



**Kanai t/a A.Thuo Kanai Advocates v Golf Links Limited & another (Environment and Land Miscellaneous Application 26 of 2018 & Miscellaneous Application 27, 28 & 29 of 2018 (Consolidated)) [2023] KEELC 18562 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18562 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 26 OF 2018  
& MISCELLANEOUS APPLICATION 27, 28 & 29 OF 2018 (CONSOLIDATED)**

**MD MWANGI, J**

**JULY 6, 2023**

**BETWEEN**

**ANTHONY THUO KANAI T/A A.THUO KANAI ADVOCATES .... APPLICANT**

**AND**

**GOLF LINKS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**INDER JIT TALWAR ..... 2<sup>ND</sup> RESPONDENT**

*(In respect of the reference by the Advocate/Applicant against  
the ruling of the Taxing Master dated 18th June 2021)*

**RULING**

**Introduction**

1. The Advocate/Applicant herein filed a Reference vide a Chamber Summons application dated July 7, 2021 which was accompanied by the supporting affidavit sworn by Anthony Thuo Kanai seeking the following orders:
  - a. That this Honourable Court be pleased to vary and/or set aside the Taxing Officer's ruling dated June 18, 2021 in relation to items no 1,3,5,6,8,18 and 21 in the respective Applicant's Bills of costs dated 18<sup>th</sup> February in Misc Application No 26, 27, 28 & 29 all of 2018 by allowing and awarding the fees on the specified items in accordance with the Advocates Remuneration Order 2009 as pleaded in the respective Bills of costs.
  - b. That this Honourable Court be pleased to exercise its inherent jurisdiction and allow such fees under items no 1,3,5,6,18 and 21 in the respective Applicant's Bills of Costs dated February 18, 2018 and/or in the alternative make such other orders as it deems fit to enable the said items



to be assessed and taxed in accordance with the appropriate paragraphs under the Advocates Remuneration Order, 2009 by giving appropriate direction that the specified items to be allowed/assessed before another Taxing Officer.

- c. That this Honourable Court be pleased to vary and/or set aside the Taxing Officer's ruling dated June 18, 2021 in the respective Applicant's Bills of Costs dated 18<sup>th</sup> February 2018 in Misc Application No 26, 27, 28, & 29 all of 2018 where she ruled that the Respondents are at liberty to recover alleged excess payment from the Applicant.
  - d. That the costs of this application be provided for.
2. The Application is premised on the grounds inter alia that the Taxing Officer erred in law by failing to consider and apply the correct value of the subject matter at Kshs 25 million as the consideration for the transfer of each of the properties under the respective Bill of Costs.
  3. That the Taxing Officer failed to apply the basic principle that requires instruction fees charged under Schedule V be not less than those that could be charged by an Advocate under the appropriate scale fees which in this case was Schedule 1.
  4. Further, the Applicant avers that the Taxing Master had no justification as to why she assessed instruction fees under Item No 1 at Kshs 207,000/= in Misc No 26 of 2018 nor any legal justification for assessing instructions fees at Kshs 157,000/= in Misc Application No 27, 28 & 29 of 2018 since she did not consider the value of the subject matter nor minimum fees under the applicable schedule.
  5. The Applicant further contests that the instruction fees is manifestly low in comparison to the value of the subject matter or minimum fees. Further, that there is no rule that bars an Advocate from electing to charge a Bill of Costs under Schedule V instead of charging under Schedule 1.
  6. In addition, that the Taxing Master failed to appreciate that an Advocate acting for both the Vendor and Purchaser is entitled to be paid fees by both Vendor and Purchaser based on their fees reduced by 1/6 which was the basis of the instruction fees under Item No 1 of the respective Bill of Costs.
  7. The Application is further supported by the Supporting Affidavit of the Advocate, Anthony Thuo Kanai dated July 7, 2021.
  8. The application is opposed by the Respondents vide the Replying Affidavit of Vishisht Talwar dated July 13, 2022. The deponent avers that the Taxing Master diligently exercised her discretion as granted by Paragraph 16 of the Advocates Remuneration Order 2009 in rendering the decision. The Ruling is legally sound, manifestly clear and supported by facts as adduced by parties.
  9. Further, that the Taxing Master acknowledged the payment of Kshs 970,000/= with a view of settling the taxation proceedings. Therefore, the Respondent had paid an excess of Kshs 140,260.40/= the cumulative taxed fees being Kshs 829,739.60/=.
  10. In addition, that the Taxing Master exercised her discretion judiciously in taxing the Applicant's Bill of Costs. The Application is therefore unmerited and should therefore be dismissed with costs.
  11. The application was canvassed by way of written submissions and both parties complied.
  12. In the submissions dated December 6, 2022, the Applicant averred that Paragraph 22(2) of the *Advocates Remuneration Order* that requires instruction fees charged under Schedule V are not less than those the fees that would be charged by him under schedule 1. Furthermore, it was argued that the Taxing Officer failed to provide a legal justification for her assessment of the instruction fees.



