



**Mwalimu t/a JK Mwalimu & Company Advocates v County Government of Kitui
(Miscellaneous Application E018 of 2022) [2024] KEELC 5255 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS APPLICATION E018 OF 2022**

LG KIMANI, J

JULY 11, 2024

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA
AND
IN THE MATTER OF THE ADVOCATE=CLIENT BILL OF COSTS**

BETWEEN

**JAPHETH KITEME MWALIMU T/A JK MWALIMU & COMPANY
ADVOCATES APPLICANT**

AND

COUNTY GOVERNMENT OF KITUI RESPONDENT

RULING

1. The Applicant’s Advocate – Client Bill of Costs is dated 13th December 2022. The same arose out of legal services rendered to the Respondent in Kitui ELC Petition Number 5 Of 2021(formerly Kitui High Court Constitutional Petition No.2 OF 2015)Justina Mwende Muinde vs County Government of Kitui and 4 others
2. The ruling on taxation on the Bill of Costs was delivered on 29th March 2023. In opposition to this, the Applicant/Advocate filed a Notice of Objection to Taxation dated 5th April 2023 under Rule 11(1) of the Advocates Remuneration Order setting out the items that were objected to, especially on Item number 1 on instructions fees where the Respondent was said to have conceded Kshs. 500,000.00 as reasonable instruction fees.
3. The Advocate further filed the Chamber Summons dated 5th May 2023 seeking the following orders:
 1. That the decision of the taxing officer delivered on 29th March 2023 in so far as the same relates to the reasoning and determination pertaining to the taxation of items



1,2,3,4,5,6,7,8,9,10,11,12,13,14 and 15 and the approved bill at Kshs.427,286.00 dated 29th March 2023 be set aside, varied and/or reviewed upwards.

2. That the Honourable Court be pleased to refer the matter back for re-taxation of the aforesaid items as per prayer 1 above with proper directions or guides to the taxing officer on the proper or legal principles or rules of law to apply in considering the amounts awardable on the items objected to.
3. That in the alternative to prayers 1 and 2 above, the Honourable court be pleased to exercise its inherent jurisdiction and discretion and re-tax or re-evaluate the taxation process and therefore review or reverse the taxation awards in the bill of costs dated 13th December afresh with finality.
- 4 THAT the costs of this reference application be provided for.
4. The Application is supported by the affidavit of Caroline Kaindi Ngala Advocate who had conducted of the matter before the Court.
5. The applicant stated that they filed the notice of objection demanding reasons and were supplied with a copy of the said reasons on 2nd May 2023. She deposed that they noticed the flaws in the reasoning and the decision-making process, hence this reference. In the counsel's view, the award of Ksh.427,286.00 was manifestly and inordinately low considering that these were costs that emanated from a Constitutional Petition in which the respondent had offered a minimum instruction fee of Kshs.500,000.00 referring to their submissions to the Bill of Cost attached thereto.
6. Further, counsel deposed that advocates' court attendances are expressly provided for and advocates are not expected to produce travelling receipts to be eligible for the same. As a result, she deposes that the applicant was exposed to suffering by being awarded inordinately low fees.

Advocate/Applicant's submissions on the reference dated 5/5/2023

7. The Applicant/Advocate submitted that the original bill of costs sought for a total sum of Kshs. 6,907,256.00 based on the work done by the Advocate on the instructions of the Respondent in Kitui ELC Constitutional Petition Number 5 of 2018.
8. The Advocate highlighted the fact that in the said Petition, a total of 10 reliefs were sought and that the Applicant had to extensively respond to the allegations to surmount the aggressive claims mounted by the Petitioners. The Petition was originally filed in the High Court of Kitui before being transferred to the Nairobi Environment and Land Court and later on to this court.
9. Among the items the Applicant contests are the instruction fees payable, attendance and travelling to Nairobi, Machakos and Kitui where the matter was handled. Their view is that the taxing officer's award of Kshs.200,000.00 is inordinately low when even their client the respondent had offered a conservative figure of Kshs.500,000.00
10. The other items as to the attendances and travelling disbursements were awarded at Nil and the applicant's view is that the taxing officer employed the wrong principles of law by stating that the Applicant had not attached the actual vouchers and receipts when there was no need to prove the same as attendances are provided for under the Advocates Remuneration Order. They submit that failure to award attendance fees to the advocate was therefore a gross misdirection on the part of the taxing officer which requires correction.



