



**Milambo v Machora and Motuka & Co Advocates (Miscellaneous Application  
115 of 2022) [2023] KEELC 17325 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17325 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 115 OF 2022**

**NA MATHEKA, J**

**MAY 9, 2023**

**BETWEEN**

**BENSON MILAMBO ..... APPLICANT**

**AND**

**MACHORA AND MOTUKA & CO ADVOCATES ..... RESPONDENT**

**RULING**

1. The application is dated December 20, 2022 and is brought under Paragraph 11 (1) and (2), paragraph 49, 50 and Schedule V (part II) of The [Advocate Remuneration Order](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya) seeking the following orders;
  1. That the Court be pleased to set aside the ruling of the taxing officer delivered on December 14, 2022.
  2. That the court be pleased to tax afresh the Respondent's Bill of Costs dated May 10, 2022
  3. Costs of the application be provided for.
2. It is based on the grounds that the firm of Machora and Motuka & Company Advocates raised an advocate client bill of costs dated May 10, 2022 claiming Kshs 232,943.50 in their purported capacity as the 2<sup>nd</sup> Interested Party. The ruling was delivered on December 14, 2022 by the Deputy Registrar Honourable J Nyariki taxing the bill of costs at Kshs 201,813. The taxing officer erred in law and in fact in amending suo motto the said Bill then proceeding to tax the said Bill contrary to the Paragraph 71 of the Advocates Remuneration Order. The taxing officer erred in law and in fact holding that the from of the Bill of costs was a typographical error is in order and provided for under the law. The taxing officer erred in law and in fact in holding that the Advocate was the right party to file the Bill of costs and proceeded to tax the same as an Advocate Client Bill of Costs rather than a Party and Party Bill of cost. The taxing officer erred in taxing the Instructions Fees Constitutional and Prerogative Orders by failing to apply Schedule 6 Paragraph 1 (i) (i) of the Advocate Remuneration Order. The taxing officer



erred in law and in fact in how he taxed items 3, 4, 5, 11, 12, 15, 16, 17, 18, 19, 20, 25 and 26. The taxing officer erred in law and in fact in including Value Added Tax(VAT) even though the nature of the Bill of Costs was unspecified and a procedural anomaly. The taxing officer failed to consider and apply the guiding principles for taxation of matter as set out in the case of *Premchand Raichand Ltd and another -vs- Quarry Services of East Africa Ltd and others (No 3) (1972) 1 EA 162 (CAN)* and more specifically in failing to note that costs should not be so high as to be a bar to access to justice. The taxing officer misapprehended the evidence and misapplied misunderstood and or overlooked the correct legal principles and judicial precedent and submissions by the Applicant that he taxed the bill at inordinately high amount hence an erroneous calculation of costs awarded to the Respondent. In the circumstances the client is aggrieved by the ruling hence for the ends of justice to be met, it is only fair and equitable for this Honourable Court to set aside the ruling of the taxing officer delivered on December 14, 2022. That this Honourable Court be pleased to tax afresh the applicant's bill of costs dated May 10, 2022 or alternatively refer the same for taxation before a different Taxing Master other than Honourable J Nyariki

3. 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.'

4. 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 vs 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 vs Shah and Others [2002] EALR 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.'

6. 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.
7. The Applicant in the instant application contends that being dissatisfied with the Taxing Officer's decision, issued a notice of objection. The Taxing Officer erred in law and in fact in holding that the



Advocate was the right party to file the Bill of costs and proceeded to tax the same as an Advocate Client Bill of Costs rather than a Party and Party Bill of cost. The Taxing Officer erred in taxing the Instructions Fees Constitutional and Prerogative Orders by failing to apply Schedule 6 Paragraph 1 (i) (i) of the Advocate Remuneration Order. The Taxing Officer erred in law and in fact in including Value Added Tax(VAT) even though the nature of the Bill of Costs was unspecified and a procedural anomaly.

8. In *Republic v Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna [2006] eKLR* Ojwang, J (as he then was) expressed himself 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 inference 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. And 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 authorising clause in the law, or a particularised 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. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...’

9. In the instant case the Taxing Master found that the citation was a typographical error and the same was supposed to be an advocate/client bill of costs, I concur. Article 159 (d) of the *Constitution* of Kenya 2010 requires the court to administer justice without undue regard to procedural technicalities. And Article 159 (b) requires justice not to be delayed. Section 3A of the *Civil Procedure Act* provides that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section



1A of the *Civil Procedure Act* provides that the objective of the Act and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of all disputes governed by the Act. Section 1A (3) of the *Civil Procedure Act* requires a party or a counsel on record to assist the court in furtherance of the overriding objectives.

10. Considering the matter before me against the above provisions of the law I find that having the wrong citation was not fatal to the bill of costs. The Taxing Master in his ruling taxed all the items to scale and added VAT which is payable in an Advocate Client bill of costs. I find that there is no error by the Taxing Master in the assessment. Consequently, I find that the application is not merited and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY 2023.**

**N.A. MATHEKA**

**JUDGE**

