



Al-Busaidy & another (Suing as the Legal Representatives of the Estate of Mohamed Said Suleiman Albusaidy) v Shell Company of East Africa Limited & 2 others (Environment & Land Case 16 of 2016) [2023] KEELC 17322 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 16 OF 2016**

NA MATHEKA, J

MAY 9, 2023

BETWEEN

SULEIMAN MOHAMED SAID SULEIMAN AL-BUSAIDY 1ST PLAINTIFF

ALI MOHAMED SAID SULEIMAN AL-BUSAIDY 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MOHAMED SAID SULEIMAN ALBUSAIDY

AND

SHELL COMPANY OF EAST AFRICA LIMITED 1ST DEFENDANT

VIVO ENERGY KENYA LTD 2ND DEFENDANT

NATIONAL OIL CORPORATION OF KENYA 3RD DEFENDANT

RULING

1. The application is dated September 29, 2022 and is brought under rule 11(2) of the [*Advocates \(Remuneration\) Order*](#) seeking the following orders;
 1. The court be pleased to review and/or set aside the taxing master's ruling dated September 14, 2022 and remit the plaintiffs' bill of costs dated June 18, 2018 for fresh taxation on the party and party items.
 2. In the alternative, the court be pleased to assess the cost for the party and party items at such sum as it deems reasonable and just.
 3. The costs of this application be provided for.
2. It is based on the grounds that on September 14, 2022, the taxing master delivered his ruling with respect to the plaintiffs' party to party bill of costs dated June 18, 2018. He assessed the party and party



items as drawn to scale at the sum of Kshs 349,250/=. The taxing master erred in principle in holding that the party and party items were drawn to scale and failed to provide the relevant paragraphs he relied upon under schedule 6 of the [Advocate \(Remuneration\) \(Amendment\) Order 2014](#) for each item. The taxed master erred in allowing VAT to be charged on a party and party bill of costs. The party and party items at No 1, 2, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 31, 32, 35 and 36 of the bill of costs dated June 18, 2018 are not in accordance with the schedule 6 of the [Advocate \(Remuneration\) \(Amendment\) Order 2014](#) and there was no basis for awarding them as drawn. That the application has been made without delay.

3. The plaintiff/respondent submits that the application to review and/or set aside the taxing master's ruling dated September 14, 2022 and seeking to remit the plaintiffs bill of costs dated June 18, 2018 for fresh taxation is misplaced and not merited as the taxing master under-taxed the said bill of costs. That the amount awarded by the taxing master is extremely so low and on the contrary constitutes an error that would have otherwise called for interference by the honourable court but the plaintiffs/applicants had opted to take it as it is to bring the matter to an end. That the application as filed is a waste of court's precious time and resources as the issues being raised now ought to have been raised during hearing when the bill came for taxation. That the applicant herein is on a delaying tactic mission as they were granted several chances to file written submissions challenging the said bill of costs or to raise any concerns over the same but they ignored and failed to do so within the timelines despite having fully participated in the hearing.
4. That the value of the property that was in question is worth Kenya shillings forty million (Kshs 40,000,000/=) letter of offer, and another transfer of Kshs 26,000,000/=ought to have been the value used by the taxing master in assessing the instruction fees and not Kshs 168,000/=as was done as that does not reflect the actual value of the property. "Annexed hereto and marked "JCC 1" are copies of transfer for Kshs 26,000,000/= and letter of offer for Kshs 40,000,000/=. That the allegations that the taxing master failed to provide the relevant paragraphs relied on are misplaced as the same are clearly captured in the said ruling with each item being dealt with separately. That the Taxing Master allowed VAT on instructions fees only and not any other item and the same is well provided for by the [Advocates Remuneration Order](#) hence the same is in order. That the amount awarded by the Taxing Master is on the lower side considering the value of the subject matter and on the contrary the same ought to be reviewed upwards. That the correct applicable scale in this matter is the [Advocate's Remuneration Order 2014](#) considering that the suit was filed in the year 2016 and it is unknown to us which scale the applicant expected the court to have relied on.
5. This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under rule 11 of the [Advocates Remuneration Order](#) which provides as follows:
 - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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.”
6. Be that as it may, the principles of varying or setting aside a Taxing Master's decision are set out in the cases of [First American Bank of Kenya v Shah and others](#) [2002] EA 64 and [Joreth Ltd v Kigano and](#)



Associates [2002] 1 EA 92, that the Taxing Master’s judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law. In *First American Bank of Kenya v Shab and Others* [2002] EA LR 64 the court held that;

“First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

7. These principles reiterate the position of the Court of Appeal in *Joreth Ltd v Kigano & Associates* [2002] eKLR, where the said court held that a Taxing Master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the Taxing Master is excessive to amount to an error in principle.
8. The Taxing Master in his ruling dated September 14, 2022 provided that the taxation of the matter would be based on Remuneration (Amendment) Order of 2014. Under Item one the taxing master based his calculations on schedule vi Part b of the 2014 *Advocates Remuneration Order* and taxed it at Kshs 168,750/=. He considered that the matter had not gone into full trial when reaching his decision. Item two was therefore one third of the same as getting up fees. Be that as it may, I find that the other items might not have been drawn to scale for example on the issue of service and the Taxing Master was erroneous to that extent. Secondly, it is trite law that VAT is awarded on advocate – client bills only and can only be awarded if the plaintiff in question tendered evidence for paid VAT and was consequently entitled to be indemnified as provided in *Pyramid Motors Limited v Langata Gardens Limited* [2015] and *Amalo Company Limited v B N Kotecha and Sons Limited & another* [2022] eKLR. On perusal of the material on record, the matter did not meet the conditions set out for grant of VAT as it fell under party to party costs and no evidence was provided for payment of VAT.
9. I find that the Taxing Master used the wrong principles on the issue of VAT and the party and party items. Some of the relevant factors to take into account when taxing a bill 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. From the discrepancy mentioned above I find that there was an error in principle by the Taxing Master in the assessment. Consequently, I find that the application is merited and I grant the following orders;
 1. The Taxing Master’s decision of taxed bill of costs dated June 18, 2018 and ruling delivered on September 14, 2022 be and is hereby set aside.
 2. The bill of costs dated June 18, 2018 shall be remitted to another Taxing Master for taxation.
 3. Costs to the applicants.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

