



REPUBLIC OF KENYA



**Kitho Civil & Engineering Company Limited v Atunga Abuka
Advocates (Commercial Miscellaneous Application E798 of 2021)
[2025] KEHC 2189 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 2189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E798 OF 2021
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

KITHO CIVIL & ENGINEERING COMPANY LIMITED APPLICANT

AND

ATUNGA ABUKA ADVOCATES RESPONDENT

*(Being a reference from the ruling of the Taxing Master
Hon. S. Githongori Bett, delivered on 29th November 2023)*

RULING

1. The applicant filed a Chamber Summons application dated 18th December 2023 pursuant to the provisions of Rule 11(1) of the [Advocates Remuneration Order](#), Sections 3 & 3A of the [Civil Procedure Act](#), and all other enabling provisions of the law. The applicant seeks orders that the Taxing Officer's ruling delivered on 29th November 2023 in Misc. Case No. E798 of 2021 regarding the entire bill of costs dated 27th October 2021 be set aside, and for the Court re-tax the respondent's Advocate - Client bill of costs dated 27th October 2021, and/or in the alternative, refer the said bill of costs to the Taxing Officer for re-taxation with proper directions.
2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Simon Kaingo, one of the Directors of the applicant company. He averred that the applicant engaged the respondent to represent it in HCCOMM No. E042 of 2020 to prevent the National Bank of Kenya from auctioning its properties based on disputed valuations, but the applicant later changed its legal representation while the case remained ongoing. He further averred that the Taxing Officer failed to consider Section 62A of the [Advocates Act](#), which governs the filing of a bill of costs in cases where there is a change of Advocates during ongoing proceedings.



3. The applicant contended that the value of the subject matter in HCCOMM No. E042 of 2020, used for taxing instruction fees, was contested and not discernible from the pleadings. Further, that the Taxing Officer failed to exercise her discretion and consider the principles of fairness, interest of the parties and the general conduct of the proceedings, thus resulting in miscalculated instruction fees of Kshs.3,645,079.70, with an unjustified 50% increase and incorrect percentage rate. Additionally, Mr. Kaingo averred that there was double taxation on certain items, and VAT was improperly levied on the total taxed sum, including disbursements. He therefore asserted that the taxation of Kshs.6,466,423.32 was excessively high, especially since the matter is still ongoing.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 9th February 2024 by Rodgers Atunga, an Advocate of the High Court of Kenya and learned Counsel for the respondent. Mr. Atunga contended that the bill of costs dated 27th October 2021, as taxed on 29th November 2023, was properly subjected to all relevant legal provisions, with both parties participating in the process. He averred that Section 62A of the *Advocates Act* referred to by the applicant does not exist, and that the Taxing Officer correctly determined the value of the subject matter in HCCOMM No. E042 of 2020 as Kshs.205,911,493.00, which was discernible and determinate from the pleadings. Mr. Atunga asserted that the Taxing Officer exercised her statutory power appropriately, and the issues raised in the instant application aim to unjustly deny the respondent its rightful fees.
5. In a rejoinder, the applicant filed supplementary affidavits sworn on 5th March 2024 & 29th May 2024 by Simon Kaingo, one of the Directors of the applicant company. He averred that the reference to Section 62A of the *Advocates Act* was an inadvertent error as he meant to refer to Section 62A of the Advocates Remuneration Order, 2014, which addresses costs where there has been a change of Advocates. He further averred that when the applicant entered into an Advocate - Client relationship with the respondent for representation in HCCOMM No. E042 of 2020, the parties herein agreed on legal fees of Kshs.180,000/= inclusive of disbursements and VAT.
6. Mr. Kaingo contended that by the time the applicant switched legal representation, the respondent had acknowledged receipt of Kshs.74,000/= leaving a balance of Kshs.106,000/=. He stated that despite the existence of the retainer agreement, the respondent filed a bill of costs dated 27th October 2021 claiming Kshs.8,229,124.37, which the applicant disputed through a Notice of Preliminary Objection, but the Taxing Officer ruled that there was no valid Retainer Agreement and proceeded to tax the respondent's bill of costs at Kshs.6,466,423.32, and failed to consider the Kshs.74,000/= already paid.
7. The respondent filed a further replying affidavit sworn on 21st June 2024 by Rodgers Atunga, an Advocate of the High Court of Kenya and learned Counsel for the respondent. He asserted that the issues raised in the applicant's supplementary affidavit regarding the Advocate - Client Retainer Agreement under Section 45(6) of the *Advocates Act* were fully addressed by the Taxing Officer during the hearing of a Notice of Preliminary Objection filed by the applicant, which was subsequently dismissed in a ruling delivered on 29th November 2023, and no appeal was filed against the said ruling. That thereafter, the Court proceeded to tax the respondent's bill of costs and issued a certificate of taxation dated 18th December 2023. He deposed that the said issues are *res judicata*.
8. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 13th March 2024 & 30th May 2024 by the law firm of Musyoka Murambi & Associates, whereas the respondent's submissions were filed by the law firm of Atunga Abuka Advocates on 19th March 2024 & 1st July 2024.
9. Ms. Omuya, learned Counsel for the applicant submitted that the Taxing Officer should consider various factors when taxing a bill of costs, including the nature and importance of the case, the amount



