



Mirugi Kariuki & Co Advocates v Kahungura & another (Environment and Land Miscellaneous Application 11 of 2021) [2022] KEELC 2791 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 11 OF 2021
FM NJOROGE, J
JULY 6, 2022**

BETWEEN

MIRUGI KARIUKI & CO ADVOCATES APPLICANT

AND

JACKSON KARIUKI KAHUNGURA 1ST RESPONDENT

RUTH WAMBUI CHEGE 2ND RESPONDENT

RULING

1. This ruling is in respect of the Chamber Summons application dated August 12, 2021 and filed in court on August 13, 2021. The application seeks the following orders:
 - (1) That this Honorable court be pleased to set aside the decision of the taxing officer delivered on the August 3, 2021 in its entirety as far as the same relates to taxation of the Advocate/Client Bill of Costs dated March 25, 2020, as the orders given are inconsistent with the provisions of the *Advocates (Remuneration) Order*, 1962 and the *Advocates Act*.
 - (2) That this honorable court be pleased to re-tax the said Advocate/Client Bill of Costs.
 - (3) That in the alternative to prayer 2 above, this Honorable Court be pleased remit the Advocate/Client bill of costs dated March 25, 2020 for re taxation before a different taxing officer with appropriate directions thereof.
 - (4) That the costs of the Application be provided for.
2. The application is supported by the affidavit sworn by Jackson Mwangi on August 12, 2021. The grounds on the face of the application and the supporting affidavit are that the applicant filed their Advocate-Client Bill of Costs on March 25, 2021 drawn at Ksh. 10, 420, 616/=; that the taxing officer delivered her ruling on 3/08/2021 and taxed the Bill of Costs at Ksh. 1, 037, 582.78/=; that the applicant wrote to the Deputy Registrar requesting for the ruling through a letter dated August 3,



2021; that the applicant was dissatisfied with the ruling of the court and has filed the present reference; that the subject matter was known as LR No. 398/39 measuring 1.163 Hectares located in Naivasha Moi South Lake currently valued at Ksh. 280,000,000/=; that the taxing master misdirected herself by considering the total damages awarded in the judgement delivered in ELC Case No. 124 of 2014 in determining instruction fees instead of taking into account the value of the subject matter; that the value of the subject matter can be ascertained from the pleadings to be Kshs. 280,000,000/=; that the taxing officer erred in law and principle by failing to take into account the provisions of Schedule 6 Part A 1b of the Advocates Remuneration Order 2014; that as a result of the wrong calculation of instruction fees, the taxing officer arrived at the wrong amount of getting up fees; that the taxing officer misdirected herself by reducing the amount for items 4, 5, 6, 7, 8, 10, 14 and 20 in the applicant's bill of costs despite counsel waiting in court for more than one hour before the matter was called; that the taxing officer erred in law by taxing off items 21, 22, 23, 25 and 28 on account that the case was not before the court on the mentioned dates and yet the applicant attended court for various things and that the taxing officer misdirected herself in failing to consider those court attendances; that the taxing officer also misdirected herself in reducing the number of folios for item 29 in the applicants bill of costs despite the number of folios being as stated; that the taxing officer erred in law by taxing off items 36, 38 and 56 on the grounds that they were not supported; that the amount taxed was inordinately low and was not commensurate to the value of the subject matter, the work done and the period of time it had taken to conclude the matter; that it is in the interest of justice that the applicant be awarded what they are entitled to for the work done.

