



Lubulella & Associates v Kitongi Investments Limited & 2 others (Miscellaneous Application E014 of 2021) [2023] KEELC 20455 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

MISCELLANEOUS APPLICATION E014 OF 2021

A NYUKURI, J

OCTOBER 4, 2023

IN THE MATTER OF THE ADVOCATES ACT CAP. 16 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE ADVOCATES (REMUNERATION)
ORDER 2014, TAXATION OF ADVOCATES AND CLIENT BILL OF**

COSTS

AND

**IN THE MATTER OF ADVOCATE-CLIENT COSTS FOR SERVICES
RENDERED IN MACHAKOS ELC CASE NO. 193 OF 2018, ISRAEL**

KISAINGU MUTINDA & ANOTHER VS KITONGI INVESTMENTS LTD & 2 OTHERS

BETWEEN

LUBULELLA & ASSOCIATES APPLICANT

AND

KITONGI INVESTMENTS LIMITED 1ST RESPONDENT

BRYAN KISAINGU MUTINDA 2ND RESPONDENT

COLLINS KIVILA MUTINDA 3RD RESPONDENT

RULING

Introduction

1. Before court is an application by way of Chamber summons filed by the Applicant on 2nd June 2022 and dated 30th May 2022. The Application is against the Ruling delivered by the taxing officer of this court delivered on 18th May 2022 wherein the Advocate/Client Bill of costs dated 23rd February 2021



was assessed at Three Hundred and Sixty-Four Thousand and Fifty-Eight Shillings (Kshs 364,058/=). The Applicant had filed a Notice of Objection to the assessment vide a Notice of Objection dated 18th May 2022.

2. The instant Application seeks the following orders;
 - a. That this court be pleased to set aside the Taxing Officer's ruling and taxation on items 1,2,57,58,3-49,50-56 and 59-60 of the Advocate/Applicant's Bill of costs dated 23rd February 2021, and remit the same for re-taxation before a different Taxing Master.
 - b. That costs of the application be provided for.
3. The Application is based on grounds on the face of it and supported by the Affidavit of one Eugene Lubale Lubulellah, a partner in the Applicant's firm, who deposed to have been aggrieved by the taxing officer's assessment of instruction fees and consequential total amount taxed. Their objection to the Taxing Officer's assessment on instruction fees was that the taxing master disregarded the submissions in which the value of the subject matter was pleaded and failing to correctly apply her mind after appreciating the pleaded value of the subject matter.
4. The Deponent also argued that the taxing master failed to consider that in suits for specific performance as contrasted with injunctions, the value of the subject matter must and can actually be established by the Taxing Officer from the pleadings, judgement or settlements by the parties and particularly as guided in *Pyramid Motors Limited v Langata Gardens Limited* [2015] eKLR.
5. It was also their averment that the Taxing Officer abdicated her duty to exercise her discretion and thus fell into an error in principle, by failing to take into consideration all the relevant factors for increasing basic instruction fees and the principles set out in *Ramesh Naran Patel v Attorney General and Another, Constitutional Appl.1* (cited with approval in *KTK Advocates v Fina Bank Limited* [2014] eKLR).
6. The Deponent further argued that the Taxing Officer erred in ignoring and failing to apply her mind and consider the care and labour required by the Advocate, the number and length of papers to be perused, the nature and importance of the matter, interest of the parties, complexity of the matter and general conduct of the proceedings as well as authorities on increase of instruction fees in taxations of comparative matters and thereby arrived at a wrong and unjust decision of awarding the bare minimum.
7. It was the Applicants contention that the Taxing Officer erroneously and unlawfully off-set or deducted from the fees due to the Advocates under the Bill of costs, the disputed and unproved sum of Ksh.200,000/= allegedly paid to the Applicants by an entity called ST. Bakhita Daycare & Kindergarten LTD, which was a total stranger to the proceedings and a distinct corporate legal entity from any of the three Respondents. He further challenged the copies of cheques and bank statements as of little to no evidential value and inadmissible because although they were marked as BKM1a-BKM1d, the replying Affidavit only made reference to BKM1. He also stated that the annexures were illegible and obscured and that they did not bear any entries identifying the Applicant as having received any money from any of the Respondents, neither were they verified as required under section 177 of the *Evidence Act*.
8. The Respondents filed a replying affidavit sworn on 25th July 2022 by Bryan Kisaingu Mutinda, the 3rd Respondent. He deposed that the Taxing officer's decision was in accordance with the Advocates Remuneration Order 2014 and that the assessment of Kshs 100,000/= for instruction fees was reasonable as that was a matter of discretion which was exercised within the law. He further deposed that the Taxing Officer took into account relevant factors including care and labour required by the



