



Jubilee Health Insurance Limited v Musyoki Benson & Associates Advocates (Miscellaneous Application E409 of 2023) [2025] KEHC 103 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
MISCELLANEOUS APPLICATION E409 OF 2023**

**RC RUTTO, J
JANUARY 17, 2025**

BETWEEN

JUBILEE HEALTH INSURANCE LIMITED APPLICANT

AND

MUSYOKI BENSON & ASSOCIATES ADVOCATES RESPONDENT

RULING

1. Vide the Chamber Summons dated 11th December 2023, the applicant has filed a reference under rule 11 (2) of the Advocates (Remuneration) Order seeking the following prayers:
 1. That the decision by the learned Deputy Registrar (Hon. Stephany Githogori Bett) delivered on 29th November 2023 be set aside and the applicant's/advocate's Bill of Costs dated 24th May 2023 be taxed afresh before any other Deputy Registrar;
 2. That the costs of this application be provided for.
2. The reference is supported by the grounds on its face as follows: by ruling of the taxing officer delivered on 29th November 2023, the respondent's Bill of Costs dated 24th May 2023 was taxed at Kshs. 6,273,164.80. The reasons for the ruling were furnished on even date. Aggrieved by those findings, the applicant filed a Notice of Objection dated 8th December 2023 on grounds that, the taxing officer applied the principles of taxation incorrectly as to amount to awarding the respondent a manifestly excessive sum thereby unjustly enriched the party.
3. The applicant further stated: the matter under consideration before the Public Procurement Review Board was not the contract amount but the tender process. Consequently, the value of the tender was inapplicable in determining instruction fees; a request for review is not a novel process that would warrant an enhancement of fees; disbursements ought to have been taxed off since receipts had not been provided to justify their award; the taxing master violated the principle that taxation should not be confined to the wealthy.



4. The respondent did not file any response to the reference. That notwithstanding, the reference was disposed of by way of written submissions that were orally highlighted. The applicant filed its written submissions dated 1st August 2024. It summarized the background giving rise to the reference and submitted that the taxing master erroneously awarded Kshs. 5,392,180.00 by placing a misguided value of the subject matter set out at Kshs. 505,190,000.00. In its view, the correct approach was not to award instruction fees based on the value of the contract as the crux of the dispute was a tender process. By making that holding, the applicant submitted that the taxing master violated the stare decisis rule and the general principles in taxation. It opined that in the circumstances, instruction fees ought to be assessed at Kshs. 200,000.00. The applicant cited several authorities to fortify these arguments and urged this court to be guided by them.
5. The applicant then challenged the award of “other legal fees” in the sum of Kshs. 7,100.00 and disbursement in the sum of Kshs. 10,000.00. It submitted that no reasons were advanced as to grant the sum of Kshs. 7,100.00. For that reason, it urged this court to strike it off. Finally, as regards disbursement, the applicant was of the view that the same ought to be disallowed since no receipts were furnished before the taxing officer.
6. The respondent filed its written submissions dated 16th August 2024. It equally gave a brief background of the facts leading up to this reference. It argues that the value of the subject matter could be determined from the pleadings. That the proceedings at the Public Procurement Administrative Review Board reversed the decision of the procuring entity awarding the tender in favor of the applicant that bid in the sum of Kshs. 505,100,203.00. Therefore, the instruction fees awarded was proper and lawful since the value of the subject matter could be determined from the pleadings.
7. The respondent further argued that contrary to the applicant’s submissions, the procedure before the Board was technical and not simply a matter of procedure challenging the procurement process. It outlined the reliefs sought by the applicant in its request for review. It further laid out that the request for review encompassed the loss of expected income and the potential profits the applicant would have earned from becoming a successful bidder. The respondent cited several decisions for the holding that the value of the subject matter in procurement matters could be discerned from the prayers enumerated in the pleadings. In any event, the respondent submitted that, the request for review was successful and were therefore entitled to the sum granted by the taxing officer.
8. In further submission, the respondent argued that the decision of the taxing officer was not one eligible to be varied or set aside as there was no error in principle. It urged this court to uphold the award granted by the taxing master as it was sound. Finally, on legal fees and disbursement, the respondent argued that the same was in line with paragraph 11 of the Advocates Remuneration Order, 2014. It urged this court to uphold the taxing master’s findings and dismiss the reference.
9. I have considered the application and the submissions and examined the law. In her ruling dated 29th November 2023, the taxing master held in part as follows:

“In this matter the applicant represented the respondent before the Public Procurement Administrative Review Board seeking a review of the award dated 28th March 2023. The respondent had submitted that the value of the subject matter is a review of the decision of the administrative board and not the amount awarded in the tender and thus the sum of Kshs. 200,000/- would be adequate as instruction fees.

I have looked at the prayers of the matter before the Board. In prayer no (b) The applicant had prayed that



- (b) the notification of intention of award dated 28th March 2023 and delivered which was addressed to the Applicant in tender no ITT NO KWS/ONT/HRA/038/2022 23 Ms Provision Of Comprehensive Group Medical Cover For Kws Staff And Board Members Policies For The Year (sic) 2023/2024, 2024/2025 be annulled and the tender be awarded to the (sic) applicant

It is evident that if the applicant was successful before the board, the tender which amounted to Kshs 505,190,000 would have been awarded to them. For those reason I considered the value of the subject matter to be Kshs 505,190,000...”

The court calculated instruction fees at Kshs. 5,392,180.00. It thereafter awarded other legal fees in the sum of Kshs. 7,100 and disbursement at Kshs. 10,000.00.

