



Mugweru t/a Mugweru Co Advocate v Kianjoya Enterprises Limited (Environment and Land Miscellaneous Application 12 of 2022) [2023] KEELC 20637 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 12 OF 2022
FM NJOROGE, J
OCTOBER 11, 2023**

**BETWEEN
JENNIFFER MUGWERU T/A MUGWERU CO ADVOCATE APPLICANT
AND
KIANJOYA ENTERPRISES LIMITED RESPONDENT**

RULING

1. This ruling is in respect of the applicant’s Chamber Summons application dated 20/04/2023 which is expressed to be brought under section 11(2) of the advocates remuneration order section 1A 1B and 3A of the *civil procedure Act* cap 21. The applicant seeks to set aside the decision of the deputy registrar of this court Hon R. Ombata, given on 6/4/2023 on what the applicant refers to as “the taxation of majority of the items” in the advocate –client bill of costs dated 31/5/2022. It also seeks that the court be pleased to tax and or allow such fees as may be appropriate, more specifically in respect to the increment by 50% or increment by half in respect to the bill of costs, computation of instructions fees in respect to opposing or presenting applications and assessment of disbursements in the bill of costs. In the alternative it seeks orders that the deputy registrar be directed to re-tax or re-assess the items with the guidance of this court for the Deputy Registrar’s consideration.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Jennifer Mugweru. The grounds on the face of the application and the supporting affidavit are that the taxing master erred in principle by failing to appreciate the relevant provisions under schedule 6 part B of the ARO and she failed to increase the fees prescribed under part A of Schedule 6 by 50% or by half; that the taxing master acted contrary to Schedule 6 and the principles thereunder and by failing to award instructions fees to present or oppose applications; that she failed to take into account the overwhelming evidence in terms of receipts presented and applied the wrong principles or relied on non-existence principles while assessing the disbursements; that the taxing master failed to appreciate and exercise her discretion in accordance with the laid down taxation principles, that the fees allowed or disallowed were manifestly understated and undercharged and thus denied the applicant adequate



- compensation for work done and that she failed to take into consideration the applicant's submissions in arriving at the sum she did.
3. The respondent filed grounds of opposition dated 27/04/2023 and filed on 28/04/2023. The said grounds are as follows:
 - a. That the application is an affront to the clear provisions of Rule 16 of the advocates remuneration order which grants the taxing master discretion, yet the applicant has failed to demonstrate any sufficient grounds to impugn the exercise of judicial discretion by the taxing master to warrant any intervention from this court;
 - b. That the taxing master considered all the relevant factors in arriving at her decision;
 - c. That the taxing master took into account the principles of taxation in conformity with rule 5 of the ARO, and that the instant application is misconceived and ought to be dismissed with costs.
 4. The application was canvassed by way of written submissions. The applicant filed its submissions on 19/06/2023 while the respondent filed their submissions on 20/06/2023.
 5. The plaintiff in its submissions gave a background of its application, relied on the case of *Safaricom Limited vs Ocean View Beach Hotel & 2 others* [2010] eKLR and submitted that article 12 of the lease agreement it entered into with the defendants provides for arbitration. The plaintiff also submitted that the lease agreement that the defendants are purporting to terminate is set to expire on 31/12/2027 and given the massive investment it has done on the property; the court should grant the orders sought so that the arbitration is not rendered nugatory.
 6. The plaintiff relied on the case of *Don-woods Company Limited vs Kenya Pipeline Company Limited* [2005] eKLR and submitted that the defendants are trying to defeat its rights as a lessee by introducing a third party as the owner in order to terminate a fixed term contract. The plaintiff further submitted that unless the court grants the orders sought, it stands to be evicted before the intended arbitration is determined. The plaintiff in conclusion sought that the court grants prayer No. 3 in order to preserve the substratum of the intended arbitration and that prayer No. 4 be granted for a period of three months and the parties to come back after three months to confirm the status of the intended arbitration.
 7. The defendants in their submissions identified the following issues for determination:
 - a. Whether there is a pending arbitration process between the parties.
 - b. Whether the interim orders of injunction should issue against the defendants/respondents as prayed in the application.
 - c. Whether there is a dispute capable of referral to the alleged arbitration process.
 8. The court ordered that the application be disposed of by way of written submissions. the applicant complied by filing written submissions on 19/6/2023 and the respondent did so on 20/6/2023. This court has considered the application, the response thereto and the submissions.

Analysis and determination

9. The only issue that arises for determination is whether the decision of the taxing master ought to be set aside on the grounds stated and whether this court ought to re-tax the bill or refer it to the taxing master with guidelines for a re-taxation.



10. The background to this reference is that the applicant filed an advocate client bill of costs on 9/6/2022 claiming a total of Kshs 5,245, 180/= which was taxed on 6/4/2023 at Kshs 3,316,610/=.
11. One of the requirements of a reference is specificity as to the objection in the identification of the impugned decisions regarding taxed items without which the court may not be able to proceed on an application of this nature. Is the reference defective for non-specificity?
12. I have perused the prayers sought in the reference where the particulars impugned ought to be found and come to the conclusion that the applicant challenges the following:
 - a. Failure to award instructions fees for presenting or opposing itemized applications;
 - b. The failure to take into account that the bill ought to have been subjected to a 50% increment upon assessment of the items provided for under schedule 6 part A as provided for under part B of the same schedule.
 - c. Failing to consider the produced evidence of disbursement receipts.
13. In respect of the first challenged item, the applicant submitted that items 24 and 84 (being applications dated 16/6/2019 and 19/6/2020) were completely taxed off on the basis that costs of applications are not provided for under the remuneration order. While referring to schedule 6 para 1 (viii) the applicant states that the application dated 16/6/2019 was allowed with costs and costs follow the event and should have been assessed by the taxing master and hastens to add that costs in an advocate client bill of costs on such an application ought to be assessed and awarded whether the same was allowed by the judge with costs or not. While perusing the bill of costs I note that the two applications were taxed off completely.
14. Concerning item 24, the taxing master stated as follows:

“Item no 24 does not arise...the same is taxed off entirely.”
15. Regarding item 84 the taxing master stated as follows:

“Item no 84 - costs of the application is taxed off entirely as there is no provision in the ARO to support the said item.”
16. I have examined the provisions of the ARO and I have found that indeed the Order provides at Schedule 6 Para 1 (viii) Kshs 3000/= as fees for the presenting or opposing of any other application not otherwise provided for. It is this court’s view that the taxing master erred and should have assessed the fees under items 24 and 84. In this court’s view the applicant deserved Kshs 5000/= as fees under each item to make a total of Kshs 10,000/=.
17. In respect of the challenge mounted against the decision of the taxing master in failing to consider the produced evidence of disbursement receipts the applicant states that his evidence in the form of receipts was not considered. The applicant submits that the taxing master “either held that the same were not provided for under the advocates remuneration order or just outrightly disregarded the evidentiary materials before her.” Having perused the ruling of the Taxing master and the Bill, I note that receipts in proof of the same were attached to the submissions on the bill of costs and were easily available for reference.
18. The respondent’s submissions filed on 20/6/2023 addressed the issue of disbursements very briefly, stating that there was no proof and/or receipts filed in support of the items no 1 2 and 3 in the disbursements list, and sought that they be taxed off. The respondent never addressed any other item



in the disbursements list, it is taken to be the case that it did not oppose any item save items nos 1,2 and 3 therein.

19. It is apparent to this court that the taxing master did not totally ignore the disbursement. She appears to have taxed off the disbursement items nos 1,2,3 and 6 entirely. of these items 1 and 2 she stated that they were not provided for in the ARO. Concerning item no 3 and 6, she stated that no proof was tendered. Items no 10 was taxed at 1400/=
20. Items 10, 16,17, and 18 were according to the taxing master not well supported and they were also taxed off at Kshs 1400. The taxing master must therefore have addressed her mind to the items that she taxed and arrived at the decision she arrived at. I note with concern that in respect of especially items 16,17 and 18 no distances travelled were stated in the bill of costs unlike in item no 13 which gave the approximate distance by naming Nairobi as the destination whose distance from Nakuru is a matter of notoriety. There is therefore no basis upon which this court can interfere with the taxing decision thereon. I will therefore not disturb the items that were taxed by the taxing master but I will address the ones taxed off entirely; these are items nos 1,2,3, and 6.
21. Of items 1,2 the taxing master gave the reasons stated above, namely that they are not provided for in the ARO. However, it is clear that a copy of the receipt were provided with submissions for considerations and in my view those are just part of the disbursements in litigation which should be allowed in a bill of costs.
22. Of item 3, the taxing master stated that no proof was tendered but there is a receipt attached to the submissions for the stated sum and I think it too ought to be allowed. On the expenses incurred in the valuation report under that item, the applicant states that because the suit in which the taxation was filed was challenging the jurisdiction of the magistrate's court the procurement of a valuation report was a necessity and the applicant was instructed to obtain one to establish the lower court's want of jurisdiction. She also urges that all the other items listed under the heading of "disbursements" ought to have been allowed. Of item no 6 there is also a receipt attached to the submissions. I am of the view that all the items totally taxed off should not have been denied the applicant, and had they been included the applicant's award would have been Kshs 127,500/= more. Instead of referring the matter back to the taxing master I find it more convenient to tax the said items 1,2,3, and 6 as prayed.
23. I now turn to the alleged failure to take into account that the bill ought to have been subjected to a 50% increment upon assessment of the items provided for under Schedule 6 Part A as provided for under Part B of the same schedule. The appropriate provisions on the subject are as follows:

"B—Advocate And Client Costs

As between advocate and client the minimum fee shall be—

- (a) the fees prescribed in A above, increased by 50%; or
- (b) the fees ordered by the court, increased by 50%; or
- (c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."

24. Relying on the case of *Otieno Ragot & Co Advocates vs Kenya Airports Authority* 2021 eKLR, the applicant urges that the provisions of schedule 6 A and B are couched in mandatory terms and are not subject to the discretion of the taxing master in an advocate/client bill and I agree with that view.



25. Under the assessment by this court, the Kshs 10,000/= allowed in respect of items 24 and 84 and the Kshs 127,500/= allowed under items 123 and 6 as herein above total to Kshs 136,500/= which when aggregated to the Taxing master's sum of Kshs 3,316,610/= bring it to a total of Kshs 3,454,110/=. The 50% increment provided for under schedule 6 A and B on this figure comes to Kshs 1, 727,055/=. Once added to Kshs 3,454,110/= as required by the rules that results in the sum of Kshs 5,181,165/=.
26. The upshot of the foregoing is that the reference by the applicant has partial merit. Consequently, I allow it in part and I issue the following orders:
- a. The taxing master's decision in the ruling dated 6/4/2023 taxing the bill of costs dated 31/5/2022 at Kshs 3,316,610/= is hereby set aside and substituted with the decision of this court taxing the same bill at the sum of Kshs 5,181,165/=.
 - b. A certificate of taxation shall therefore issue for Kshs 5,181,165/=.
 - c. Each party shall bear their own costs of the present reference.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 11TH DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