advocate, the length of papers to be perused, the nature and importance of the matter, value of subject matter where ascertainable, interest of the parties, complexity of the matter and novelty of the matter in assessing costs. He also stated that the Applicant in his own bill of costs acknowledged receipt of Kshs 200,000/= when in fact he had been paid Kshs 350,000/= and that no objections were raised by the applicant on the bank statements filed by the Respondents. He therefore concluded that the application lacked merit and it ought to be dismissed.

9. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on 20th January 2023 and the Respondent's submissions filed on 2nd February 2023.

Applicant's submissions

10. Counsel for the Applicant reiterated the grounds of their application and submitted that the deduction of Kshs 300,000/= was erroneous as the same was paid to the Applicant by an entry different from the Respondents. They argued that the purported cheque leaves were untenable as proof of payment since they were made by an entity which was different from any of the Respondents and without any nexus to the suit, being St.bakhita Daycare And Kindergarten Ltd.
11. On the instruction fees, they submitted that the Taxing officer had a duty to ascertain the minimum instruction fees provided under Schedule 6 of the *Advocates Remuneration Order*. To support this, they cited the case of *Joreth Ltd v. Kigano & Association* [2002] eKLR where the court held the view that the value of the subject matter ought to be determined from the pleadings, judgment or settlement by the parties.
12. It was also their contention that the Taxing Officer inconveniently omitted to take into consideration the amended plaint which effectively enlarged the scope of the suit and increased the number of Plaintiffs and claims sought.
13. They also argued that the Taxing Officer had not taken into consideration all the relevant factors in identifying the basic minimum fee, citing the guidelines laid out in the *case of Joreth (supra)*. It was their argument that failure to take the relevant factors into consideration was an error in principle as laid out in *Kipkorir Titoo v. Kiara Advocates v. Deposit Protection Fund Board* (2005) eKLR.
14. They concluded by stating that even if the court does not find that the suit sought specific performance with regards to the subject parcels, the basis of assessing instruction fees on the pleaded sum of Kshs 69,295,178/- is affirmed by *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Ltd* [2021] eKLR where the court agreed with the Taxing Officer for relying on the pleaded sum in assessing the instruction fees. They also argued that the orders sought were not merely for an injunction but also specific performance as pleaded by the Applicants.

Respondents' submissions

15. Counsel for the Respondent submitted that assessment of instruction fees and getting up fees is purely a discretionary function and cited the Black's Law Dictionary definition of judicial discretion. They placed reliance on the case of *R v. Ministry of Agriculture & 2 Others* where the court relied on *Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another* and held that taxation of costs was not a mathematical but a discretionary exercise of which the court will not interfere with the awarding of a competent taxing officer because it thinks an award is too high or too low.



16. They also cited the case of *Gecaga v Gateway Insurance Company Ltd & 2 Others* KEHC 288 (KLR) where the court declined to interfere with the assessment of the taxing master for applying her discretion and assessing instruction fees for unliquidated claim at Kshs 300,000/=.
17. As to the issue of deposit by Clients/Respondents, they submitted that the Advocated had already admitted to have received Kshs 200,000/= under item 67 of the bill of costs, hence the only contention would be for Kshs 100,000/=.
18. They then argued that the jurisdiction of this court was limited in as far as evidence is concerned, since that falls under the ambit of the Taxing Officer and counsel had many opportunities to raise all questions concerning payment of deposit by the Client. To buttress this argument, they placed reliance on *Donholm Rabisi Stores v East African Portland Cement* (2015) eKLR where the court was of the view that taxation of costs was a special jurisdiction reserved for the taxing officer and that a reference is not an appeal but the court is simply looking for the manner in which the taxing officer exercised their discretion. They also cited the case of *Kenyariri Advocates v First Community Bank Limited* [2021] eKLR where Justice D.S Majanja found that once a bank(Client) produced a bank statement to show that payment was made, it was incumbent upon the Advocates to counter and dislodge that position by proving that the same statement was incorrect or erroneous by way of evidence and not mere denials. They concluded by submitting that the Application ought to fail since the Applicant had failed to demonstrate that the taxing master improperly exercised her discretion.

