



**Lubulella & Associates Advocates & another v St. Bakhita Daycare  
& Kindergarten Limited & another (Miscellaneous Application  
E045 of 2021) [2022] KEELC 15512 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E045 OF 2021  
MD MWANGI, J  
DECEMBER 13, 2022  
IN THE MATTER OF THE ADVOCATES ACT CAP.16 LAWS OF  
KENYA  
AND IN THE MATTER BETWEEN**

**BETWEEN**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... ADVOCATE**

**AND**

**KINDERGARTEN LIMITED ..... RESPONDENT**

**AND**

**ST. BAKHITA DAYCARE & KINDERGARTEN LIMITED ..... CLIENT**

**RULING**

**Background**

1. The Application by the Advocate/Applicant is brought under the provisions of Section 51 of the *Advocates Act*, Chapter 16 Laws of Kenya & Rule 13A of the *Advocates Remuneration Order*, Section 3A, 63(e) of the *Civil Procedure Act* and Order 41 Rule 1 of the *Civil Procedure Rules*.
2. The Advocate prays for entry of judgment in his favour in terms of the certificate of taxation dated February 15, 2022. Further, the advocate seeks interest on the taxed amount at the rate of 14% per annum from the date of service of the bill of costs until payment in full and the costs of the application.



3. The Application is premised on the grounds on the face of it, more particularly, that: -
  - a. The Advocate's and Client Bill of costs herein has been taxed, a Certificate of Taxation issued, and a reference application therefrom struck out/dismissed.
  - b. The Advocates wish to proceed and realize the costs taxed herein by way of execution hence judgement and Decree are required therefrom.
  - c. It is just and fair that the orders sought herein be granted.
4. The Application is further supported by the affidavit of Eugene Lubale Lubulellah sworn on March 24, 2022.

### **Client's Response**

5. The Application by the Advocate is opposed by the Client/Respondent by way of a replying affidavit sworn by one Felista Muthoki Mutinda sworn on the June 7, 2022. The Deponent is a director of the Client/Respondent Company.
6. The deponent deposes that indeed, Honorable IN Barasa on October 5, 2021 taxed the Advocate's Bill of Costs dated July 2, 2021 and a certificate of taxation dated February 15, 2022 issued at the sum of Kshs 128,337.76/-.
7. The deponent affirms that the client had engaged the Advocate to facilitate a Lease over Land Reference Number 209/16719 (Eagle Plains Estate) between Sandridge Properties Limited and itself, which engagement is the subject of this proceedings.
8. The Advocate handled several matters both contentious and non-contentious matters on behalf of the client as enumerated in the Replying Affidavit. The client subsequently effected payments by way of Cheques amounting to a sum of Ksh 2,540,000/- in legal fees paid to the Advocate as evidenced by the attached Cheques.
9. The deponent further avers that pursuant to the Ruling delivered on May 26, 2022, the Client intends to file a suit against the Advocate seeking to recover the sum of Ksh 911,820.52 being the over-payment of legal fees. The over-payment therefore settles the costs due from the Client notwithstanding the payments of Ksh 2,540,000 /- stated above.
10. The client is of the view that it has overpaid the Advocate over and above the scale fees and the court should therefore intervene to resolve the question of all monies paid by the client against the work done by the Advocate.

### **Court's Directions**

11. The court's directions were that the application by the Advocate be canvassed by way of written submissions. Both parties complied. The Advocate's submissions are dated September 16, 2022 and the Clients submission are dated September 23, 2022. The court has had an opportunity to peruse the submissions of both parties.

### **Issues for Determination**

12. What is before this court is an application for entry of Judgment after a taxation of an advocate - client bill of costs and issuance of a certificate of taxation; not a reference. Accordingly, the only issue for determination is whether the court should enter judgment in favour of the Advocate/Applicant as



prayed by the Advocate/Applicant with interest at 14% per annum from the date of service of the bill of costs until payment in full.

### Determination

13. It is not in dispute that the Advocate bill of costs, the subject matter of this application, was taxed on October 5, 2021, at Ksh 128,337.76/=. A certificate of costs was subsequently issued on February 15, 2022.
14. The taxation has not been challenged by the Client in accordance with the provisions of Rule 11 of the *Advocates Remuneration Order*.
15. Section 51(2) of the *Advocates Act* provides that the certificate of taxation of the taxing officer unless set aside or altered by the court is final in regard to the amount of costs covered therein.
16. The issues that the client now raises in the replying affidavit are issues that were before the taxing officer. If the client was dissatisfied with the ruling of the taxing officer, the law has provided it with the avenue and forum for determination of such issues.

1. There is a legion of authorities on matters Advocate - Clients' bills of costs; the Advocates Act and the Advocates Remuneration Order suffice.
2. As the Court of Appeal held in the case of *Machira & Company Advocate vs Arthur K Magugu* (2012) eKLR:-

“With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in *Machira vs Magugu* (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used....”

“In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.”