11. The Applicant/Advocate relied on the holding in the case of Premchand Raichana-vs-Green Hills Investments Ltd HC 572 of 2000(unreported)as quoted in the case of Wambugu Motende & Co. Advocates-vs- the Attorney General & others (2013) eKLR.
12. The applicant concluded by submitting that the taxing officer applied the wrong principles in arriving at the impugned ruling and urged the court to review the taxing officer’s award and substitute the same with such other sums as the court shall award in the circumstances.

The Respondent’s Submissions

13. Counsel for the Respondent indicated to the Court that he would rely on the submissions filed before the Deputy Registrar during taxation. In the said submissions dated 8th February 2023 Counsel opposed the bill of costs and on item 1 of the bill relating instructions fees Counsel where the applicant sought an award of Kshs. 4,000,000. He cited Schedule 6 Part A item 1 (j) of the Advocates Remuneration Order and the authority of Republic vs Ministry of Agriculture & 2 Others Ex Parte Muchiri W’Njuguna & 6 Others (2006) eKLR. Counsel. Counsel proposed an award of Kshs 500,000 as instruction fees
14. Counsel further opposed the award of court attendances and travelling expenses to Nairobi and Machakos among other particular items.

Analysis and Determination

15. The Applicant in this case challenges the Deputy Registrar’s ruling delivered on 29th March 2023, which arose from the Applicant’s Advocate – Client Bill of Costs dated 13th December 2022. The Deputy Registrar’s ruling was that she had considered the subject matter of the petition, the complexity of the case and the interest of the parties in taxing the instruction fees and relied on the holding in the case of Joreth vs Kigano & Associates (2002) eKLR. The taxing officer also relied on the holding of the court in Duke O. Omwenga t/a Omwenga and Co. Advocates vs Monarch Insurance Co. Ltd (2022) eKLR where it was held that travelling expenses ought to be proven by way of receipts.
16. The instruction fee was taxed at Ksh.250,000.00 and attendances were taxed at Ksh.2,100 and travelling expenses were taxed off on the ground that they were not proven.
17. The substantive petition against the Respondent was filed in 2015, therefore the Advocates Remuneration Order (2014) applies to this particular case. Schedule 6 thereof at 1(j) provides that:

“To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing officer in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

(i) where the matter is not complex or (i) opposed such sum as may be reasonable but not less than 45,000

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000.”
25. The petition accused the respondents including the respondent herein of trespassing into the Petitioner’s land parcel numbers Mutonguni/Musengo/35 and Mutonguni/Musengo/38 in a bid to extend a water pipeline from the Petitioner’s borehole to Kakumuti market under a tender



document. The respondents were accused of destroying vegetables, pawpaw and banana saplings thereby occasioning loss and damage. They also accused the respondents of conspiring to grab their boreholes. The Petitioner cited various violations of her constitutional rights and sought 10 orders from the court on various matters. I also note that the matter went on for around 8 years until the Applicant herein had the suit dismissed for want of prosecution on 6th December 2022 by way of an application.

26. In the Court of Appeal case of Joreth Limited v Kigano & Associates [2002] eKLR which the Deputy Registrar relied on in making her decision, it was held that:

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

25. Further, in the case of Republic v Capital Markets Authority Ex Parte Solomon Muyeka Alubala; National Bank of Kenya Limited (Interested Party) [2021] eKLR Nyamweya J quoted the holding of Ojwang J as follows:

“Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR :

- “1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
5. objectivity is to be sought when applying loose-textures criteria in the taxation of costs;
6. where the complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”



25. The Court is of the view that the Respondent in submissions made to the Court and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate conceded that the costs properly payable as instructions fee amounted to Kshs 500,000/- He submitted to the court as follows in the submissions filed before the taxing Officer;