- involved, the parties' interests, the conduct of proceedings, and other relevant circumstances. She cited the case of *Joreth Limited v Kigano & Associates* [2002] 1 E.A, and stated that the value of the subject matter in HCCOMM No. E042 of 2020 was indeterminate since the main prayer in the plaint therein was to stop the defendant from selling the applicant's properties to recover the mentioned sum which was in contention. She submitted that as the aforementioned case is still ongoing, and the final amount to be recovered by the defendant is uncertain. She contended that the Taxing Officer ought to have exercised her discretion judiciously when taxing instruction fees, considering all relevant factors.
10. Counsel cited the case of *Keziah Gathoni Supeyo v Yano t/a Yano & Co. Advocates* [2019] eKLR, and Section 62A of the *Advocates Remuneration Order* and argued that the Taxing Officer should have considered that the respondent's work in HCCOMM No. E042 of 2020 was limited to drafting the plaint and accompanying documents. She contended that increasing instruction fees by 50% was erroneous. Ms. Omuya highlighted further errors in the taxation process such as the fact that the Taxing Officer misapplied a 1.75% rate instead of 1.5% for instruction fees exceeding Kshs.20,000,000/=. That on item 6, she failed to account for discrepancies in the number of folios billed. On item 27, that she allowed double taxation by billing the same application multiple times, and that items 28, 41 & 43 included unsupported or duplicate charges. Counsel also argued that levying VAT on all taxed sums, including Court fees and disbursements, was improper.
 11. Mr. Atunga, learned Counsel for the respondent relied on the Court of Appeal case of *S R D'Souza & others v C C Ferrao & others* [1960] EA 602, cited by the Court in *Green Hills Investments Ltd v China National Complete Plant Export Corporation (Complaint) T/A Covac* [2004] eKLR, and submitted that the applicant has not made out a case to warrant the setting aside or interfering with the findings of the Taxing Officer. He also relied on the Court of Appeal case of *Joreth Limited v Kigano & Associates* (*supra*), and further submitted that the value of the subject matter in HCCOMM No. E042 of 2020 is definite and can be discerned from the face of the pleadings. Counsel argued that the fact that the applicant changed its Advocates on record in the said case does not in any way affect the instruction fees payable to the respondent.
 12. In a rejoinder, Ms. Omuya cited Section 45(1)(b) & (6) of the *Advocates Act* and the case of *Leonard K. Mbuvi T/A Katunga Mbuvi & Co. Advocates v Clinix Health Care Ltd (6th Accused Person)* [2019] eKLR, and argued that receipts showing payments of Kshs.74,000/= and Kshs.150,000/= to the respondent are sufficient proof of a Retainer Agreement. She asserted that the said Agreement negated the Taxing Officer's jurisdiction to tax the bill of costs dated 27th October 2021. Additionally, she emphasized that the Taxing Officer applied incorrect principles in taxing the aforesaid bill of costs at Kshs.6,466,423.00, as the amount already paid (Kshs.224,000/=) was not factored in, leading to an inflated taxation.
 13. In response, Mr. Atunga argued that the applicant's supplementary affidavit refers to Section 45(6) of the *Advocates Act*, but fails to disclose that the same issue was raised in a Preliminary Objection dated 21st January 2022, which was heard and dismissed by the Taxing Officer in her ruling delivered on 29th November 2023. He submitted that the applicant did not appeal from the said decision, thus the issue was conclusively decided. Counsel asserted that attempting to raise the same issue again constitutes an attempt to bypass the doctrine of res judicata. To buttress these submissions, Mr. Atunga referred to the Court's holding in the case of *Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR.



Analysis and Determination.

