



Tom Ojienda & Associates v County Government of Nairobi (Environment and Land Miscellaneous Application E096 of 2020) [2024] KEELC 4026 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E096 OF 2020**

OA ANGOTE, J

MAY 2, 2024

BETWEEN

PROF TOM OJIENDA & ASSOCIATES ADVOCATE

AND

COUNTY GOVERNMENT OF NAIROBI CLIENT

RULING

1. The Advocate/Applicant in this matter initiated this reference by way of an application dated 25th April 2023, in which it has sought the following orders:
 - a. That the findings and the ruling of Hon. Diana Orago in Misc App No. E096 of 2020 with regards to the Applicant's Bill of Costs dated 3rd September 2020, awarding the Applicant a sum of Kshs. 208,257.12/- be set aside and/or varied;
 - b. That the Advocate's Bill of Costs dated 3rd September 2020 be taxed afresh inter partes.
 - c. That the Honourable Court be pleased to interrogate the Applicant's Bill of Costs in light of actual work done and adopt the Applicant's proposal on taxation of the costs.
 - d. That costs and further incidentals to this application be provided for.
 - e. That this Honourable Court be pleased to grant any other relief as this Court may deem just and expedient to grant.
2. The Applicant's case is that it filed an Advocate-Client Bill of Costs dated 3rd September 2020 against the Client/Respondent following the failure by the Respondent to pay it for representing the latter in ELC Civil case No. 538 of 2012.



3. In the said Bill, the Applicant sought for Kshs. 17,582,727.20. After the parties filed their respective submissions, the taxing master, in a Ruling delivered on 24th June 2021, awarded the Applicant Kshs. 208,257.20.
4. The Applicant avers that the Taxing Officer erred in law and fact in her taxation of items 1 to 68 of the Bill of Costs, as her ruling on all items is arbitrary and devoid of judicial reasoning to sustain it. It argues that in the ruling dated 24th June 2021, the Taxing Officer erroneously held that the Bill emanated from ELC Case No. 187 of 2011 Leonard Kimutai Kipsanai vs City Council of Nairobi & Others and that the bill swaddled the period between 7th June 2011 and 28th December 2012.
5. Rather, it was deposed by the Applicant, the Bill emanated from ELC Civil Suit No. 538 of 2012 Peterson Maina Karumi & 2 others vs City Council of Nairobi & 2 Others; that the Respondent instructed the Applicant to act for it on 29th August 2012; and that the Taxing Officer therefore did no consider the Applicant's Bill of Costs dated 3rd September 2020.
6. Secondly, the Applicant deposed that the Taxing Officer erred in applying the Advocates Remuneration Order 2006 in taxing the Bill of Costs while the Applicant represented the Respondent in the period between 2012 and 2013 and that the applicable Remuneration Order ought to have been the Advocates Remuneration Order 2009.
7. The Applicant deposed that the Taxing Officer ignored its submissions and awarded it instruction fees of KShs. 100,000; that she failed to consider factors such as the nature and importance of the matter to the parties and that the Taxing Officer did not consider that the Respondent risked having injunction orders issued against it in the substantive suit.
8. The Applicant avers that the taxation of the Bill of Costs at a sum of Kshs. 208,257.12 was extremely low as the Taxing Officer failed to consider the nature and importance of the matter to the parties and the general conduct of the proceedings; that the Taxing Officer erred in taxing off items in the Advocate-Client Bill of Costs which were not contested and that items 2 to 67 were drawn to scale.
9. The Applicant deposed that the Taxing Officer erred in finding that the matter was settled through a consent in court dated 25th May 2012, which consent was recorded pursuant to an application dated 25th May 2011, which was not the case as the suit was withdrawn by the court.
10. The Respondents opposed the application vide a Notice of Preliminary Objection dated 8th August 2023 and a Replying Affidavit sworn on 17th October 2023. The Respondents averred that the reference dated 25th April 2023 is fatally defective and contrary to the provisions of Rule 11 of the Advocates Remuneration Order.
11. According to the Respondents, the reference is time barred as it was filed more than a year outside the time prescribed under Rule 11, and was filed without the leave of the court and that the Applicant failed to give notice of its objection to the taxation within 14 days of the ruling made on 24th June 2021.
12. In the 1st Respondent's Replying Affidavit sworn by Wesonga Ogola, the Nairobi County Solicitor, it was deposed that the application is misconceived, an abuse of court process and does not properly invoke the jurisdiction of this Honourable Court as it seeks to set aside the decision of the taxing master in its entirety and that the application does not comply with Rule 11(1) of the Advocates Remuneration Order 2009.
13. It was deposed that the Taxing Master's discretion was judiciously exercised; that the application is incompetent as the Applicant did not seek reasons from the Taxing Master before filing the reference, and if such reasons were sought, they were not attached to the application herein and that the



Applicant's failure to seek reasons from the taxing officer and to attach the said reasons renders the application defective.

14. The Respondents further averred that the Applicant did not annex any evidence of the disbursements to show that the decision of the taxing master, in relation to such disbursements, was based on an error of principle and that the Applicant has not rendered sufficient reasons explaining how the taxing officer erred in principle or how the award was manifestly low.

