



**A.M. Mbindyo & Co. Advocates v Kitonga (Environment and Land Miscellaneous Application 7 of 2021) [2022] KEELC 14852 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 7 OF 2021  
CA OCHIENG, J  
NOVEMBER 16, 2022**

**BETWEEN**

**A.M. MBINDYO & CO. ADVOCATES ..... APPLICANT**

**AND**

**CHARITY MULUNDE KITONGA ..... RESPONDENT**

**RULING**

1. What is before court for determination is the applicant's chamber summons application dated the April 6, 2022 brought pursuant to sections 3, 3A and 6(e) of the Civil Procedure Act and rule 11(2) of the Advocates Remuneration Order. The applicant seeks the following orders:
  1. That this honourable court be pleased to set aside, review or substitute the taxing master's decision in HC Misc Application No 7 of 2021 issued on March 9, 2022 with respect to item 1 on instructions fees and item 56 and 57 with respect to advocate client costs increased by half and getting up fees in the bill of costs dated February 8, 2021.
  2. That the cost of this application be in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Alphonse Muema Mbindyo advocate, where he deposes that they filed an advocate/client bill of costs on February 10, 2021 in which they sought a sum of Kshs 4,699,330 as costs arising from legal services provided to the respondent in Machakos HCCC No 43 of 2014 (OS) – Joyce Ndungwa Kitonga & Others v Lither Peter Muia & Others. Further, that in the said suit, a total of seven (7) reliefs were sought among them claim over property known as Machakos Town Block 11/78 valued at Kshs 31,000,000 in the year 2008 with accrued monthly rent of Kshs 241,000 from the year 1987 to date, totaling the sum of Kshs 103,389,000. He contends that the said suit was filed in respect to a dispute over control, occupation and title to Machakos Town Block 11/78 as well as preservative orders, call for accounts on profits and benefits derived therefrom. He insists the issues raised were weighty and



complex and the Taxing officer ought to have considered the complexity in determining instruction fees. He confirms that on March 9, 2022, the taxing officer awarded the applicant Kshs 272,047 out of a sum of Kshs 4,699,330. He avers that, being dissatisfied with the said award, they filed an objection to item No 1 of the bill of costs on instruction fees where the applicant sought for Kshs 2,500,000 but was awarded Kshs 75,000, on the ground that the High Court case was commenced by way of originating summons (OS) and that the value of the subject matter could not be ascertained, yet there exists a valuation report dated the July 18, 2018 requisitioned by the respondent and filed together with the originating summons. He insists that the taxing officer took a simplistic approach and failed to consider the principles and provisions of statute in taxation of the bill of costs as laid down in the Advocates Remuneration Order. Further, the taxing officer ought to have considered the applicant's submissions and been guided by the provisions of paragraph 1 (1) schedule vi.

3. The respondent opposed the application by filing a replying affidavit where she deposes that the applicant's claim that the suit property has generated a sum of Kshs 103,389,000 as rent remains unsubstantiated. She explains that the applicant's request to file a valuation report on current market value, as a basis of determining the value of subject matter, through an application dated the April 28, 2021 was dismissed. She contends that the reference over the taxation is in respect to Machakos HCCC (OS) No 43 of 2014 which matter is yet to be determined. Further, the subject of litigation in the aforesaid suit was property known as Machakos Town Block 11/78 which is registered in the names of Pius Kinyamasyo Musyoki, Peter Muia Ndunda, James Kitonga and Samuel Makenzie Kyalo. She insists the taxing officer committed no error by applying schedule 6 of the Advocates Remuneration Order (2014) since the value of the subject matter could not be ascertained from the pleadings. She reiterates that the applicant is not entitled to the amount of Kshs 2,500,000 since he ceased acting before the determination of the said suit hence the amount of work done ought to be commensurate to the costs awarded, as was correctly taxed. She reiterates that the taxing officer applied the correct principles in so finding the bill of costs emanated from a matter which was not complex.
4. The application was canvassed by way of written submissions.

