



SBM Bank Kenya Limited v Osamba Otieno & Company Advocates (Environment & Land Miscellaneous Case E013 of 2024) [2024] KEELC 13510 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E013 OF 2024
SM KIBUNJA, J
DECEMBER 4, 2024**

BETWEEN

SBM BANK KENYA LIMITED APPLICANT

AND

OSAMBA OTIENO & COMPANY ADVOCATES RESPONDENT

RULING

1. The applicant filed the reference vide the chamber summons dated the 10th July 2024 seeking for *inter alia*:
 - a. The taxing officer's decision of 3rd July 2024 taxing off Kshs.74,679.14 of VAT at item 18, and allowing all other items as drawn on the Advocate/Client bill of costs dated 12th March 2024, be set aside.
 - b. Items 1 to 15 of the said bill of costs be assessed by this court, or in the alternative be remitted to another taxing master for re-taxation.
 - c. Costs be borne by the respondent.

The application is premised on the seven (7) grounds on its face marked (1) to (7), and supported by the affidavit of Donald Juma, advocate, sworn on the 10th July 2024, *inter alia* deposing that the respondent filed the Advocate/Client bill of costs dated 12th March 2024, and the applicant filed replying affidavit and submissions; that the taxing officer taxed the said bill of costs on 3rd July 2024, allowing items 1 to 15 as drawn; that the taxing officer erred in principle in allowing item 1 as drawn without taking into account that the suit was not a liquidated claim but one for declaratory and injunctive orders; that the taxing officer erred in principle by allowing item 1 without taking into consideration the scope of work done by the respondent that was limited to filing the plaint and application dated 15th May 2018 in ELCLC No. 118 of 2018, before the conduct of the suit was reassigned to another counsel, and arriving at exorbitantly high award; that the taxing officer erred



in taxing items 4 to 9 as drawn despite the advocate not filing list of documents or furnishing the court with documents indicated to have been drawn, perused or copied; that the taxing officer erred in principle in allowing items 11 to 13 as drawn though the respondent never demonstrated ever attending court on the indicated dates; that the taxing officer taxed the bill of costs at Kshs.1,647,024.62 and has threatened to execute for Kshs.542,868.62 which is the amount owing after deducting Kshs.1,104,156 which had been paid as legal fees by the client on the 26th July 2018.

2. The reference is opposed by the respondent through the replying affidavit of Richard Osamba Otieno, advocate, sworn on the 27th July 2024, in which he inter alia deposed that the applicant has not shown any error of principle which would justify the court interfering with the decision of the taxing master, as the suit property value is Kshs.48,974,483, which correctly formed the basis of tabulating instruction fees on item 1; that where judgement has not been entered, instruction fees is determined from the pleadings and all materials on record, as taxation is meant to result in fair compensation for services rendered by the advocate; that it is not disputed that one of the prayers in the suit is for an order permitting plaintiff to sell the described property to recover outstanding loan amount and interest accrued; that from the documents on record, particularly the loan statement, the outstanding amount sought to be recovered by the applicant was Kshs.48,974,483, which the taxing master rightly determined as the subject value of the suit.
3. The learned counsel for the applicant and the respondent filed their submissions dated the 23rd September 2024 and 20th October 2024 respectively, which the court has considered.
4. The issues for the determinations by the court in this reference are as follows:
 - a. Whether the applicant has established that the taxing officer erred in principle in his ruling of 3rd July 2024, in taxing items 1 to 15 as drawn of the Advocate/Client bill of costs dated 12th March 2024.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the chamber summons, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:
 - a. Both parties have in their submissions cited to almost similar superior courts decisions on what factors to consider in determining the value of the subject matter for purposes of determining the instruction fees payable. Those decisions includes the following:
 - i. *Peter Muthoka & Another v Ochieng & 3 Others* [2019] eKLR;
 - ii. *Joreth Limited v Kigano & Associates* [2002] KECA; and
 - iii. *Kenya Airports Authority v Otieno Ragot and Company Advocates* (Petition E011 of 2023) [2024] KESC 44 (KLR) (2 August 2024) (Judgement).

What runs through these decisions, and which is relevant to the main issue for determination in this instance, is how to arrive the value of the subject matter at the time the taxation took place. The thread running through the decisions is as captured by the Supreme Court of Kenya in the *Kenya Airports Authority decision* [*supra*] that

“the common ground that the subject matter of the suit in issue should be identified first, and then the value thereof determined. How is the value of the subject matter to be determined? Paragraph 1 of Schedule V1A is clear on this issue, and in point of fact stipulates that, “...where the value of the subject matter can be determined from



the pleading, judgement or settlement of the parties”. This means that the value of the subject matter can be determined from the pleadings or judgement or settlement of the parties.”

- b. That it is trite that this court should not 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 inference that it was based on an error of principle, as was held in the case *First American Bank of Kenya v Shah and Others* [2002] EA 64. The applicant’s main ground of challenging the taxation ruling is on error of principle in allowing items 1 to 15 as drawn in disregard of the applicant’s filed replying affidavit and submissions.
- c. Before embarking on analysing what the applicant had submitted on and deposed in their filed replying affidavit, the court has noted the following on the taxation ruling:
 - i. The typed ruling that was delivered by the taxing officer that is on the record show it was “read and signed in open court at Mombasa this 3rd June 2024” while the proceeding of 3rd July 2024 reads the “ruling delivered via teams”.
 - ii. The first line on the ruling refers to “Applicant’s Advocate – Client bill of costs dated 3rd May 2024”, while the reference and all filings, including supporting and replying affidavits and submissions by learned counsel refer to an Advocate- Client bill of costs that is dated the 12th March 2024.

Though the learned counsel did not address the court on the above glaring and conflicting dates and mood of delivery of the ruling, the court is left wondering whether the taxation ruling delivered by the taxing officer was about a bill of costs dated 12th March 2024, that is on record or 3rd May 2024, referred to on the ruling, that the court has not seen. Further, the court is unable to confirm the date the taxation ruling was delivered; was it on 3rd June 2024 that is on the typed copy of the taxation ruling or on the 3rd July 2024, that is in the proceeding of that same date? These differences may be out of innocent errors by the taxing officer but they affect the foundation of the taxation ruling that is the subject matter of the reference filed herein. It is necessary that these questions be answered for posterity’s sake, and to enable the court to be certain on the issues put forward for determination in case other applications touching on taxation are filed in the future.

- d. In view of the findings in (c) above, the court finds the best way to have the questions raised above resolved is to have a fresh taxation of the Advocate/Client bill of costs dated the 12th March 2024 done before another taxing officer. Though under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya costs should follow the event unless otherwise ordered by the court, in this instance, I find none of the parties is to blame for the errors observed by the court, and none should be held responsible for the others costs. Accordingly, I find it just and fair for each party to bear their own costs in the reference.
6. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That the taxing officer’s ruling erroneously dated 3rd June 2024, and delivered on 3rd July 2024, on the Advocate/Client bill of costs dated 12th March 2024, is hereby set aside.
 - b. That the said Advocate/Client bill of costs dated the 12th March 2024, is remitted for fresh taxation before another taxing officer other than Hon. Nyariki J.
 - c. Each party to bear their own costs.



It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF DECEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Applicant : M/s Wanjiku For Juma

Respondent : Mr Osamba

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