“In view of the forgoing circumstances, we humbly submit that the petition was purely based on public proceedings and the matter was settled at a preliminary stage, we are of the view that an instruction fee of Kshs 500,000/- would be a reasonable compensation for the Advocates work done. We urge this Honourable Court to tax the instructions fees chargeable as Kshs 500,000/-”

25. The Court has considered the above submissions and considers that the taxing officer was wrong in failing to consider the concession by Counsel for the Respondent, who was the Respondent’s County Attorney and was in a position to know the value of the subject matter of the petition, the complexity of the petition, the interests of the parties and the replies required to be filed by the Respondent. Given the said concession and having considered the petition itself, the court is of the opinion that Ksh. 250,000 was an inordinately low figure as instruction fees in this case. However, the court considers the proposal by the Applicant for an award of Ksh.4,000,000/= to be manifestly excessive considering that the matter did not proceed to a full hearing.

26. In Republic vs. Ministry of Agriculture & 2 others Ex parte Muchiri W’njuguna & 6 Others Ojwang, J(as he then was) expressed himself inter alia as follows:-

“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. 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. Needless to state 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. 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... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law or a particularized justification of the mode of exercise of any discretion provided for....The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction.



25. The Court finds that the amount offered by the Respondent's County Attorney as instruction fees in the sum of Ksh.500,000.00 is a reasonable instruction fee in this suit.

26. Further, items 2,5,7,8,9,10,11,12,13 and 14 relate to court attendance and were taxed at Ksh.2,100. The Advocates Remuneration (2014) provides in Schedule 6 section 7(d) that: attendance fees shall be as follows:

“At court or in chambers before a judge not otherwise provided for— at Higher Scale Half-hour or less- Kshs1,900

One hour-Shs. 3,000

Half-day- Shs. 7,100

Whole day-15,000”

25. It is noted that the applicant did not indicate in the Bill of Costs the amount of time spent in Court during the court attendances. It was thus left to the taxing officer to decide on the amount of time to allocate to the several items of court attendance. The court declines to interfere with the discretion of the taxing officer in arriving at the sum of Kshs 2,100.00 for all court attendances.

26. The Applicant also contended that court expenses incurred in travelling to attend court were wrongly taxed off due to failure to prove that they incurred such expenses. The Court notes that items 2, 7, 8, 9, 10 and 11 refer to attending Court in Nairobi, Machakos and Kitui. The bundle of documents provided by the applicant show that the suit was initially filed in the High Court in Kitui and was eventually transferred to the ELC in Kitui. It is not clear at what point the suit was transferred to Machakos and Nairobi.

27. The above notwithstanding, the court agrees with the taxing officer that travelling expenses are actual costs incurred, which ought to be proven by way of production of receipts and since no receipts were provided the said items were properly taxed off. This was in line with the finding in the case of Duke O. Omwenga t/a Omwenga and Company Advocates v Monarch Insurance Company Ltd [2022] eKLR Fred Ochieng J found that:

“Therefore, I find that the Taxing Officer was right when she held as follows;

“Travelling expenses are actual costs incurred, which ought to be proven by way of production of receipts.”

In the absence of these receipts, items 40 – 52 are each taxed off.”

25. This was also held in the case of Ngatia & Associates Advocates vs. Interactive Gaming & Lotteries Limited [2017] eKLR, where the court held that disbursements must be proved by way of receipts.

26. The Court thus finds that the application dated 5th May 2023 partly succeeds as follows;

1. That the decision of the taxing officer delivered on 29th March 2023 be and is hereby varied and/or reviewed to the extent that item 1 of the Bill of Costs dated 13th December 2022 being instructions fees is taxed at Kshs 500,000/- in place of Kshs 250,000/-
2. All other prayers in the application dated 5th May 2023 are hereby dismissed.
3. Each party shall bear their costs of the application.

conclusions



DELIVERED, DATED AND SIGNED AT KITUI THIS 11TH DAY OF JULY 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

The ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

Kiama for the Applicant

No attendance for the Respondent