10. It is not in dispute that the respondent was entitled to legal fees on account of the advocate client relationship existing between the parties regarding the subject matter. The contentious issue is whether the award of the taxing master was proper, judicious and lawful? In *Joreth Limited vs. Kigano Associates* [2002] KECA 153 (KLR), the Court of Appeal held as follows:

“What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.”

11. I am therefore conscious not to interfere with the decision of a taxing master unless it is demonstrably clear that the taxing master erred in principle and arrived at a wrong conclusion. The applicant’s contention is that the instruction fees awarded were grossly excessive on account of the fact that the issue before the Board revolved around the tender process and not the contractual sum. That position was vehemently opposed by the respondent who opined that the award on instruction fees was properly pegged on the value of the subject matter as discerned in paragraph 24 (a) of the applicant’s supporting affidavit sworn on 11th April 2023.
12. The background giving rise to the filing of the Bill of Costs is not contested. By tender no. KWS/ONT/HRA/038/2022-2023 dated 21st February 2023, Kenya Wildlife Service (KWS), the procuring entity, invited prospective bidders to adduce their bids for the provision of a comprehensive group medical insurance cover for its board members and staff for the years 2023/2024 and 2024/2025. The applicant submitted its bid for the sum of Kshs. 505,100,203. Following the tender evaluation process, the procuring entity awarded the successful bidder, Britam General Insurance Company Kenya Limited, vide a notification of award letter dated 28th March 2023.
13. Aggrieved by that process, the applicant submitted a request for review before the Public Procurement Administrative Review Board on 11th April 2023. The applicant sought numerous prayers in the request. The respondent represented the applicant in those proceedings having drafted the pleadings and discharged instructions issued by the applicant. This included filing the applicant’s written submissions. The Board in its decision dated 2nd May 2023, dismissed the request. Following this the respondent proceeded to file its Bill of Costs dated 24th May 2023.
14. To determine the proper amount on instruction fees, it is imperative to set out the law on instruction fees and in particular on matters before the Public Procurement Administrative Review Board.



Ojwang', J (as he then was) in Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others [2006] eKLR issued the following guidelines when assessing instruction fees:

- “ 1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
2. the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
3. the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
4. so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
7. where responsibility borne by advocates is taken into account, its nature is to be specified;
8. where novelty is taken into account, its nature is to be clarified;
9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”

15. Significantly, the learned judge remarked as follows:

“Private law claims do not fall in the same class as public law claims such as those in judicial review, in constitutional application, in public electoral matters. Such matters are in a class of their own and the instruction fees allowable in respect of them should not, in principle be extrapolated from the practices obtaining in the private law domain which may involve business claims and profit calculations...”

16. Further Odunga, J. (as he then was) in Nyangito & Co. Advocates vs. Doinvo Lessos Creameries Ltd. [2014] KEHC 5481 (KLR), agreeing with the above decision added:

“Taking cue from the above decision, a decision which I associate myself with, it is my view and I hold that in judicial review, constitutional applications and in public electoral matters, the amount in dispute is not necessarily the determinant factor in deciding the quantum of costs payable though the same may be taken into account in considering the interest and importance of the matter to the parties.”

17. Drawing reference from the above decisions, it's imperative that when assessing instruction fees on a public procurement matter, the taxing officer ought to consider that this is a public law remedy that does not fall within the domain of private law. In the circumstances, therefore, the taxing mater ought to take into account, not only the value of the subject matter, if it can be discerned from the pleadings, but also the nature and importance of the case, the amount involved, the interest of the parties, general



conduct of the proceedings and all other relevant circumstances. [See Opa Pharmacy Ltd vs. Howse & McGeorge Ltd Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233].

18. In view of the foregoing analysis, I find that the taxing master misapplied the principles when she elected to award instruction fees in the manner she did. It is apparent that she only took into account the value of the applicant's bid as set out in its request for review and generated her assessment based on that figure. Furthermore, she did not indicate the provisions of law invoked that informed her decision. The calculations lacked a legal basis and her discretion was exercised injudiciously. It was a wrong approach and warrants interference by this court.
19. Regarding other legal fees, the taxing officer failed to explain how she arrived at the figure and what informed her basis in awarding the same altogether. I therefore find that the award also ought to be set aside. As for disbursement, I also find that the same was awarded without any justifiable basis. No explanation was given as to explain how the taxing master arrived at that figure and what were the applicable measures. I therefore find that it should be set aside.
20. In view of the above, I find that the taxing master erred in principle in awarding instruction fees, other legal fees and disbursement. It is therefore appropriate that the same be referred back for taxation before another taxing master with appropriate guidelines as was held by the Court of Appeal in Steel Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 where Spry, JA. held as follows at page 143:

“ Counsel for the appellant submitted, relying on D'Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion.”

21. The upshot of the above is that the reference by the Chamber Summons dated 11th December 2023 herein succeeds in the following terms:
 1. The taxing master's ruling dated 29th November 2023 which taxed instruction fees at Kshs. 5,392,180.00, other legal fees at Kshs. 7,100.00 and disbursement at Kshs. 10,000.00 in respect to items 1 and 24 of the respondent's Bill of Costs dated 24th May 2023 is hereby set aside;
 2. The respondent's Bill of Costs dated 24th May 2023 shall be remitted back for taxation by another taxing master other than Hon. Githogori Bett for reconsideration in particular of the items cited herein;
 3. The taxing master shall strictly formulate the basis upon the awards set aside by this court shall be premised if at all justified;
 4. Each party shall bear its own costs of this reference.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

For Appellant:



For Respondent:

Court Assistant:

