



**Kenya Power & Lighting Co. Ltd v Msellem (Miscellaneous Civil Application
E056 of 2021) [2022] KEELC 2624 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION E056 OF 2021**

MAO ODENY, J

JULY 8, 2022

**IN THE MATTER OF: THE ADVOCATES (REMUNERATION)
(AMENDMENT) ORDER, 2014 AND IN THE MATTER OF: THE
PARTY & PARTY BILL OF COSTS DATED 22ND JUNE 2021**

BETWEEN

KENYA POWER & LIGHTING CO. LTD APPLICANT

AND

AHMED SHEIKH AMIN MSELLEM RESPONDENT

RULING

1. This Ruling is in respect of a Chamber Summons application dated 15th December, 2021 by the applicant brought under Rule 11(2) of *Advocates (Remuneration) Order*, Order 22 Rule 22 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to set aside and/or vacate the decision of the taxing officer, Hon. D. Wasike, delivered on the 24th day of November, 2021 and/or any other consequential orders arising therein.
 4. That this Honourable court be pleased to re-tax the Bill of Costs dated 22nd June, 2021.
 5. That in the alternative to prayer (4) above, this Honourable court be pleased to remit the Bill of costs dated 22nd June, 2021 for re- taxation before a different taxing officer with appropriate directions thereof.



6. That the costs of this application be provided for.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

3. The application is supported by the grounds on the face of the application and the affidavit by Justus Ododa sworn on 15th December 2021 together with the annexures thereto.
4. The objection against the impugned taxation of costs is based on the following grounds;
 - a. The taxing master erred in law and in fact in relying on the valuation report dated 14th November, 2014 which had put the market value of the suit property at Kshs. 30,000,000/- whereas the value of the property was not in dispute.
 - b. The taxing master erred in principle in assessing the instruction fees on the basis of the valuation Report dated 14th November, 2014 which was annexed to the Originating Summons and not on the damages which the court assessed at Kshs. 274, 560.00.
 - c. The taxing Master erred in awarding further instruction fees as claimed under items 3,4 and 5 of the Party & Party Bill of costs whereas the same had already been sought under item number 1.
 - d. The taxing Master erred in awarding excessive costs for service as sought by the Respondent.
 - e. The taxation of costs at Kshs. 984,633.00 is based on wrong principles and so manifestly high as to occasion a grave miscarriage of justice to the Applicant herein.
 - f. That the Taxing master erred in law and in fact by disregarding the Applicant's submissions.
5. Counsel abandoned prayer No. 4 of the application on the ground that the decision of the taxing master in respect of which the applicant herein is aggrieved is essentially an error of principle and the general practice is for the Honourable Judge dealing with such a reference to refer the matter to a different taxing officer for taxation.
6. Mr Kiarie Kariuki submitted that the applicant objected to the taxing master's decision on item numbers 1,2,3,4, 5, 16, 17, 19, 20, 24 and 32 of the bill of costs vide a letter dated 26th November 2021 to the Deputy Registrar. Counsel further submitted that there was no basis at all for the taxing master, under item No. 1 that relates to the instruction fee to refer to the market value of Kshs 30,000,000/- that was on the valuation report whereas the value of the suit property was not in dispute.
7. According to counsel judgment that was delivered in the primary suit (Malindi ELC (O.S) No. 35 of 2015) awarded the Respondent damages for trespass of Kshs 274,560/- and that the damages was indeed correctly acknowledged by the Taxing master at the introductory bit of her ruling on taxation where she stated as follows:

The value of the subject matter is unknown and the claim was for declaratory orders for trespass and damages which the court assessed at Kshs 274,560.00. The value of the property was not an issue as the claim was for encroachment and trespass and therefore had no bearing on the value of the property. The applicable scale is therefore paragraph 1 "other matters" which gives the basic fee at Kshs 75,000.00."
8. Counsel therefore submitted that the taxing master indicated that the power lines had decreased the value of the property and noting that the valuation report put the property at Kshs 30,000,000/- that



she was inclined to increase the basic fee which she increased from the basic Kshs 75,000/- to Kshs 600,000/- which counsel submitted that the same was manifestly high and based on an erroneous principle.