3. There is no replying affidavit of the respondents on record.

The Applicant's Submissions

4. The applicant filed their submissions dated February 17, 2022 on February 21, 2022. The applicant gave the background of the case, the brief facts and submitted on whether the ruling delivered on August 3, 2021 should be set aside and whether costs should issue.
5. On the first issue the applicant submitted that the court has the jurisdiction to interfere with the discretion of the taxing master where it is evident that they erred in principle when assessing the costs. The applicant relied on the cases of *Kipkorir, Tito and Kiara Advocates vs Deposit Protection Fund Board* [2005] eKLR and the case of *First American Bank Ltd vs Shah & another* [2002] 1 EA 64 and submitted that the taxing officer considered the wrong principles of taxation while taxing the Applicant's Bill of Costs and that it is in the interest of justice that the court sets aside the said ruling. It was also submitted that the taxing officer erred in failing to rely on the value of the subject matter which was Kshs. 280,000,000/= and instead relied on the damages awarded by the court in determining the instruction fees and that the instruction fees of Kshs. 400,000/= was not reasonable in the circumstances.
6. The applicant also submitted that the taxing officer also erred by reducing the number of items 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, 19, 20 and 24 in the applicant's bill of costs despite counsel waiting in court for more than one hour before the matter was called. The applicant further submitted that the learned taxing officer erred in law and principle by completely taxing off items 21, 22, 23, 25 and 28 on the ground that the case was not before court on the mentioned dates and yet the applicant attended court. It was also submitted that the taxing master should have awarded instructions fees against both respondents.
7. On the costs issue the applicant submitted that the respondents should bear the costs of this suit.



The Respondents submissions

8. The respondents filed their submissions dated May 6, 2022 on the same date. In their submissions they gave the brief facts of their case and submitted on whether the ruling delivered on August 3, 2021 should be set aside and whether the applicant is entitled to any costs.
9. On whether the ruling delivered on August 3, 2021 should be set aside, the respondents submitted that the plaintiff had sought for a permanent injunction against the defendants, special damages of Kshs. 14,071,314.88, general damages and costs. They submitted further that the court entered judgement on April 25, 2018 for a permanent injunction against the defendants, the interested parties and all unauthorized parties, a sum of Kshs. 8,037,309.88 in special damages and Kshs. 500,000/= in general damages together with the costs and interest. The respondents submitted that it is from this figure that the value of the subject matter can be ascertained.
10. The respondents went on to submit that the applicant filed its bill of costs dated March 25, 2021 which totaled to a sum of Kshs. 10, 420, 616/= on April 20, 2021 based on the alleged value of Kshs. 280,000,000/=. That the applicant failed to serve the said bill of costs of the respondents as required under Section 48 of the *Advocates Act* cap 16. That the applicant also failed to inform the respondents of the date the matter was fixed for taxation.
11. The respondents also submitted that the taxing officer erred in taxing the bill by failing to apply the subordinate court's scale because the suit was based on the law of tort and the damages granted were within the jurisdiction of the lower court. The respondents relied on Rule 58 of the Advocates Remuneration Order and the case of *Joseph Mumali Wanga vs Blessed TC World Class Spares Limited* [2021] eKLR. They submitted that if the said bill is to be retaxed, then the said re-taxation should be in accordance with Rule 58 of the Remuneration Order. On this issue, the respondents concluded their submissions by stating that the ruling of the taxing officer should be set aside as the Deputy Registrar while taxing the bill of costs made an error on principle but also on the other hand, the respondent is content with the amount taxed as the same is not extremely high in the circumstances. They sought that the applicant's application be dismissed with costs.

Analysis and Determination.

12. The applicant is challenging the taxation of item No's 4, 5, 6, 7, 8, 10 and 14 of their bill of costs and he states that the taxing officer erred in reducing the amounts sought despite counsel waiting in court for more than one hour before the matter was called.
13. The taxing officer in her ruling taxed item No's 4, 5, 6, 7, 8, 10, 14 and 20 at Kshs. 1,100 as the matter did not take more than half an hour before the court as provided for under paragraph 7 of Schedule 6 of the *Advocates Remuneration Order*.
14. Item No. 4 on the Applicant's bill of costs is for attending court for ruling on contempt on April 30, 2019. A perusal of the court proceedings indicate that the matter was not before the court on April 30, 2019 as it had been mentioned on April 1, 2019 and given a ruling date for July 4, 2019.
15. Item No. 5 is for attending court for ruling on January 3, 2019. A perusal of the court proceedings indicate that the matter was not before the court on January 3, 2019 as it had been mentioned on November 19, 2018 and given a date for oral submissions for February 14, 2019 and it proceeded on February 15, 2019.



16. Item No. 6 is for attending court on November 27, 2019 for mention for sentencing which in my view was correctly taxed at Kshs. 1,100/= as per paragraph 7 of Schedule 6 of the [Advocates Remuneration Order](#).
17. Item No. 7 is for attending court on November 11, 2019 which also in my view was correctly taxed at Kshs. 1,100/=.
18. Item No. 8 is for attending court to take a ruling date for the application for contempt on July 4, 2019 which was rightly taxed at Kshs. 1,100/=.
19. Item No. 10 is for attending court for hearing of the application dated June 19, 2018 on November 19, 2019. A perusal of the court proceedings indicates that the matter was not before the court on that day as the previous proceedings were on November 11, 2019 when a further mention date was given for November 27, 2019.
20. Item No. 14 was correctly taxed at Kshs. 1,100/= as the matter was mentioned and given a further mention date for November 15, 2016 to take a hearing date.
21. Item No. 20 is for attending court on January 8, 2018 for mention for submissions. However, a perusal of the court proceedings indicate that the matter was not before the court on January 8, 2018 as it was last in court on November 6, 2017 when it was given a mention date for January 17, 2018.
22. Therefore, item No's 6, 7, 8 and 14 were correctly taxed. The applicant was not entitled to court attendance fees for item No's 4, 5, 10 and 20 as the matter was not before the court on those days.
23. The applicant is also challenging the taxing off of item No's 21, 22, 23, 25 and 28 of its bill of costs as the taxing officer indicated that the matter was not before court on those dates. A perusal of the court proceedings indicates that the court mentioned the matter as indicated under item No's 21, 22 and 23. The same are taxable at Kshs. 1,100/= as per paragraph 7 of Schedule 6 of the [Advocates Remuneration Order](#).
24. A further perusal of the court proceedings shows that the matter was not before court on September 25, 2019 as indicated under item 25 as it had been previously mentioned on August 2, 2019 and given a ruling date for September 30, 2019.
25. The matter was also not before court on November 15, 2017 as indicated under item No. 28 as the previous proceedings were on November 6, 2017 when a further mention date was given for January 17, 2018. The award under items No 25 and 28 were not therefore deserved.
26. In total, of the 13 items challenged 8 were properly taxed while 6 awards were undeserved. No specific comment however is made on the approach to these items by the respondents whose main apprehension appears to be to how to stave off a re-taxation, and to have any such exercise, if ordered, conducted under Rule 58 of the [Advocates Remuneration Order](#).
27. I have examined the nature of the case and I am of the view that owing to its nature and complexity and the general importance of the issue it raised and the work involved, the taxing master did not err in principle in taxing the same under Schedule 6. However, the matter was defended and the taxing master ought to have employed Schedule 61(b) in assessing the instruction fee awardable.
28. Regarding the instruction fees, it is noteworthy that the further amended plaint dated November 2, 2015 sought Kshs 14,071,314.88 as special damages for destroyed properties. The court in its judgment issued declarations and an injunction as sought. It also awarded the sum of Kshs 8,037,309.88 as special damages Kshs 500,000/= as general damages for trespass. The total sum is Kshs 8,537,309.88.



The plaintiffs sought an injunction and general damages for trespass as well and special damages for destroyed properties. Did the value of the land feature in the claim? The answer is “no”. Was it ascertainable from the pleadings? The same answer to the first question obtains. The subject matter of the suit was trespass. In this court’s view this being a suit premised on trespass, the appropriate sum to be awarded in the item labelled instructions fees was correctly premised on the sum awarded as that was the value of the subject matter.

29. As to the respondent’s submission that re-taxation should be in accordance with Rule 58 of the [Advocates Remuneration Order](#), I find that there is no justification for that proposal since it has not been demonstrated that the trial court ordered that course of action in its judgment and the same can not be determined at this juncture.
30. Was the instruction fee amount correctly assessed in accordance with the awarded sum? The value of the subject matter is Kshs. 8,537,309.88. As per Paragraph 1b of Schedule 6 of the [Advocates Remuneration Order](#), the calculation of instruction fees should be as follows:
 31. For the first Kshs. 1,000,000/= the amount that ought to be awarded is Kshs. 120,000/=. This leaves a balance of Kshs 7,537,309.88 whose instruction fees is Kshs 120,000/= plus 2% of 7,537,309.88. 2% of 7,537,309.88 is Kshs. 150,746.98. This brings the intermediate fees amount for the decretal sum between Kshs 1000,000/= to Kshs 20,000,000/= to Kshs. 270,746.20. Add this to the Kshs 120,000/= fee for the first Kshs 1,000,000/= and the total instruction fees to be awarded becomes Kshs. 390,746.20. considering the work done and the time spent before court, I will increase this figure to Kshs 600,000/=.
 32. As per Paragraph 2 of Schedule 6 of the [Advocates Remuneration Order](#), getting up fees is a third of the instruction fees awarded, and in this case, it comes to Kshs. 200,000/=.
 33. It is clear from the preceding two paragraphs that the taxing master erred in relying on Schedule 6 (1) (a) and she ought to have relied on Schedule 6(1)(b) in computing both the instruction fees and the getting up fees.
 34. As to whether the proposition that the applicant represented both respondents and instruction fees should thus have been awarded twice, I have considered the case law cited by both the applicant and the respondent and it is relevant for each side’s submission. However, this court notes from the plaint that the two respondents were said to be owners of the land without any indication as to nature of tenancy whether joint or common. The pleadings were also not prepared or delivered separately. The case of Nguruman, (*supra*), cited by the applicant indeed appears to lay down the rule that costs occasioned by preparation of separate pleadings, and other related costs were incurred which were unnecessary, then the same should be disallowed. In the circumstances this court finds that there was no basis upon which their interest in the suit could have been severed, and in any event the sum awarded is due to them jointly. In this court’s view there would be no justification for holding in the present case, that separate fees are due from each of the respondents.
 35. In the circumstances described above, I find that there is need to re-tax the instruction fee and the assess the getting up fee awarded and thus the global taxation award by the taxing master has to change. There is also need to exclude item No’s 4, 5, 10, 20, 25 and 28 as the awards therein were undeserved. Each of those items was assessed at Kshs 1,100/= which gives a subtotal of Kshs 6,600/=. This court, rather than send the parties to engage in another long process before a different taxing master, and having found the exact sums due or to be excluded under a re-taxation exercise, would rather re-tax the bill itself and write finis to the business of taxation.



36. The applicant's application dated August 12, 2021 therefore has merit and it is hereby allowed, and the applicant's bill of costs dated March 25, 2021 in respect of Nakuru ELC No 124 of 2014 Jackson Kariuki Kahungura & Anor v Hon John Karanja Kihagi & others is now re-taxed by this court in the following terms:
- a. The instruction fees of Kshs 400,000/= awarded is substituted with the sum of Kshs 600,000/= found due by this court.
 - b. The getting up fees of Kshs 133,333/= awarded is substituted with the sum of Kshs 200,000/= assessed by this court.
 - c. Vat on instructions fees at 16% is Kshs 96,000/=.
 - d. Items No's 4, 5, 10, 20, 25 and 28 are collectively taxed off at Kshs 6,600/=;
 - e. Save for the changes in the instruction fees the getting up fees and the attendance fees under items No 4, 5, 10, 20, 25 and 28, all other items shall remain as taxed by the taxing master.
 - f. The applicant's bill of costs dated March 25, 2021 in Nakuru ELC No 124 of 2014 is therefore now retaxed by this court while factoring in sums assessed or deducted in (a), (b) (c) and (d) above at the global sum of Kshs 1,308,316.50 and the Deputy Registrar shall issue a certificate accordingly.
 - g. Each party shall bear their own costs of the instant reference.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

