



**CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Muikobu) (Environment & Land Miscellaneous Case E240 of 2021) [2024] KEELC 537 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 537 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND MISCELLANEOUS CASE E240 OF 2021**  
**EK WABWOTO, J**  
**FEBRUARY 8, 2024**

**BETWEEN**

**CM ADVOCATES LLP ..... ADVOCATE**

**AND**

**ANDREW OMANDI COLE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE ELEANOR MUIKOBU) ..... CLIENT**

*(Being a reference from the Ruling on taxation of Advocate's Bill of costs by the Taxing Master, Honorable Diana Orago (D.R.) dated and delivered on 6th February 2023)*

**RULING**

1. The Applicant filed a Reference vide a Chamber Summons application dated 22<sup>nd</sup> February 2023 which was accompanied by a supporting affidavit sworn by Carol Kendi Kithinji where the Applicant sought the following orders:
  - a. That the Honourable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the Taxing Master, Honourable Diana Orago (DR) dated and delivered on 6<sup>th</sup> February 2023 taxing the Advocate/Respondent's Bill of costs dated 21<sup>st</sup> June 2021 at Kshs 319,661.20.
  - b. That the Honourable Court be pleased to re-assess the quantum of total fees and disbursements in the Advocate and Client bill of costs.
  - c. That in the alternative to prayer 2 above, the Honourable Court be pleased to remit the Bill of costs dated 21<sup>st</sup> June 2021 for re-assessment of the quantum of total fees and disbursements chargeable before the taxing master or a different taxing master with appropriate directions
  - d. That the costs of this Application be provided for



2. The Application was premised on various grounds including that:
  - i. That the Taxing Master acted contrary to well settled principles of law and also misdirected herself on principles of law applicable
  - ii. The Taxing Master misdirected herself and arrived at a decision that was not only erroneous and unreasonable in the circumstances but legally untenable by awarding the Applicant/ Advocate fees which are grossly disproportionate to the work done by the Applicant. The Taxing Master failed to consider the valuation report that estimate the value of the property at Kshs 193,500,000
  - iii. In Miscellaneous Application No. E170 of 2021 between the same parties and relating to the same property the Taxing Master acknowledged the value of the property as Kshs 200,000,000.
  - iv. The learned Taxing Master exercised her discretion on unclear , unreasonable and legally untenable in awarding the fees as Kes 275,570
3. The Applicant filed submissions dated 27<sup>th</sup> September 2023, further submissions and supplementary affidavit dated 20<sup>th</sup> November 2023. The Applicant outlined several issues for determination including:
  - a. Whether the taxing master erred by failing to take into consideration the valuation report filed by the Applicant valuing the property?
  - b. Whether the taxing master failed to take the relevant factors into consideration in awarding the instruction fees?
  - c. Whether the award by the taxing master is manifestly low as to constitute an error in principle and warrant interference by the Court?
  - d. Whether the chamber summons application is merited?
  - e. Whether the honourable court's jurisdiction has been properly invoked on the issue of retainer?
  - f. Whether without prejudice there was a valid and binding remuneration agreement between the parties?
4. On the other hand, the Respondent filed submissions and a replying affidavit dated 23<sup>rd</sup> October 2023 in which it was argued that the parties were subject to a retainer agreement entered into on 12<sup>th</sup> July 2016. It was also submitted that between 2018 to 2021 the Respondent had paid Kshs 5,000,000 therefore any payments sought by the Advocate were unjust enrichment. In the alternative that the Court failed to uphold the retainer agreement, the Respondent sought to have the bill of costs taxed at Kes 65,000/-
5. Having considered the all the parties' extensive submissions, responses and authorities cited, it is clear that the sole issue for determination before this court is whether the Taxing Master erred in law and principle while taxing the Advocate - Client Bill of Costs dated 21<sup>st</sup> June 2021 herein and thereby reached a wrong assessment.
6. It is common ground that a reference is an appeal against the decision of the Taxing Master, therefore the issue of Taxing Master's jurisdiction is of paramount importance. This Court is guided by the



decision of the Court of Appeal in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* NRB CA Civil Appeal No. 154 of 2014 [2017] eKLR where it was held as follows:-

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Master by law. It is derived from the *Advocates Act* and the *Advocates Remuneration Order*. The Taxing Master sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn v Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The *Advocates Act* and the *Advocates Remuneration Order* confer on the Taxing Master jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Master would be bereft of jurisdiction to tax a bill...” [Emphasis Mine]

7. In this instant case, the parties do not dispute the existence of an advocate- client relationship. Both parties presented evidence confirming that their relationship spans over 5 years and has been cordial until the dispute as to payment of final fees arouse. The Court must emphasize that its function as at this stage strictly binds it to the evidence and pleadings submitted at the Court of first instance. For this reason, I find fault in Respondent’s assertions and reliance upon a retainer agreement seeing that it that had not been pleaded initially.
8. It is also a well-founded principle that save for instances of consolidation, every suit must be considered on the weight and strength of its respective evidence and pleadings. Therefore, I find fault in the Applicant’s assertions that the value of the subject matter ought to inferred based on its similarity to Miscellaneous Application No E170 of 2021 that was determined by the same Taxing Master.
9. The principles governing taxation of costs by a Taxing master laid out in the above cited cases were also reiterated in the leading case of *Premchand Raichand Ltd Another v. Quarry services of East Africa Ltd and Another* [1972] KLR the principles laid out are: -
  - i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
  - ii. The taxing master was expected to tax each bill on its merits;
  - iii. The value of the subject matter had to be taken into account;
  - iv. The taxing master’s discretion was to be exercised judicially and not whimsically or capriciously;
  - v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
  - vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the Taxing Master unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.



10. I wish to echo the sentiments of Ojwang J. (as he was then) in *Republic v Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna* [2006] eKLR, where he expressed that:

“The court cannot interfere with the Taxing Master’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 factors...If the court considers that the decision of the Taxing Master discloses errors of principle, the normal practice is to remit it back to the Taxing Master for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity ...” [Emphasis Mine]

11. In this instance, I have perused the said taxation ruling with specific focus of the following excerpt:

“...In a case in which the value of subject matter is unascertainable from the pleadings, the Taxing Master has the discretion of determining the instruction fees...”

12. This Court finds that the Taxing Master did err in principle in considering the value of the subject matter as unascertainable, when in fact a valuation report had been filed and consequently deliberated upon by the Parties. Furthermore, I have also considered that the payment of Kshs 500,000/- as pleaded and evidenced by the Client-Respondent was not considered by the Taxing Master and should have bearing on the final determination.

13. In the foregoing, this Court hereby finds that the Advocate/ Applicant’s Chamber Summons Application dated 22<sup>nd</sup> February 2023 is merited and the same is allowed under the following terms:

- a. The Ruling of the Taxing master Diana Orago dated and delivered on 6<sup>th</sup> February 2023 taxing the Advocate/Applicant Bill of Costs dated 21<sup>st</sup> June 2021 at Ksh 319,661.20/= is hereby set aside in its entirety.
- b. The Bill of Costs dated 21<sup>st</sup> June 2021 is hereby remitted for re-assessment in its entirety before a different Taxing Master.
- c. Each party is ordered to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Ms. Kendi for the Advocate/Applicant.

Mr. Oriwa for the Client/Respondent.

Court Assistant; Caroline Nafuna.

