



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC MISC. CASE NO. E8 OF 2020**

**MUSA M'MBWANA NANDWA ..... APPLICANT**

**VERSUS**

**HARUN WATSULU SHITANDI ..... RESPONDENT**

**RULING**

The application is dated 16<sup>th</sup> November 2020 and is brought under paragraph 11 (2) of the Advocates Remuneration Order, 2009 seeking the following orders;

1. The decision of the Deputy Registrar as the taxing officer dated and delivered on 5<sup>th</sup> November, 2020 on the taxation of the applicant's advocate-client bill of costs dated 21<sup>st</sup> January, 2020 and filed in court on 21<sup>st</sup> January, 2020 in Kakamega ELC Misc. App. No. 19 of 2020 on all the items objected be set aside, reversed, reviewed and or otherwise varied.
2. The court be pleased to find that the taxing officer erred in law in the manner in which he taxed the objected items as per the notice of objection.
3. The court be pleased to find that the taxing officer went against the principals of taxation and more so in view of the existing certificate of costs and the respondent's submissions.
4. The court be pleased to find that the applicant was duly entitled to the objected items as was duly presented.
5. The court do issue such further orders as it may deem fit and just in the interest of justice.
6. The costs of this application be awarded to the applicant.

It is based on the grounds that the applicant being dissatisfied with the taxing officer's decision, issued a notice of objection. The taxing officer failed to take into account that V.A.T which is compulsory paid to the government on account of fees received for professional services rendered and is not negotiable. The taxing officer failed to take into account that the applicant's fee could not less than the party and party costs taxed as per the certificate of costs issued. The taxing officer taxation was not based on any principles known in law. The taxing officer largely ignored the submissions of the applicant and the evidence placed before him. It is further supported by the annexed affidavit sworn by Musa M'Mbwana Nandwa Advocate

It is the respondent's submission that a taxation is the assessment of the fees which properly represent the work done and the Bill of Costs should represent a factual statement of services rendered and the disbursements made in the case. If any of the facts alleged in the Bill of costs are shown to be untrue, for example, if it is shown that particular service charged has not been rendered or that a particular disbursement has not been in fact been made, the relevant item must be taxed off. This is what the respondent's submission before the taxing officer were intended to do and the taxing officer herein considered their reasons for objecting to the items, as it was his duty, and allowed such costs charges and expenses as are authorized by the advocates (Remuneration) Order (Rule 16) as they appeared to him to have been necessary or proper for the attainment of justice or defendant the rights of the respondent. The taxing officer also made sure that he did not allow costs which were incurred or increased through over caution, negligence or by mistake as was demonstrated in the respondent's submissions before him.

That in those circumstances the taxing officer was right and had a duty to the public when he made sure that the costs did not rise to such a level as to deprive of access to the courts to all but the wealthy and also made sure that the applicant was properly and fairly compensated for the work he did for the respondent in this matter.

Be that as it may, the respondent objects to the hearing by this honourable court of this reference on merits on the grounds that the applicant having heard the ruling on taxation on 5<sup>th</sup> day of November, 2020, he went ahead on 6<sup>th</sup> day of November, 2020, to draft a Notice of

objection to taxation which he filed on 10<sup>th</sup> day of November, 2020 and thereafter filed the chamber summons herein dated 16<sup>th</sup> November, 2020 and filed the same on the 24<sup>th</sup> day of 2020 before receiving the requested reasons from the taxing officer.

This court has considered the application and the submissions therein. The respondent in their submissions raised a preliminary point of law that the applicant never waited for the reasons of the taxation by the Taxing Master and filed the reference on the 16<sup>th</sup> November 2020. I find that indeed the applicant herein filed an objection/reference in court as required under rule 11 (2) of the Advocates (Remuneration) Order on 10<sup>th</sup> November 2020 seeking an explanation as to why the Taxing Master had taxed bill of costs as they had. That the same were never given and he filed this reference. I find that the court may rely on the ruling by the Taxing Master and failure of the reasons and the respondent's objection is overruled. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:

***“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.***

were never given and he filed this reference. To date the reasons have never been given and the court will rely on the Taxing Master's ruling. In the case of **Evans Thiga Gaturu vs Kenya Commercial Bank Limited (2012) eKLR** the court held as follows:

*“That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First and foremost, the above provision presupposes that in delivering their decisions on taxation, the Taxing Officer only pronounce the results of the taxation without the reasons behind them. In most cases the court is aware that taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances it would be foolhardy to expect the Taxing Officer to redraft another “ruling” containing the reasons. In my view this is another provision that requires to be looked into afresh. I do not see the reasons why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor. In my view there is no magic in requiring the Taxing Officer to furnish reasons before the making of a reference.”*

Secondly, the applicants bill of costs is a replica of the party and party bill of costs taxed by the same Taxing Master where he awarded kshs. 957,374/=. The Client/Advocate bill of costs in the same matter is taxed at kshs. 256,012/=. The Taxing Master also failed to take into account VAT. **Some of the relevant factors to take into account when taxing a bill include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. From the discrepancy mentioned above I find that the** there was an error in principle by the Taxing Officer in the assessment.

On the issue of Value Added Tax (VAT) I note that the Taxing Master did not provide for the same. I find that the applicability of the VAT is mandatory on all incomes earned. The issue of the VAT had been claimed in the bill of costs but the Taxing Master maintained that no evidence of tax return was shown. I find that the issue of the VAT could not be left out since the income earned must automatically be charged for VAT and that it would not be fair to force the Applicant to pay VAT on behalf of his client. The upshot of the foregoing is that the court finds that there was an error in principle by the Taxing Master. Consequently, I find that the application is merited and I grant the following orders;

1. The Taxing Master's decision of the taxed bill of costs dated 21<sup>st</sup> January 2020 and Ruling delivered on 5<sup>th</sup> November 2020 be and is hereby set aside.
2. The bill of costs dated 21<sup>st</sup> January 2020 and Ruling delivered on 5<sup>th</sup> November 2020 shall be remitted to another Taxing Master.
3. Each party shall meet their respective costs of this application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**