### **Analysis and determination**

5. Upon consideration of the instant chamber summons application including the rivaling affidavits and submissions, the only issue for determination is whether the taxing officer's decision in HC Misc Application No 7 of 2021 issued on March 9, 2022 with respect to items one (1), 56 and 57 of the advocate client bill of costs dated the February 8, 2021 should be set aside.
6. The applicant contends that the taxing officer erred by failing to consider the valuation report in determining the value of the suit property before taxing the impugned bill of costs.
7. In its submissions, the applicant reiterated its claim and insisted that the taxing officer erred in law by disregarding the principle on stare decisis. To buttress its averments, it relied on the following decisions of *Joreth Limited v Kigano & Associates* [2002]eKLR; *Masove Nyangau & Co Advocates v Kensalt Limited* [2019] eKLR; *Mwangangi & Co Advocates v Machakos County* [2018] eKLR and *Rachuonyo & Rachuonyo Advocates vs National Bank of Kenya Limited* [2021] eKLR.
8. The respondent in her submissions reiterated her averments as per the replying affidavit and urged the court to uphold the costs as taxed. She insists that an advocate is entitled to payment of a reasonable fee which is commensurate to work done. Further, that item No 57 should be taxed off completely. To support her averments, she relied on the following decisions: *Joreth Limited v Kigano & Associates* [2002] eKLR; *Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No 3)* [1972] EA 162; *Brampton Investment Limited v Attorney General & 2 Others* [2013] eKLR; *Nyangito & Company*



*Advocates v Doinyo Lessos Creameries Ltd [2014] eKLR* and *Mumias Sugar Company Limited v Professor Tom Ojienda & Associates [2019] eKLR*.

9. On the issue of the instruction's fees, an excerpt from schedule 6 of the Advocates Remuneration Order 2014 provides that:

' The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader 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, judgment or settlement between the parties,'

10. In the case of *Joreth Limited v Kigano & Associates [2002] eKLR* the court held that:-

' 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.'

11. Further in *Republic v Ministry of Agriculture and 2 others: Ex parte Muchiri W'Njuguna & others [2006] eKLR* it was held as follows:

' 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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts.'

12. I note the applicant's main contention is the failure of the taxing officer to award a higher amount on the instruction and getting up fees in respect to their bill of costs. Upon perusal of the originating summons, I note the value of the subject property was not provided. The applicant sought for the taxing officer to allow a valuation report produced in 2008, in respect to the suit property but the application was declined. Schedule 6 of the Advocates (*Remuneration*) (*Amendment*) Order, 2014 clearly provides on how the value of the subject matter should be determined while assessing instructions fees and these are from the pleadings, judgment or settlement between the parties. In the current scenario, the taxing officer determined the instructions fees based on her discretion since no value of suit property had been indicated in the pleadings, further the matter is still pending as there was no settlement between the parties.

13. Based on the facts as presented and in relying on the legal provisions I have cited while associating myself with the quoted decisions, I find that the applicant has failed to demonstrate that the calculation of instruction fees was erroneous. Further, I find that the taxing officer did not err in principle by determining the instructions fees based on her discretion as she had powers to do so. In the circumstances, I will proceed to uphold the determination of the taxing officer as regards item (1) of



the bill of costs in respect to instructions fees. On the issue of item 56 on getting up fees, I note this suit is still pending and the applicant has not explained whether it had been set down for hearing or not.

14. On getting up fees, schedule 6 paragraph (2)(i) of the Remuneration Order provides as follows:-

' In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one-third of the instruction fee allowed on taxation.

Provided that this fee may be increased as the taxation officer considers reasonable but it does not include work comprised in the instruction fees.'

15. From the applicant's averments in the supporting affidavit he has not demonstrated how complex the matter was and what preparation he had put in place to commence the hearing of the said suit. In relying on the legal provisions I have quoted, I do not find that the taxing officer erred by awarding 1/3 of the instructions fees in respect to getting up fees and will not interfere with it.

16. It is against the foregoing that I find this reference unmerited and will proceed to dismiss it.

Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