3. In the case of *Carolyn K Mumbo & Co Advocates vs Mulu Mbuvi* [2019] eKLR, the court too made a similar finding that;

“Guided by the above this Court is therefore inclined to reach a finding that indeed there is a specific procedure under the *Advocates Remuneration Order*, which provides for the specific mechanism in the form of a reference to this Court for purposes of review and or challenging of the taxing master decision, therefore in my view paragraph 11 of the *Advocates Remuneration Order* cannot be short circuited by filing for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* as undertaken by the Respondent herein.”

17. The client has not taken advantage of the procedure provided for as enumerated above.
18. However, a reference to will be considered only on the well settled principles. Not every issue may be raised in a reference.



19. In making such a reference, a party is required to show that his/her case meets the well settled principles to justify the court's interference with the discretion by the Taxing Master.
20. The principles were reiterated in the case of *First American Bank of Kenya vs Shab and Others* [2002] EALR 64 at 69 in which Ringera J (as he then was) observed as follows:

“This court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an 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 irrelevant 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...”

21. In the case of *NW Amolo & Another vs Samson Keengu Nyamweya* [2019] eKLR, Justice L Njuguna faced with a similar case stated that;

“On the issue concerning the reconciliation of the accounts, it is noted that the application before me is limited to the entry of judgment pursuant to the certificate of taxation. In that case, I am of the view that this is not the proper forum for me to consider the payments made by the respondent, if any. The respondent is at liberty to move the court appropriately should he wish to address this issue.”

22. In the case of *Nyangito and Co Advocates vs Doinyo Lessos Creamaries Ltd* (2014) eKLR, Justice Odunga restated the principles to be considered in making a determination on a reference to set aside the decision of the taxing officer in the following terms:-

- a. 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.
- b. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration order itself, some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interests of the parties, the general conduct of the proceedings and any direction by the trial Judge.
- c. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high.
- d. It is within the discretion of the taxing officer to increase or reduce the instruction fees and amount of the increase or reduction is discretionary.
- e. The taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it.
- f. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees.



23. The Court of Appeal in *Kamunyori & Co Advocates vs Development Bank of Kenya Ltd* (2015) eKLR affirmed the position that only an “error of principle” can justify the court’s interference with the decision of the taxing officer.
24. The Court of Appeal elaborated on the meaning of an error of principle as follows:-
- “Failure to ascertain the correct subject matter in a suit is an error of principle. So too, failure to ascribe the correct value to the subject matter is 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 fees is arrived at on the wrong principle, it will be set aside.”
25. Accordingly, the court finds that since the certificate of taxation issued in this matter has not been challenged as provided for under the Advocates Remuneration Order, the court has no option but to enter judgment in favour of the Advocate for the sum of Ksh 128,337.76/= as prayed.
26. On the aspect of interest, I will rely on this court’s finding in the case of *PI Samba and Company Advocates vs Buzeki Enterprises Limited* [2022] eKLR where the court cited the Court of Appeal decision in *Otieno Ragot & Co Advocates vs Kenya Airports Authority* (2021) eKLR, in which the court stated that: -
- “The rule (rule 7) deals with interest chargeable by an advocate in respect of its claim for disbursement and costs following submissions of a fee note. It is patently clear from the rule that interest begins to accrue from the expiry of one (1) month from the date of delivery of the bill or fee note. The learned judge’s reasoning that the rule does not specify the date from which time begins to run was therefore a misdirection.....
- ..... Additionally, it is distinctive that a review of the applicant’s Bill of Costs does not disclose that the applicant included a charge for ‘...interest at 14% per annum on his (her) disbursements and costs...’ in the Bill of Costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest defined by rule 7 ought to have been included in the Bill of Costs, but it was not. This omission would thereby negate the application of rule 7, and instead render the bill liable to an exercise by the court of its discretion under section 26 of the *Civil Procedure Act*.”
27. I have looked at the bill of costs that was drawn, filed and presented by the Advocate/Applicant in this matter. The Advocate did not include a charge of interest at 14% per annum which he now claims in this application. Guided by the above cited bidding authority, Rule 7 cannot therefore apply in this case. I am therefore only then left with the provisions of section 26 of the *Civil Procedure Act* to guide me on the aspect of interest.
28. Exercising this court’s discretion under section 26 of the *Civil Procedure Act*, the court awards the Advocate/Applicant interest at the rate of 14% per annum but from the date of taxation of the bill of costs being the October 5, 2021 until payment in full. I pick on the date of taxation because the client having participated in the taxation proceedings ought to have known about the outcome of the taxation and made arrangements to make payments forthwith.
29. Accordingly, judgment is entered in favour of the Advocate/Applicant for the sum of Ksh 128,337.76/- with interest at 14% per annum from the October 5, 2021 until payment in full.
30. The Advocate/Applicant shall also have the costs of this Application.



