in her taxation of the Applicant’s bill but for reasons somewhat different from those put forward by the Applicant. I am in agreement with the Applicant that the taxing officer erred in her determination of the value of the subject matter of the High Court suit but not because of her failure to take into account the valuation reports that were submitted by the Applicant. I am of the view that the taxing officer misdirected herself as to the nature of the dispute that was before the High Court thereby using a wrong schedule of the Advocates Remuneration Order (ARO) to tax the Applicant’s bill.
19. From the ruling of the taxing officer, the instruction fees due to the Applicant was taxed under Schedule V1(1) (d) as read with 1 (b) of the Advocates Remuneration Order(ARO) 2006 which provides as follows:

- “(b) To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader 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, judgement or settlement between the parties (emphasis added) and

That value exceeds	But does not exceed	
Sh.	Sh.	Shs.
-	500,000	49,000
500,000	750,000	63,000
750,000	1,000,000	77,000
1,000,000	20,000,000 fees as for Sh.1,000,000 plus an additional cent.	1,000,000 plus an additional 1.5 per cent
Over 20,000,000	Fees as for 20,000,000 plus an additional 1.25 per cent	

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



(d) To defend any other proceedings; an instruction fee calculated under subparagraph 1(b).” It is clear from the foregoing that fees for defending a suit can only be charged under Schedule V1 (1)(d) of the ARO “where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties.” The High Court suit that was brought by the County Council of Kisumu against the Municipal Council of Kisumu in which the Applicant acted for the Municipal Council of Kisumu was a suit for trespass and the only relief that was sought by the County Council of Kisumu was an injunction to restrain the Municipal Council of Kisumu from interfering with the suit properties that were all registered in the name of County Council of Kisumu. The County Council of Kisumu did not seek any declaration of ownership or possession of the suit properties. The fact that that the Municipal Council of Kisumu claimed that it was the owner of the suit properties and as such was not a trespasser did not in my view make the properties the “subject matter” of the suit for the purposes of taxation. Since the subject matter of the High Court suit was in my view trespass, the instruction fees should have been assessed under Schedule V1 (1)(L) of the ARO 2006 which provides for fees for matters not provided for. The taxing officer had the discretion after ascertaining the basic instruction fees chargeable under Schedule V1 (1)(L) of the ARO 2006 to increase or decrease the same taking into account the factors set out in proviso (i) to Schedule VI (1) of the ARO.

20. Even if I am wrong in the foregoing finding and it is assumed that that the Applicant’s bill was to be taxed under Schedule V1 (1)(d) as read with 1(b) of the ARO and not under Schedule V1 (1) (L) of the ARO 2006, still there would be no basis for carrying out valuation of the suit properties for the purposes of assessing the instruction fees under that schedule. Schedule V1 (1)(b) provides expressly that the fees set out thereunder is only chargeable where the value of the subject matter can be ascertained from the pleadings, judgment or settlement. There is no room for ascertaining the value of the subject matter from valuation reports submitted during taxation where like in the present case, the same cannot be ascertained from the pleadings, judgment or settlement. It was therefore not open for the Applicant to prepare valuation reports for the purposes of taxation. It is worth noting that the Applicant’s valuation reports were prepared in July 2020 and the bill filed in August 2020. There is no doubt that the said valuation reports were prepared for the purpose of the taxation. It is also worth noting that the Applicant was instructed in 2011 while the values given in the valuation reports submitted by the Applicant before the taxing officer were the market values of the suit properties as at 2020; 9 years later.
21. Due to the foregoing, I am unable to fault the taxing officer for rejecting the valuation reports submitted by the Applicant. The same were not admissible for the purposes of ascertaining the value of the subject matter of the High Court suit. The same were neither pleadings, judgment or settlement. The taxing officer was correct when she stated as follows in her ruling “These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instruction fees, that value has to be ascertainable from the pleadings, judgment, or settlement.” The Applicant cited several authorities from this court and the High Court in support of its contention that valuation reports are admissible in evidence during taxation to assist the court in ascertaining the value of the subject matter of the suit. With utmost respect and deference to my colleagues whose decisions have been cited by the Applicant, I am not in agreement with the said decisions. In my view, the taxing officers do not require valuation reports



to assist them in ascertaining the value of the subject matter of a suit. The ARO and case law provide for what the taxing officer should do when the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement. The taxing officer has the discretion to assess reasonable instruction fees payable taking into account factors such as the nature and importance of the suit, the interest of the parties, the general conduct of the proceedings, direction by the trial judge if any, and all other relevant circumstances. The decision by the Court of Appeal in Joreth Limited v Kigano & Associates (supra) is categorical that the taxing officer is not supposed to ascertain the value of the subject matter of a suit from valuation reports or opinions of value submitted during taxation.

22. Once the taxing officer came to the conclusion that the value of the suit properties could not be ascertained from the pleadings, judgment or settlement and that the valuation reports submitted by the Applicant were inadmissible, the taxing officer should have used her discretion to assess a reasonable instruction fees. The taxing officer had no discretion or power to take it upon herself to value the suit properties as she did. The taxing officer therefore fell into error when she carried out a valuation of the suit properties on her own and returned a figure of Kshs. 67,325,200/- for the three properties.
23. In the final analysis and for the foregoing reasons, it is my finding that the taxing officer committed errors of principle first, in taxing the Applicant's bill under Schedule V1 (1)(d) as read with 1(b) of the ARO instead of taxing the same under Schedule VI (1)(L) of the ARO and secondly, in carrying out a valuation of the suit properties for the purposes of ascertaining the value of the subject matter of the High Court suit instead of exercising her discretion to assess a reasonable instruction fees.
24. In Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board (supra) the court stated as follows:

“ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Sonza v Ferrao [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires.”

25. I find no compelling reason why I should tax the bill of costs herein. I am of the view that the taxing officer would be better placed to tax the contested item afresh with appropriate directions. I am a live to the fact that the issue of the taxing officer having used a wrong schedule of the ARO to tax the Applicant's bill was not a ground for the Applicant's reference. The same was raised by the court on its own motion and the Applicant was not given an opportunity to address the court on the same. In adherence to the rules of natural justice, I will not base my final orders in the matter on that point.

Conclusion:

26. In conclusion, the ruling and orders made by the taxing officer, Hon. M.Shimenga on 24th June 2021 in respect of item 1 of the bill of costs dated 19th August 2020 are set aside. The said bill is remitted back to the same taxing officer for taxation of item 1 a fresh with the following directions;
 1. Since the value of the subject matter of the High Court suit cannot be ascertained from the pleadings, judgment or settlement, the instruction fees in the Applicant's bill is not taxable under Schedule V1 (1)(d) as read with 1(b) of the Advocates Remuneration Order 2006.
 2. The taxing officer shall exercise her discretion to assess instruction fees as she considers reasonable and just taking into consideration the nature and importance of the High Court suit, the interest of the parties, the general conduct of the proceedings, direction by the trial judge if any, and all other relevant circumstances.



3. The taxing officer shall compute the total costs payable to the Applicant afresh taking into account the re-taxation of item 1 of the bill and shall issue a fresh certificate of costs to the Applicant.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of:

Ms. Onyango for the Applicant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