Analysis and determination

19. The court has considered the Application, the response and the parties' rival submissions. The applicant contested the assessment on instruction fees, getting up fees and other items stated in the application. Further, the Applicant challenges the amount of Kshs 200,000/- alleged to have been paid to them by the Respondents.
20. Consequently, the issue that the court needs to determine is whether the Taxing Officer judiciously applied her discretion in assessing the Applicant's bill of costs herein.
21. Taxation of costs is a discretionary function of the Taxing Officer. This court will not lightly interfere with the Taxing Officer's exercise of discretion merely on the basis that the award is too low or too high, unless it is with clarity demonstrated either that the assessment was anchored on an error of principle or the amount awarded was manifestly excessive or too low to justify a conclusion that it was based on an error of principle.
22. In the case of *First American Bank of Kenya v Shah & Others* (2002) 1 EA 64, the court held as follows;

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.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.

23. Similarly, in the case of *Peter Muthoka & Another v Ochieng & 3 others* NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR the Court of Appeal expounded on the principles in *Joreth Ltd v Kigano & Associates* and set down the proper basis of taxing the instruction fees as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

24. On the question of what should be considered in assessing the instruction fees, it is trite that the instruction fees ought to be based on the value of the subject matter; which value may be discerned from pleadings, judgment or settlement by the parties. However, where the value of the subject matter cannot be ascertained, the taxing officer would then use their discretion to assess instruction fees by taking into account among other matters, the care and labour applied by the advocate, the volume of documents perused, the nature and importance of the matter, the interest of parties, general conduct of the proceedings or the judge's direction in the matter.

25. In the case of *Joreth Ltd v Kigano & Associates* [2002] eKLR, the Court of Appeal held as follows;

The value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

26. In the instant application, the Applicant's grievance is that the plaintiff having sought for specific performance, among other prayers, the value of the subject matter is ascertainable and must be established from the pleadings, judgment or settlement and that the Taxing Officer disregarded the decision in the case of *Pyramid Motors Limited v Langata Gardens Limited* [2015] eKLR. In addition, the Applicant took the position that the Taxing Officer did not exercise her discretion judiciously by failing to take into account relevant matters including care and labour required, the nature and importance of the matter, the volume of documents to be perused, the value of the subject matter, and the complexity and novelty of the matter. On their part, the Respondent's position was that the Taxing Officer properly exercised her discretion and took into account all the above relevant factors in arriving at the assessed sum.

27. In her ruling, the Taxing Officer found that the value of subject matter could not be ascertained from the pleadings and rejected the applicant's submission that because the plaintiff sought specific performance, then the value of the subject matter was the value of the subleases in the sum of Kshs 69,295,178/=. Her reason for arriving at that conclusion was that there was no specific sum indicated in the Plaintiff.

28. This court has considered the pleadings in the primary suit where the Applicant represented the Respondent. From the amended plaintiff, it is clear that the dispute in the primary suit ELC Case No.



