



Gazemba Wekesa & Co Advocates v Pinnie Agency Limited (Miscellaneous Cause E053 of 2022) [2024] KEELC 4200 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CAUSE E053 OF 2022**

J OMANGE, J

MAY 2, 2024

BETWEEN

GAZEMBA WEKESA & CO ADVOCATES APPLICANT

AND

PINNIE AGENCY LIMITED RESPONDENT

RULING

1. This references arises out of a Ruling delivered on the 21st November 2022 in respect of an advocate client bill of costs dated 25th June 2021. The Taxing Master taxed the bill at Ksh. 1,780,083.8/=.
2. The application is premised on grounds on the face of the application and on the applicant's supporting affidavit sworn by Lilly Umazi Mwashighadi on the 13th February 2023. She avers that the petitioners are aggrieved by the ruling of the Taxing Officer for the following reasons;
 - a. The Taxing Officer erred in law by awarding Ksh. 1,500,000 as instruction fees without considering value of subject matter.
 - b. The Taxing Officer erred in law finding that number of folios in item 2 as 48 and in item 62 as 5 folios whereas that was not the case.
 - c. Taxing Officer misdirected herself in finding the value of the subject matter was unascertainable despite contrary evidence.
 - d. Taxing Master erred in principle by not awarding costs for items 4, 5, 6, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 61 and not giving reasons for not awarding costs.
3. The Respondent did not file a response to the application as such the application is unopposed. Counsel for the applicant indicated that he did not wish to file submissions.



4. The issue for determination is whether the Taxing Officer exercised her discretion Judiciously and whether the applicant has established basis to interfere with the Taxing Officer 's ruling dated 21st November 2022.

5. Courts would not generally interfere with the decision of a Taxing Master. In *Republic versus Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others* [2006] eKLR; the Court stated;

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a Taxing Officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low;

it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... 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 interference 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. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account 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.”

6. The applicant's contention is that the instruction fees of Kshs. 1,500,000 was arrived at without considering the value of the subject matter with reason being that it was unascertainable. In her ruling the Taxing Master stated, on instructions fees, Paragraph 1 part II of Schedule 5 is instructive of the principles that guide the Taxing Master in awarding the same.

The principles are care and labour required, number and length of papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties' complexity of the matter and all other circumstances to the case that may be fair and reasonable. In a case where the value of the subject matter is ascertainable the Taxing Officer has the discretion of determining the determining the instruction fees.....This matter being a non-contentious one I will use my discretion and award Ksh 1, 500,000/=”

7. The Taxing Master relied-on section of the *Advocates Remuneration Order* 2014 that is Part II of Schedule 5 which reads as follows;

“Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.”



8. The Taxing Master in her ruling went ahead to rely on *Joreth Limited Vs Kigano & Associates* (2002) eKLR with the understanding that the value of the subject matter was unascertainable. The court in the above case held as follows: -

“We would at this stage point out that the value of the subject matter for 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 ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account amongst other matters, the nature and the 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.”

9. The applicant faults the Taxing Master for not considering that in the documents the tender for the affordable housing project was worth Kshs. 5 billion. It is therefore the contention of the applicant that the Taxing Master should have awarded instruction fees of 1.5 % of the value of the tender.
10. I do agree with the applicant that; the value is discernible from the tender documents in respect of which legal advice was given. However, under Schedule 5 there is no requirement that the Taxing Master award 1.5% of such value. The section merely requires that in exercising discretion the Taxing Master should consider amongst other factors the value of the subject matter. Unlike Schedule 6 which is explicit that where the value of the subject matter is discernible the Taxing Master shall award 1.5%, Schedule 5 which is applicable to this bill leaves it entirely to the discretion of the Taxing Officer to consider various factors before awarding instruction fees.

Another issue raised is that the Taxing Master disallowed items 52 to 61 and did not give any reasons for failing to do so.

11. A discretionary power must at all times be exercised judicially by those who wield this power. A court can only demonstrate that discretion was exercised judicially by giving clear reasons for the exercise of such discretion. It is therefore, not enough to restate the principles that the Taxing Master considered. They must be demonstrated by relating the facts of the case to the principles which have been applied.
12. It is important that reasons for disallowing items presented for consideration be clearly documented so that parties are able to discern the reasons for disallowing the items. I find that the timeless words of Ojwang J in the case of *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others* [2006] eKLR provide useful guidance. In the case the learned Judge stated;

“From the foregoing analysis it is clear that I am not of the opinion that the Taxing Officer was properly guided when she conducted the taxation which has been challenged in the two applications – and certainly not, with regard to the item on advocate’s instruction fees. Her exercise of discretion was, in my view, and with much respect, done perfunctorily and as a mere formality. It was necessary to specify clearly and candidly how she had exercised her discretion.

Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs. Since the sum awarded as instruction fees herein, namely Kshs. 20,000,000/=, was not shown to have been guided by the relevant principles, nor was it transparently accounted for, it



appeared, in my assessment, as a mystical figure which cannot be allowed to stand. Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the Taxing Officer is to provide only for reasonable compensation for work done; the Taxing Officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious; so far as possible, the Taxing Officer should apply the test of comparability;

The Taxing Officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the Taxing Officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of analysis and determination adopted by the trial judge; the Taxing Officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the Taxing Officer should state clearly the nature of any novel matter in the proceedings; the Taxing Officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel.”

13. Such that the Taxing Master in exercising discretion on the basis of certain criteria and guided by relevant principles, must endeavour to ensure that based on the evidence the parties have provided, they relate the criteria to the specific facts established by the claimant. Reasons for any items that are disallowed must be clearly stated.
14. In view of the foregoing reasons the taxation dated 21st November, 2021 is hereby set aside. The taxation is to be carried out by a fresh Taxing Master who shall while carrying out the taxation be guided by the principles set out in this Ruling and particularly on the following; In exercising discretion on instruction fees, where the Taxing Master relies on certain criteria for instance if the Taxing Officer is considering care and labour taken the Taxing Officer should indicate the elements of care and labour considered for instance the bulky documents prepared etc. Reasons should be given for any items that are not allowed.
15. Given that this reference was not defended, there is no order as to costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 2ND OF MAY, 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

-Mr. Mbugua for Applicant

-Court Clerk: Steve