Submissions

15. In his submissions, Counsel for the Applicant relied on the case of *DK Law Advocates vs Zhong Gang Building Material Co. Ltd & Another* [2021] eKLR where the court laid out the principles guiding the court's power to interfere with the award of a Taxing Officer.
16. Counsel submitted that the taxing officer made an error of principle in its ruling by misdiagnosing the appropriate proceedings that was to be subject to taxation; that the Taxing Master referred to the bill of costs with respect to Nairobi ELC No. 187 of 2011, which swaddled the period of 7th June 2011 and 28th December 2012, containing 49 items and was drawn at Kshs. 7,931,922 instead of the Applicant's Bill of Costs dated 3rd September 2020 arising from ELC Civil Case No. 538 of 2012, containing 67 items, all of which totalled to Kshs. 17,582,727.
17. The Applicant's Counsel relied on the case of *Kamunyori & Company Advocates vs Development of Kenya Limited*, as quoted with approval by the Court of Appeal in *Otieno, Ragot & Company Advocates vs Kenya Airports Authority* [2021] eKLR, where the court noted that failure to ascertain the correct subject matter in a suit for purposes of taxation is an error of principle.
18. Counsel argued that after the foundational error in misidentifying the subject proceedings, the Taxing Master consequently erred in wrongly applying the Advocate Remuneration Order 2006 rather than that of 2009; that the Applicant obtained instructions on 29th August 2012 and that the Taxing Officer failed to consider factors such as the importance of the matter, complexity of the proceedings and interest of the Respondent.
19. Counsel's argument is that the Respondent risked having injunction orders issued against it with regard to plot numbers 45, 46 & 47 Komarock Community Shopping Centre, which has an approximate value of Kshs. 20,000,000 and that their proprietary rights were under threat, necessitating diligent and exemplary legal services.
20. Lastly, Counsel submitted that the Taxing Officer wrongly found that the matter was settled through a consent dated 25th May 2023, yet the case was dismissed through the ruling dated 8th March 2013.
21. Counsel for the Respondent submitted that the reference was filed out of time, more than a year after the ruling of the court. They relied on Rule 11 of the Advocates Remuneration Order and the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] E.A. 696.
22. Counsel also relied on the case of *Matiri Mburu & Chepkemboi Advocates vs Occidental Insurance Company Limited* [2017] eKLR where the court held that the requirement of Paragraph 11 of the Remuneration Order is not a mere technicality. He further relied on the case of *Twiga Motors Limited vs Dalmas Otieno Onyango* [2015] eKLR in which it was held that failure to adhere to the timelines in Rule 11 of the Advocates Remuneration Order rendered the application incompetent.
23. They urge that the Applicant has not supplied any reasons for the inordinate delay in filing the reference and is guilty of laches and that they have further filed the reference without the leave of court for enlargement of time. Counsel relied on the case of *Nyakungi & Company Advocates vs Kenyatta*



National Hospital Board [2005] eKLR, Paul Gicheru t/a Gicheru and Company Advocates vs Kargua (K) Construction Co. Ltd [2008] eKLR and Njoroge Kironyo & 3 others v Koronyo Njoroge [1976] eKLR.

24. It was submitted that the taxing master exercised her discretion judiciously and in consonance with the principles set out in the case of Joreth Ltd vs Kigano & Associates (2002) 1 EA 92 (CAK), First American Bank of Kenya vs Shah (2002) 1 EA 92 and Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] EA 162.
25. Counsel further submitted that the taxing master's decision cannot be impugned merely based on quantum, but rather on an error of principle and that the value of the subject matter is not conclusive as to the complexity of the case. Counsel relied on the case of Republic vs Ministry of Agriculture & 20 Others ex-part Muchiri W' Njuguna [2006] eKLR.

Analysis and Determination

26. This court has considered the reference filed by the Applicant, the Respondent's Affidavit and submissions filed by the parties. The following issues are for this court's consideration:
 - a. Whether this suit is time-barred under Rule 11 of the Advocates Remuneration Order
 - b. Whether this Reference is merited.
27. The reference herein has been filed with respect to the ruling of the taxing master, Hon. Diana Orago delivered on 24th June 2021. The Applicant's case is that the taxing master erroneously taxed the wrong Bill and that the Bill of Costs that was taxed was with respect to ELC Case No. 187 of 2011 Leonard Kimutai Kipsanai vs City Council of Nairobi & Others rather than ELC Case No. 538 of 2012.
28. The Applicant illustrates this error by pointing out that the Bill of Costs it filed in respect of ELC Case No. 538 of 2012 dated 3rd September 2020, had 69 items and sought for KShs. 17,582,727.20. However, the Bill of Costs taxed in the ruling had 49 items and was drawn at Kshs. 7,931,922.
29. The Applicant also claims that the Taxing Master relied on the 2006 Advocates Remuneration Order rather than that of 2009, and that she erred in taxing items 2 to 67 which were not contested by the Respondent.
30. The Respondents have raised a preliminary objection against this reference on the grounds that it has been filed out of time and without leave of the court. They argue that the reference does not comply with Rule 11 of the Advocates Remuneration Order because the Applicant failed to seek reasons from the taxing master before filing the said reference.
31. The Respondents' position is that the taxing master judiciously exercised her discretion. They aver that the application is misconceived, an abuse of court process and does not properly invoke the jurisdiction of this Honourable Court as it seeks to set aside the decision of the taxing master in its entirety.
32. The Respondents have raised a preliminary objection on the grounds that this suit is time barred. They assert that under Rule 11 of the Advocates Remuneration Order, a reference ought to be filed within 14 days of the decision of the taxing master. As the reference herein was filed more than a year later, they assert that the same is time barred. They also claim that the Applicant failed to seek the leave of court before filing this reference out of time.
33. Contrary to the Respondents' claim, the Applicant indeed sought the leave of this court to file this reference out of time by way of a Notice of Motion application dated 29th November 2021. The



