



**Raphael Wambua Kigamwa t/a Wambua Kigamwa & Co. Advocates v Kunah (Environment and Land Miscellaneous Application E007 of 2023) [2024] KEELC 5050 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5050 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023**

**LA OMOLLO, J**

**JULY 4, 2024**

**BETWEEN**

**RAPHAEL WAMBUA KIGAMWA T/A WAMBUA KIGAMWA & CO.  
ADVOCATES ..... APPLICANT**

**AND**

**RAPHAEL KIPYEGON NGETICH KUNAH ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Respondent/Applicant's Chamber Summons application dated 7<sup>th</sup> November, 2023. The said application is expressed to be brought under Rule 11 of the *Advocates Remuneration Order* and Order 40 Rule 1(a) & (b) of the *Civil Procedure Rules*.
2. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to set aside and/or revoke the taxing officer's decision and ruling dated 24<sup>th</sup> October, 2023.
  - d. That the Honourable Court be pleased to tax afresh the bill of costs dated 26<sup>th</sup> September, 2023.
  - e. That in the alternative to prayer 2 above, the Bill of Costs 26<sup>th</sup> September, 2023 be remitted to the taxing officer for taxation afresh. (sic)
  - f. That the costs of the application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of one Raphael Kipyegon Ngetich Kunah sworn on 7<sup>th</sup> November, 2023.



### **Factual Background.**

4. The Applicant/Respondent commenced the present proceedings vide the Notice of Motion application dated 26<sup>th</sup> September, 2023 which sought the following prayers;
  - a. That the advocate-client bill of costs arising from Kericho ELC Appeal no. E005 of 2022- Evergreen Tea Factory Company Limited v Raphael Kipyegon Ng'etich Kunah be taxed and a certificate of costs do issue.
  - b. That the costs of this application be provided for.
5. The said application was allowed on 24<sup>th</sup> October, 2023.
6. The application under consideration first came up for hearing on 14<sup>th</sup> November, 2023 when the court gave directions that it be served upon the Applicant/Respondent.
7. On 31<sup>st</sup> January, 2024 the court gave directions that the application be disposed of by way of written submissions.
8. The application was mentioned severally to confirm filing of submissions by the parties. It was finally reserved for ruling on 14<sup>th</sup> May, 2024.

### **Respondent/Applicant's contention.**

9. The Respondent/Applicant deposes that the ruling delivered on 24<sup>th</sup> October, 2023 on the Advocate-Client's bill of costs dated 26<sup>th</sup> September, 2023 has been explained to him by his Advocates on record.
10. It is his contention that the bill was taxed at Kshs. 669, 225/=.
11. It is further the Respondent/Applicant's contention that he is advised by his Advocates on record that the taxing officer erred in principle in the taxation of the bill of costs.
12. He contends that he was not served with the bill of costs dated 26<sup>th</sup> September, 2023 or the hearing notice and he was not privy to the proceedings leading to the ruling of the taxing officer.
13. He also contends that he currently resides in the United States of America and was not served with the bill of costs either physically, through WhatsApp or email.
14. He further contends that it was because of the foregoing grounds that he is dissatisfied with the taxing officer's decision and ruling.
15. It is his contention he is seeking that this court taxes the bill of costs or in the alternative orders that the bill of costs be taxed afresh by the taxing master.
16. It is also his contention that he only became aware of this matter when he received an email from his former Advocates addressed to the court on 25<sup>th</sup> October, 2023 asking the registry to assess the draft certificate of costs.
17. It is further his contention that his former Advocates sent him another email on 3<sup>rd</sup> November, 2023 addressed to the court.

The letter dated 2<sup>nd</sup> November, 2023 was attached in the said email which requested the Deputy Registrar to sign the Certificate of Costs.
18. He contends that the taxed costs are excessive and not commensurate with the work rendered by his former Advocates.



19. He also contends that he had paid his former Advocates Kshs. 200,000/= for the work done and the taxed costs were not justified.
20. He further contends that the costs taxed on 24<sup>th</sup> October, 2023 should be set aside and he be allowed to defend the bill of costs dated 26<sup>th</sup> September, 2023 before another taxing officer.
21. It is his contention that he instructed his current Advocates to peruse the file but the file could not be traced in the registry.
22. He ends his deposition by stating that he got information from the registry that the file was still in the taxing officer's chambers two weeks after the taxing master rendered his ruling and that this court has the jurisdiction to grant the orders sought herein.