9. Further that the taxing Master in her ruling on taxation under Instruction fee expressly acknowledged that the matter was straightforward, with no complexity and did not have bulky documentation at all, therefore the increase of the basic fee to Kshs 600,000/- solely on the value as stated in the valuation report of Kshs 30,000,000/- was erroneous as the taxing master ought to have been guided by amount awarded in the judgment in assessing the instruction fee.
10. Mr. Kiarie Kariuki relied on the case of *Joreth Ltd v Kigano And Associates* (2002) 1 EA where the Court of Appeal held that where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.
11. Similarly, counsel cited the case of *Kipkorir, Titoo & Kiara v Deposit Protection Fund Board* (2005) e KLR, the Court of Appeal held that 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. Counsel also relied on the case of *Peter Muthoka & Another v Ochieng & 3 Others* (2019) e KLR.
12. On the specific items that counsel had issue with, counsel submitted that in terms of item No. 2 which relates to Getting up fees the same should be adjusted if item No. 1 on instruction fee is interfered with. Further that the decision of the taxing officer on item Nos. 3, 4 and 5 of the party and party bill of costs, was an error in principle as the said items relate to instruction fee whereas instruction fee is normally charged once taking into account the same had been allowed as instruction fees under item no. 1.

Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

13. Counsel relied on the replying affidavit dated 24th day of January, 2022 where the respondent deponed that the applicant by its letter to the taxing officer dated 26th November, 2021 did specify the items it had issues with and instead of limiting the subject application to those items, counsel decided to ignore those items altogether and opted to treat the subject Reference as Civil appeal and called upon the court to among others, set aside the decision by the taxing master contrary to the requirement of Order 11 of the *Advocate (Remuneration) Order* which only requires the High Court to make a decision on objected items and nothing more.
14. The respondent also deponed that by calling this Honourable Court to re-tax the bill, the applicant is simply in a way abandoning the objected items contained in its letter to the taxing officer and replacing them with all the items, a move which is inherently unprocedural. That the applicant wants the court to remit the subject bill for re-taxation before a different taxing officer which not only amounts to forum shopping for courts but also impliedly casting aspersion on the person the taxing officer without any justification.
15. It was counsel's submission that the Court found that the Defendant trespassed on the suit property and directed that the offending power line be removed which was done. That basing the instruction fee on value of the property party and party costs were supposed to be Kshs. 970,000 but the taxing master taxed it at Kshs. 600,000/=, which was reasonable.



16. Counsel finally submitted that by increasing the instruction fee to Kshs. 600,000/= the Taxing Officer exercised her discretion under the Remuneration Order and no appeal lies on discretion unless it can be shown that the said discretion was not exercised judiciously and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

17. The issue for determination is whether the taxing master exercised her discretion judiciously in determining the instruction fee and whether she applied the right principles in arriving at her decision.
18. The general principles governing interference with the exercise of the taxing master's discretion are well settled as was held in the South African Case of *Visser vs Gubb* 1981 (3) SA 753 (C) 754H – 755C. The court stated as follows:

The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

19. Similarly, in the case of *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR (*supra*) the Court observed 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.”

20. The taxing master must be guided by the principles governing taxation as was held in the leading case of *Premchand Raichand Ltd Another -vs- Quarry services of East Africa Ltd and Another*. The principles laid out are: -
- i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.
 - ii. The taxing master was expected to tax each bill on its merits;
 - iii. The value of the subject matter had to be taken into account;
 - iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;
 - v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.
 - vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer unless the officer has misdirected



himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.”

21. This case sums up the principles that a taxing master must take into account when considering a bill for taxation. The applicant faulted the taxing master for considering the value of the suit property hence came up with an excessive figure.
22. A taxing master is under a duty to consider the instruction fee which should cover the advocates work including taking instructions and preparing the case for trial or appeal, the value of the subject matter and that the taxing master’s discretion must be exercised judicially and not whimsically or capriciously.
23. From the record and the submission by counsel, I notice that the taxing master applied the principles governing taxation by considering the instruction fees and the value of the subject matter. This was a land matter where the respondent claimed for trespass and injunction. The fact that the respondent was awarded Kshs 274,560.00. does not mean that the instruction fee was to be based on this amount. This was one of the reliefs that had been granted as the court found the applicant to have trespassed on the suit land.
24. The court had to look at the case in its totality and the work done by counsel in preparation of the case.
25. Further in the case of *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR the court held 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 is somewhat too high or too low; it will only interfere if it thinks the award is 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.”

26. There is no evidence that the taxing master exercised her discretion capriciously or whimsically. I find that it would be unjust to interfere with the discretion of the taxing master and therefore dismiss the application with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