## Client's Application

31. The Client's Notice of Motion dated June 7, 2022 seeks for Orders that: -
- a. The Honourable Court be pleased to direct the Advocate to deliver a cash account of all monies received by the Advocate with respect to all representation made by the Advocate including but not limited to the subject matter of these proceedings being Lease with respect to Land Reference Number 209/16719 (Eagle Plains Estate) between Sandridge Properties Limited and St Bakhita Daycare and Kindergarten Limited.
  - b. Upon such delivery and reconciliation, this Honourable Court be pleased to find that the Client has paid the Advocate all legal fees and there are no legal fees outstanding.
  - c. The Honourable Court be pleased to find that the Ruling dated October 5, 2021 delivered by Honourable IN Barasa is spent.
  - d. The costs of this application be in the cause.
32. In opposition to the application, the Advocate filed a Replying Affidavit deponed by Eugene Lubale Lubulellah sworn on the November 22, 2022 in which he contended that:-
- a. The application is misconceived, mischievous, in bad faith, an abuse of the process of Court and fatally defective.
  - b. That the Court lacks jurisdiction to entertain the application and grant the orders sought.
  - c. That there is no legal or factual basis to grant the orders sought.
  - d. The application for delivery and reconciliation of accounts is being introduced in these Miscellaneous Taxation proceedings in flagrant abuse of the [Advocates Remuneration Order](#) and the process of Court.
  - e. The applicant's disputed payments allegedly made over 6 years ago could only be originated by way of Plaint or Originating Summons and would nonetheless be time barred by Section 4 (3) of the [Limitation of Actions Act](#).
  - f. The application is sub judice as the Client has filed similar applications claiming to have made the very same payments alleged herein in Nairobi Elc Misc Application No E044 OF 2021: E045 of 2021: E046 of 2021 and Machakos Misc ELC E014 of 2021 between the parties herein.
  - g. Further, that the Application is incompetent as there is no judgement or decree against the Advocate for the sum of Ksh 911,820.52.
  - h. The application lacks merit and is contradictory as it discloses that the payments made were in respect of different services not in respect of the demised taxation hereof. In any case, the Client raised the very payments before the Taxing Master who dismissed with costs.
  - i. In any event, the applicant has not filed any reference against the taxation hence no legal basis to stop the entry of judgement upon the Certificate of Taxation herein.

## Court's Directions

33. The Application was equally disposed of by way of written submissions by consent. The Advocate's submissions are dated November 22, 2022. The Client did not file any submissions.



## Issues for Determination

34. Having considered the application, the Replying Affidavit and the submissions filed, the key and central issue for determination in this Court's opinion is whether the Court has the jurisdiction to determine the application as brought the Applicant.

## Analysis and Determination

35. In the *locus classicus* case on this subject, *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR, the Court of Appeal expressed itself in the following words: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

36. Paragraph 11 of the *Advocates Remuneration Order* provides that:

“Where a party is aggrieved by the decision of a Taxing Master, he is required to object in writing by requesting the Taxing Master to give reasons for the items of taxation that he is objecting to and thereafter file reference before a Judge.”

37. Section 51 (2) of the *Advocates Act* on the other hand is clear that;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

38. In the case of *Lubulellah & Associates Advocates vs NK Brothers Limited* [2015] eKLR the court observed that;

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs”.

39. The Client, as I already observed earlier on in this ruling has not filed a reference. It has instead filed an application for the Advocate to account for the money paid to the Advocate. As I explained in the case of *Lubulellah & Associates Advocates v St Bakhita Daycare & Kindergarten Limited* (2022) eKLR,

“The question that the Respondent ought to have solemnly pondered before moving to court is how to recover the alleged over-payment, if at all. The modality adopted by the Respondent is unknown in our law. Under the provisions of the *Advocates Act* and the *Advocates Remuneration Order*, this Court's mandate is only limited to entering judgement in favour of the Advocate upon issuance of a taxation certificate under Section 51 (2) of the *Advocates Act* and to handle references by Clients - to review, vary or set aside the decision



of the taxing officer under rule 11 of the Advocates Remuneration Order. Nothing more, nothing less. In purporting to consider the application filed by the client herein, this court would be arrogating itself jurisdiction which it does not otherwise have.

40. I reiterate my finding in the above cited decision; this is not the appropriate forum in which to address the subject of reconciliation of accounts and recovery of the alleged over-payments, if any. The client has the option to file a suit to recover the alleged over-payments upon proof and where the Advocate too will have the opportunity to adduce evidence and counter/interrogate the claim through cross-examination.
41. Accordingly, my finding is that this Court lacks the jurisdiction to hear and determine the client's application as presented. The Client's application dated June 7, 2022 is therefore hereby dismissed with costs to the Advocate.

### **Conclusion**

42. In conclusion, the Court makes the following orders: -
  - a. Judgment is entered in favour of the Advocate/Applicant against the Client for the sum of Ksh 128,337.76/- with interest at 14% per annum from the October 5, 2021 until payment in full.
  - b. The Client's application dated June 7, 2022 is dismissed.
  - c. The Advocate shall have the costs of both Applications.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2022**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Wendoh Lubullelah for the Advocate.

Mr. Lungure holding brief for Ms. Ngereza for the clients.

Court Assistant – Hilda/Yvette.

M.D. MWANGI

JUDGE