court allowed the application on 20th February 2023 as it was unopposed. It was on this basis that the Applicant filed the reference herein on 25th April 2023.

34. Therefore, this reference was filed out of time with the leave of this court.
35. Rule 11 of the Advocates Remuneration Order was generally intended to be an expedited means of resolving disputes that arise from the taxation process. These grievances are not limited to only addressing portions of a taxing master, but may also be relied on to challenge the entirety of a ruling.
36. The nature of a reference was set out in the case of *Vishisht Talwar vs Antony Thuo Kanai T/a Thuo Kanai Advocates* [201] eKLR, where the Court adopted a passage in the case of *Machira & Co. Advocates vs Arthur K. Magugu* (CA 199/2012) eKLR as follows:

“Rule 11 therefore provides for ventilation of grievances from such decision 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. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open Court. Reviews, however, would require provisions akin to those in Section 80 of the *Civil Procedure Act* of discovery of new and important matters, errors on the fact of the record and so on. In our view of the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate’s bill of costs through reference under Rule 11 to a Judge in chambers.”

37. As indicated above, the reference herein is with respect to the ruling of the taxing master dated 24th June 2021. The Applicant’s primary claim is that the taxing master erroneously taxed the wrong Bill, because in her ruling, she stated that the Bill of Costs was with respect to ELC Case No. 187 of 2011 Leonard Kimutai Kipsanai vs City Council of Nairobi & Others rather than ELC Case No. 538 of 2012.
38. The principles for setting aside a decision of a taxing master were summarised in *Del Monte Kenya Limited vs Kenya National Chamber of Commerce and Industry (KNCCI) Murang’a Chapter & 2 Others* [2021] eKLR, upon consideration of the determinations in *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92. These include:
 - a. That there was an error of principle
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 - d. That so far as practicable there should be consistency in the award.
39. It is trite that in a reference, a Judge will not interfere with an awarded quantum by a taxing officer unless there was an error in principle or the discretion was improperly exercised, resulting in injustice. This was held in the case of *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR as follows:

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”



40. The Court of Appeal in the case of Kamunyori & Company Advocates vs Development Bank of Kenya Limited (2015) Civil Appeal 206 of 2006, as quoted by the Appellate Court in Otieno, Ragot & Company Advocates vs Kenya Airports Authority [2021] eKLR articulated instances of error in principle as follows;

“.. failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on 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 instructions fee is arrived at on the wrong principles, it will be set aside”

41. In this matter, the Applicant has asserted that this reference arose from ELC Civil Suit No. 538 of 2012. The Applicant has annexed a copy of the Advocate-Client Bill of Costs and the Submissions filed by both parties before the taxing master. These pleadings buttress the Applicant’s claim. There is no mention of or reference of Nairobi ELC No. 187 of 2011, which was considered by the taxing officer.

42. It is also clear that the Bill of Costs dated 3rd September 2020 contained 67 items valued at Kshs. 17,582,727.20, and not 49 items valued at Kshs. 7,931,922.90/.

43. There is therefore a glaring error of principle by the taxing master because her ruling dated 24th June 2021 was not with respect to the Applicant’s Bill of Costs dated 3rd September 2020. This error therefore resulted in an irrational, inaccurate and unfair taxation. The taxing master’s ruling was consequently wholly erroneous.

44. This error flowed throughout the ruling as the taxing master failed to appreciate that the Respondents’ only contention was with respect to Item 1 of the Bill of Costs, having submitted that items 2 to 67 were drawn to scale. It is disingenuous of the Respondents now to assert that the taxing officer rightly exercised her discretion despite the glaring errors in the ruling.

45. With respect to the Respondents’ contention that the Applicant failed to seek reasons from the taxing officer before filing the reference, it is apparent that the taxing master incorporated reasons for her exercise of discretion in her ruling dated 24th June 2021.

46. In conclusion, this court sets aside the ruling of the Taxing Master dated 24th June 2021 and issues the following orders:

- a. The Applicant’s Bill of Costs to be taxed afresh by a taxing master other than Hon. Diana Orago.
- b. Each party to bear its/his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Msando for Prof. Ojienda for Applicant

Ms Masibo for Respondent



Court Assistant - Tracy