13. The Respondents in their submissions dated October 17, 2022 submitted that the Taxing Officer exercised her discretion appropriately and in fair and just manner.
14. Having considered the submissions and supporting documents, it is clear that the issues for determination before this court are as follows:
  - i. Whether the Application dated 7<sup>th</sup> July 2021 is merited?
  - ii. Who will bear in costs of the application?

### **Analysis and Determination**

15. Before analyzing the above issues, it must be emphasized that matters of quantum of taxation are matters purely within the province, competence and judicial discretion of the taxing officer. This Court will not likely interfere with an award of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in injustice.
16. The Court in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR was categorical that;

“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.”
17. The same position was restated in *Kamunyori & Company Advocates v Development Bank of Kenya Limited* (2015) Civil Appeal 206 of 2006, where it was held that;

“.. 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”
18. With regard to calculation of instruction fees, the court in the case of *Paul Ssemogerere & Olum v Attorney General - Civil Application No5 of 2001* [unreported] held that:

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”[Emphasis Mine]



19. The role of the Court in reviewing taxation has been discussed at length by the Court of Appeal in *University of Nairobi & another v Moses* (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment), where it was held that:

“That the High Court in the discharge of its supervisory mandate over a Taxing Master has power to correct the Taxing Master’s ruling, not only if the decision is founded on malafides; ulterior and improper motive; not properly applying his/her mind to the matter or exercised the judicial discretion improperly; but also where there is demonstration of the Taxing Master having disregarded the express provision of a Statute, and urged this Court to set aside the High Court’s decision and allow the appellants’ reference with costs.”

20. I will now address the identified issues as follows: -

#### **A. Whether the Application dated July 7, 2021 is merited**

21. Paragraph 22(1) of the *Advocates Remuneration Order* provides that:

1. In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.
2. Subject to paragraph 3, an advocate who makes an election under subparagraph (1) may not by reason of his election charge less than the scale fee under the appropriate Schedule.

22. In *Nyamogo & Nyamogo Advocates v Protex (K) EPZ Limited* Machakos HCMCA No 176 of 2007, Lenaola, J (as he then was) held that:

“Under paragraph 22(1) of the Advocates Remuneration Order it is not open to the taxing officer to make an election to apply schedule V of the Order since the right to make an election vests in the advocate....The refusal by the taxing officer to tax the Bill of Costs under Schedule V in the light of the election was an error which was so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all parties.....The proper course where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a re-taxation of the bill in terms of the court’s ruling. That is the usual and proper course where a taxing officer has erred in principle, is to make a remit to another taxing officer and to order a re-taxation of the bill in terms of the court’s ruling. That is the usual and proper course. Where a case is remitted, there is sometimes an advantage in its coming before a different taxing officer, who can bring a fresh mind to it. On the other hand, if the taxing officer from whose taxation appeal was made, is familiar with what is a complex case, no objection being taken against him and especially if there is no other officer of comparable experience, the same taxing officer should re-access the bill.”

23. The Advocate/Applicant herein had prepared and caused the registration of transfers of CR 35560/1, CR 35561/1, CR 35562/1 and CR 35563/1. The Taxing Master in her Ruling held that,

“... I am persuaded that the bills of costs fall for taxation under schedule V of the ARO in the first instance and not schedule 1. It matters not that the applicant has made an election



under Paragraph 22 of the ARO to charge fees under Schedule V as the bill of costs in my opinion do not fall for taxation under any other schedule....”

24. It is evident from the record that the Applicant elected to charge under paragraph 22 of the Advocates Remuneration Order. This is evident vide the Notice of Election dated February 18, 2018 addressed to the Respondents.
25. From Paragraph 22(1) of the *Advocates Remuneration Order* cited above, it follows that once an advocate makes an election, the Taxing Master has no option but to proceed in the manner elected. This was the case in the instant matter. The Taxing Master therefore erred in principle in indicating that it matters not that the applicant had made an election under Paragraph 22 of the *ARO* to charge fees under Schedule V.
26. In the case of *Anthony Thuo Kanai T/AA Thuo Kanai Advocates v John Ngigi Ng'ang'a* [2014] eKLR on page 6 paragraph 3, Honourable Justice P Nyamweya held as follows: -

“I have perused the provisions of the Advocates (Remuneration) Order of 2009 of the fees to be charged with respect to contentious and non-contentious matters and find that the charging of fees in both types of matters in charging of fees is subject to election of the application of the Schedule V under rule 22 of the Advocates Remuneration Order. In particular, it is stated in rule 18 that the application of Part II of the Advocates (Remuneration) Order on remuneration in non-contentious matters is subject to the provisions of rule 22. It is therefore the law that an Advocate can elect to apply Schedule V to costs in non-contentious matters.....

I also note in this regard that Schedule V of the Advocates (Remuneration) Order 2009 provides for two methods of assessing fees. The first is an agreed hourly rate under Part I of the Schedule, and the second is the alternative method according to the scales provided in Part II of the Schedule. In the alternative method, costs for specific items are allowable in addition to the instruction fees, and the taxing officer is required to make an allowance for other charges when assessing the instruction fee. ”
27. Although the Taxing Master taxed the Bills under Schedule V and despite noting the value of the properties, she did not consider the value of the properties in her taxation. She only considered the work done as she expressly stated in her ruling.
28. In the case of *Joreth Limited v Kigano & Another* [2002] EA 92 the court set out various factors that are to be considered in determining the instruction fee namely; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties. The taxing master is vested with discretion to increase or decrease instruction fees and that in exercising such discretion, the taxing officer must act judicially by taking into account relevant factors stipulated in the Advocates (Remuneration) Order 2009 including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. (see also *First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 EA 61 and *Republic v Minister for Agriculture & 2 Others ex Parte Samuel Muchiri W'Njuguna & 6 Others* (2006) e KLR).



29. Odunga J (as he then was) in *Sophie Chirchir v Africa Merchant Assurance Co. Ltd* [2022] eKLR quoted with approval the Court of Appeal of Uganda in *Makula International v Cardinal Nsubuga & Another* [1982] HCB 11 where the court held as follows in respect of taxation of an advocate-client bill of costs:
- “The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”
30. In this matter, though the Taxing Master set out the Schedule under which the bills were to be taxed, she did not set out the basic fee before proceeding to consider whether that basic fee should be increased or reduced. She further did not give her reasons for deciding that the instruction fee should be decreased, as she did.
31. The Taxing Master merely stated that the properties passed from the transferor to the transferee at the sum of Kshs 25,000,000/- in 2011. In Misc 26 of 2021, she assessed item 1 (instruction fees) at Kshs 207,000/- taxing off Kshs 384,667/- without any elaboration. In the other three matters (Misc 27, 28 & 29 of 2021), she assessed instruction fees at Kshs 157,000/-, taxing off Kshs 384,667/- without any explanation. There is also a rider under rule 22(2) that the Taxing Master overlooked to the effect that an advocate who makes an election under subparagraph (1) may not by reason of his election charge less than the scale fee under the appropriate Schedule. Taxation before a Taxing Master should not defeat the purpose of that provision.
32. Further, a perusal of the Bills of Cost in Misc 26 of 2021, under Item 1 shows that the Advocate charged fees for receiving instructions from the Client, for incorporation of the Company and for preparing and completion of Transfer in respect of the four properties each valued at Kshs 25,000,000 among other services rendered. However, the Taxing Master only taxed for the transfer but did not make a finding on incorporation of the Company stated under Item 1. That surely is an error of principle.
33. In taxation of matters, whereas the taxing master has the discretion to disallow some itemized items, such a discretion should be exercised fairly, judiciously and in wider interest of justice.
34. Justice A. Makau in *Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited* [2018] eKLR held that,
- “a Taxing master is bound to be guided by the Advocates Remuneration Order as regards items to be allowed or disallowed; but has no power to oust a legal right that has been exercised in accordance with the law. The Taxing master, however has discretion in taxing a Bill of Costs, which discretion must be exercised fairly, judiciously in accordance with the law and in the wider interest of justice. It is not the duty of this court to tell the Taxing master how to tax the Bill of Costs and which items to ignore or grant save to state the Advocate Remuneration Order, gives clear guidelines on taxation and which should be followed.”
35. In the premises, I set aside the ruling dated June 18, 2021 and direct that the Applicant's Bills of costs be taxed under Schedule V of the Advocates Remuneration Order before a different Taxing Master.
36. The upshot is that the application is merited and is granted in the following terms: -



- a. The decision of the Taxing Master dated June 18, 2021 be and is Hereby set aside in its entirety and the Advocate/Client Bill of Costs dated February 18, 2018 is Hereby remitted back for taxation before a different Taxing Master.
- b. The Applicant shall have the costs of the application.
- c. The Orders in (a), (b) and (c) above to apply in Elc Misc 27 of 2021, Elc Misc 28 of 2021 and Elc Misc 29 of 2021.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Thuo for the Applicants.

Ms. Justus for the Respondents.

**M.D. MWANGI**

**JUDGE**