- 193 of 2018 was that the Defendants being the developer, had sought to construct a school within the estate in a location where it was not supposed to be constructed as per the architectural designs of the estate, and that therefore they breached the subleases issued to the Plaintiffs who purchased houses from the Defendants on the basis of the approved architectural plans. They contended that the Defendants cannot unilaterally change the architectural plans by introducing a school where it initially was not. They faulted the approval for change of user and sought for injunction to stop the defendants from changing the approved plans and also for specific performance for the defendants to comply with what was agreed upon in the subleases and not try to change how the entire estate was designed.
29. From the pleadings, it is clear that there is no value of the subject matter disclosed. The dispute is not about ownership of the property in the subleases but compliance by the Defendants with architectural designs of the estate as described in the subleases. On that basis therefore, I do not agree with the applicant's submission that because there is a prayer for specific performance of the sub-leases, then the value of the property described in the sub leases ought to be taken as the value of the subject matter. This is because, the dispute before court does not raise the question of ownership rights created by the subleases but the extend of specific performance only on the aspect of change of user from residential to educational use on a section of the estate. That is a prayer for specific performance in regard to one of the terms of the subleases. That being the case, and there being no specific value disclosed in the pleadings, I find and hold that the value of the subject matter was unascertainable and therefore, the Taxing Officer did not err in making a finding that the value of the subject matter was not ascertainable.
30. On whether the Taxing Officer properly exercised her discretion in arriving at the awarded sum of Kshs 100,000/= for instruction fees and Kshs 33,333/= for getting up fees, the ruling shows that she took into account the time spent in preparing for the matter, the volume of documents involved and the fact that the matter is still pending determination. The dispute in the primary suit revolves around interpretation of the terms of the subleases and whether the change of user by the Defendants with intention of constructing a school within the estate, without consent of the sub-leasees would constitute a breach of the terms of the sub-leases. Those questions, in my view, do not raise any novel matter. The quantum of the taxed amount alone, whether too low or too high cannot be the basis for this court's interference with the Taxing Officer's exercise of discretion. For this court to interfere with the Taxing Officer's discretion, it must be shown that the Taxing officer erred in principle by failing to consider relevant factors or putting into account irrelevant factors. In view of the fact that the primary suit is yet to be heard, and the Taxing officer having taken into account relevant matters in the award of Kshs 100,000/= for instruction fees, I am not persuaded that there is material placed before me to demonstrate that she exercised her discretion injudiciously. In the premises, I find and hold that the Taxing Officer properly exercised her discretion in awarding the amount stated for instruction fees. That being the case, and the sum for getting up fees being one third of the instruction fees, I find and hold that the awarded sum of Kshs 33,333/= was properly assessed.
31. As regards the other items complained of, this being an advocate client bill of costs, the advocate is entitled to 50% of the amount taxed as provided for under Schedule 6 (B) of the [Advocates Remuneration Order 2014](#). In addition, the advocate being a service provider, is entitled to collect VAT on his fees and therefore the claim for VAT is allowed. As the Taxing Officer in her ruling allowed filing fees, court attendance and drawing, there is no dispute on the same. On the question of advance payment of the sum of Kshs 300,000/=, it is my view that bank statements and copies of cheques issued to the Applicant and attached to the Respondent's replying affidavit clearly demonstrate that the Applicant was paid Kshs 300,000/. In any event, a sum of Kshs 200,000/= was acknowledged by the Applicant as having been paid as shown in item 67 of his bill of costs. Therefore, the Applicant's argument that the cheques were issued by Bakhita School which was not a party in the primary suit, is a fallacious and dishonest argument because legal fees may be paid by the client personally or any other



person for the client. If a third party makes payment for legal fees for a client, an advocate cannot be heard to argue that that is not proper payment merely because the money did not come from the client personally, because if that were to be upheld, that would allow the advocate to get double payment for a single service which will be an unjust enrichment; which is frowned upon by both equity and the law. In the premises, I find and hold that the Taxing Officer was right and did not err in discounting the sum already paid by the client.

32. In view of the above I set aside the assessment and remit the bill for reassessment by a different Taxing Officer who should take into account the following matters;
- a. The Taxing Officer did not err in principle in awarding instruction fees and getting up fees and therefore the same stand.
 - b. The advocate is entitled to an additional 50% of the taxed costs under schedule 6 paragraph B of the Advocates Remuneration Order 2014 as this is an advocate-client bill of costs.
 - c. The advocate is entitled to collect VAT at the prevailing rates as provided in law.
 - d. There is no contest on court filing fees, attendance fees and the sums for drawing.
33. Each party to bear its own costs of this application.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Wendo holding brief for Lubulella for Advocate/Applicant

Ms. Ngeresa for Client/Respondent