**The Applicant/Respondent's response.**

23. The Applicant/Respondent filed a Replying Affidavit on 6<sup>th</sup> December, 2023.
24. He deposes that the Respondent/Applicant retained his services to act for him in Sotik CM ELC No. 001 of 2021 Raphael Kipyegon Ngetich v Evergreen Tea Factory Limited.
25. He also deposes that the value of the subject matter as was pleaded in the plaint was Kshs. 18,000,000/= and adds that the Defendant had entered appearance and filed a Statement of Defence.
26. He further deposes that that the Defendant filed a preliminary objection on the jurisdiction of the court which was opposed and eventually dismissed.
27. It is his deposition that the Defendant lodged an appeal to this court vide Kericho ELC Appeal No. E005 of 2022 Evergreen Tea Factory Company Limited v Raphael Kipyegon Ngetich Kunah.
28. It is also his deposition that they filed a preliminary objection in the Appeal on the ground of jurisdiction. That after directions were given on the preliminary objection and submissions filed the Respondent/Applicant withdrew instructions.
29. It is further his deposition that they filed their Advocate-client bill of costs for taxation which was served upon the Respondent/Applicant vide his email address, rkunah@yahoo.com, which address they were using to communicate with him throughout the pendency of the suit.
30. He deposes that affidavits of service were filed in court as evidence of service and that the Respondent/Applicant had sufficient notice of the proceedings herein but for reasons best known to him, he opted not to defend the taxation.
31. He also deposes that the allegations that the Respondent/Applicant had paid Kshs. 200,000/= as part fees is not denied as it was a deposit of the fees for the lower court matter.
32. He further deposes that the scale fees for the lower court matter are based on Schedule 7 of the Advocates Remuneration Order 2014. It is his deposition that since the value of the subject matter is Kshs. 18,00,000/=, the instruction fees amounts to Kshs. 780,000/= without including disbursements and attendances.
33. It is his deposition that he will lodge the said bill in due course and that the Respondent/Applicant did not pay any fees towards the appeal.
34. It is also his deposition that the value of the subject matter in the appeal is still Kshs. 18,000,000/= which confirms that the Advocate-Client bill of costs was drawn to scale and the learned taxing master's decision cannot be faulted.



35. It is further his deposition that this reference is incompetent as the client did not demand for reasons prior to lodging it as required by Order 11 of the Advocates Remuneration Order and it should therefore be struck out with costs.
36. He ends his deposition by seeking that the reference be dismissed with costs.

### **Issues for Determination.**

37. The Respondent/Applicant and Applicant/Respondent filed their submissions. Both are dated 9<sup>th</sup> May, 2024.
38. The Respondent/Applicant identifies the following issues for determination;
- a. Whether the amount of work done by an Advocate should affect fees payable.
  - b. Whether failure to serve the taxation notice and bill of costs warrants setting aside of the ruling of the taxing master.
  - c. Whether the taxing master, in the final calculations, is mandated to consider the fees already paid to an Advocate.
39. With regard to the first issue, the Respondent/Applicant relies on the judicial decision of *Republic v Minister of Agriculture & 2 Others Ex parte Samuel Muchiri W Njuguna & Others* [2006]eKLR and submits that the only issue that arose for determination in Kericho ELC Appeal No. E005 of 2022 was that of jurisdiction.
40. The Respondent/Applicant submits that the said issue was not complex that would require extensive research and that since the matter had not proceeded for hearing, the preliminary nature of the tasks completed by the Applicant/Respondent should inform the taxation.
41. On the second issue, the Respondent/Applicant relies on Order 5 Rule 22 sub rule 4 of the *Civil Procedure Rules*, Section 107(2) of the *Evidence Act*, *James Kanyita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR, *Sifuna & Sifuna Advocates v Hon. Patrick Simiyu Khaemba* [2021] eKLR and submits that even though the Applicant/Respondent argues that he served the Respondent/Applicant via email, no such proof of service via email was availed.
42. With regard to the third issue, the Respondent/Applicant relies on *Kanu National Elections Board & 2 Others v Hon. Salah Yakub Farah* [2018] and submits that the taxing officer erred in principle is failing to put into consideration the Kshs. 200,000/= already paid by the Respondent/Applicant to the Applicant/Respondent when doing the taxation.
43. The Respondent/Applicant submits that the Applicant/Respondent does not deny receiving the said sum which should have been brought to the attention of the taxing master.
44. The Respondent/Applicant relies on *Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & another* [2018] eKLR and seeks that the taxing master's ruling delivered on 24<sup>th</sup> October, 2023 be set aside.
45. The Applicant/Respondent submits that the reference is incompetent as the Respondent/Applicant did not demand for reasons prior to lodging it as required by Paragraph 11 of the Advocates Remuneration Order.
46. The Applicant/Respondent also submits that the decision of the taxing master was based on the law and the guidelines set for taxation of costs and that the Respondent/Applicant has not demonstrated that the taxing master failed to follow the law.



47. The Applicant/Respondent relies on *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others* No. 3 (1972) EA 162 and reiterates the averments in his replying affidavit before submitting that the instruction fees was based on the value of the subject matter under Schedule 6 of the [Advocates Remuneration Order](#) 2014.

48. The Applicant/Respondent seeks that the reference be dismissed with costs.

#### **Analysis and determination.**

49. After considering the Respondent/Applicant's application, the response thereto and the submissions, the issues that arise for determination are;

- a. Whether the taxing officer's decision on the bill of costs dated 26<sup>th</sup> September, 2023 delivered on 24<sup>th</sup> October, 2023 should be set aside and the same be taxed afresh.
- b. Who should bear costs of the application.

50. The principles for setting aside the decisions of Taxing Officers were established by the Court of Appeal in the case of [Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board](#) [2005] eKLR. It was found 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.”

51. In [Kamunyori & Company Advocates v Development Bank of Kenya Limited](#) [2015] Civil Appeal 206 of 2006, the Court of Appeal gave instances where discretion cannot be deemed to have been exercised properly 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.”

#### **A. Whether the taxing officer's decision on the bill of costs dated 26th September, 2023 delivered on 24th October, 2023 should be set aside and the same be taxed afresh.**

52. The Respondent/Applicant is seeking that this court sets aside the taxing officer's decision on the bill of costs dated 26<sup>th</sup> September, 2023 that was delivered on 24<sup>th</sup> October, 2023 on the ground that he was neither served with the bill of costs or the hearing notice.

53. The Respondent/Applicant also argues that the taxed costs are excessive and not commensurate to the services rendered by the Applicant/Respondent.

54. The Respondent/Applicant also argues that Applicant/ Respondent was paid Kshs. 200,000 as deposit for legal fees and that it has not made this disclosure.

55. In response, the Applicant/Respondent argues that they represented the Respondent/Applicant in Kericho ELCA No. E005 of 2022 Evergreen Tea Factory Company Limited v Raphael Kipyegon



Ngetich Kunah and while the matter was still pending, the Respondent/Applicant withdrew instructions which necessitated them to file their Advocate-Client bill of costs.

56. The Applicant/Respondent also argues that they served the bill and the taxation notices on the Respondent/Applicant vide his email address but despite service he opted not to participate in the proceedings.

57. Paragraph 11 of the [Advocates Remuneration Order](#) provides as follows;

- “1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation which he objects.
- 2) The Taxing Officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- 4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have expired.”

58. Where a party is dissatisfied with the decision of a taxing officer, he has to give a Notice of Objection itemizing the items objected to especially where the taxing officer has not given any reasons for the decision.

59. A perusal of the court record shows that on 24<sup>th</sup> October, 2023 the present matter was before the taxing master. On the said date the taxing officer allowed the application dated 26<sup>th</sup> September, 2023 as prayed.

60. In the judicial decision of [Evans Thiga Gaturu v Kenya Commercial Bank Ltd](#) [2012] eKLR the Court held as follows;

“In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons.”

61. A further perusal of the Court record shows that the Respondent/Applicant did not file any Notice of Objection.

62. It is important to note that the taxing officer’s decision did not contain any reasons as he allowed the Applicant/Respondent’s application as prayed. It was therefore necessary for the Respondent/Applicant to seek reasons as none were advanced by the taxing officer in his decision.



63. As aforementioned, the Applicant/Respondent filed the application dated 26<sup>th</sup> September, 2023 seeking that the taxing officer taxes the Advocate-Client bill of costs and issue a certificate of costs. I have perused the said application and its annexures and cannot trace any Advocate-Client bill of costs. What is annexed to the said application are pleadings filed in Sotik CMELC No. 1 of 2021 and Kericho ELCA E005 of 2022.
64. A perusal of the entire court record shows that the Advocate-Client bill of costs referred to is missing. What is on record is a Certificate of Costs dated 30<sup>th</sup> October, 2023 which states as follows;
- “...that the Advocate-Client bill of costs dated the 26<sup>th</sup> September, 2023 was taxed on the 24<sup>th</sup> October, 2023 at Kshs. 669, 225/=...”
65. Paragraph 13 of the *Advocates Remuneration Order* provides for taxation of costs between an advocate and a client. Paragraph 13(3) in particular provides as follows;
- “(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”
66. In the judicial decision of *Monyo & 2 others v Ngige* (Miscellaneous Civil Application E07 of 2020) [2023] KEHC 817 (KLR) (10 February 2023) (Ruling) the Court held as follows;
- “To help count weight (sic) and approximate the strength of the reference, it is necessary that material pointing to such strength be availed. For taxation matter like this, it would have been necessary to avail a copy of the bill, or for the affidavit to set out what was charged for instructions fees and attendance, for the court to compare with the ruling on taxation and reasons advanced. As said before, the bill of costs and the ruling are alluded to but no copy is exhibited.” (Emphasis mine)
67. Despite the fact that the Respondent/Applicant failed to file a Notice of Objection, it is apparent that there is no Advocate – Client bill of costs in the court record. I am at a loss in explaining how the Certificate of Costs for the sum of Kshs. 669,225/= was issued and how the figure of Kshs. 669,225/= was arrived at.

### **Disposition.**

68. In the said circumstances, failure to file a Notice of Objection notwithstanding, the application dated 7<sup>th</sup> November, 2023 is allowed in the following terms:
- a. The Taxing Officer’s decision and ruling dated 24<sup>th</sup> October, 2023 is hereby set aside set.
  - b. The bill of costs dated 26<sup>th</sup> September, 2023 shall be remitted to the Taxing Officer for Fresh Taxation.
  - c. The Respondent/Applicant shall have cost of this application.
69. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 4<sup>TH</sup> DAY OF JULY, 2024.**

**L. A. OMOLLO**

**JUDGE**



In the presence of: -

Mr. Langat for the Applicant.

Mr. Mogambi for the Respondent.

Court Assistant; Mr. Joseph Makori.