14. I have considered the Reference filed herein, and the affidavits filed in support thereof. I have also considered the respondent's replying & further affidavits and the written submissions by Counsel for both parties. The issues that arise for determination are -
- i. Whether the Taxing Officer had jurisdiction to tax the respondent's bill of costs dated 27th October 2021; and
 - ii. Whether the Taxing Officer's ruling delivered on 29th November 2023 should be set aside and the respondent's bill of costs dated 27th October 2021 referred back to the Taxing Officer for re-taxation.

Whether the Taxing Officer had jurisdiction to tax the respondent's bill of costs dated 27th October 2021.

15. The applicant contended that it had a Retainer Agreement with the respondent, hence the Taxing Officer had no jurisdiction to tax the respondent's bill of costs dated 27th October 2021. The respondent on the other hand contended that the said issue is res judicata having been determined by the Taxing Officer in a ruling delivered on 29th November 2023.
16. On perusal of the Court record, this Court notes that in opposition to the respondent's bill of costs dated 27th October 2021, the applicant filed a Notice of Preliminary Objection dated 24th January 2022, seeking to have the said bill of costs struck out. It argued that the Taxing Officer had no jurisdiction to entertain the respondent's bill of costs under the provisions of Section 45(6) of the *Advocates Act*, on grounds that there was a Retainer Agreement between the parties herein. The Taxing Officer considered the said Preliminary Objection and in a ruling delivered on 12th October 2023, she found that there was no written agreement for legal fees between the parties herein, thus the applicant's Preliminary Objection was not merited.
17. The applicant has neither demonstrated nor is there any evidence on the Court record to show that applicant appealed against the said ruling. As such, since the said ruling by the Taxing Officer has never been varied and/or set aside by a Court of competent jurisdiction, the said position stands. This Court therefore agrees with the respondent Counsel's submissions that the issue of a Retainer Agreement offends the doctrine of res judicata under Section 7 of the *Civil Procedure Act*, rendering the said issue not open for determination by this Court.

Whether the Taxing Officer's ruling delivered on 29th November 2023 should be set aside and the respondent's bill of costs dated 27th October 2021 referred back to the Taxing Officer for re-taxation.

18. A Court can only interfere with the Taxing Officer's decision when there has been an error in principle and when he has not directed his mind in accordance with the provisions of the law that is, by considering factors that ought not to have been considered in the first place or by failing to consider



factors which he ought to have been considered. In the case of Tom Ojienda v County Government of Meru [2021] eKLR, the Court stated that -

The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court in *Visser v Gubb* 1981 (3) 753 (C) 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. It is now well settled that the High Court should not interfere with the Taxing Officer's decision on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. In this instance, the applicant challenges the Taxing Officer's award on instruction fees on grounds that the value of the subject matter could not be determined from the pleadings, since the main prayer in the plaint in HCCOMM No. E042 of 2020 was to stop the defendant from selling the applicant's properties to recover the mentioned sum which was in contention.
20. The applicant contended that as the aforementioned case is still ongoing, the final amount to be recovered by the defendant is uncertain. For this reason, the learned Taxing Officer ought to have exercised her discretion and considered all the relevant factors when taxing item No. 1 on instruction fees. The respondent on the other hand submitted that the value of the subject matter in HCCOMM No. E042 of 2020 is definite and can be discerned from the face of the pleadings. Further, the fact that the applicant changed its Advocates on record in HCCOMM No. E042 of 2020 does not in any way affect the instruction fees payable to the respondent.
21. The Court of Appeal in the case of Joreth Limited v Kigano & Associates (*supra*), held as hereunder in respect to the value of the subject matter for purposes of taxation -

the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee 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. (Emphasis added).
22. It is not in contest that HCCOMM No. E042 of 2020 has not yet been determined, thus the value of the subject matter ought to be determined from the pleadings. Upon perusal of the plaint therein, the applicant herein averred that the defendant herein advanced to it banking facilities, being an overdraft of Kshs.9,533,000/= and two bank performance guarantees of Kshs.13,848,864.10 and Kshs.56,924,432.05 in favour of the Kenya Rural Roads Authority. The facilities were secured by a



number of properties which the defendant sought to sell in a bid to recover Kshs.194,463,481.07. The applicant herein claims to have received a notice to auction, which auction intended to realize Kshs.199,718,841.82. Consequently, it filed HCCOMM No. E042 of 2020 seeking an order of injunction restraining the defendant therein from interfering and/or dealing with the suit properties in any way. The applicant also sought general damages.

23. From the foregoing, it is evident that the applicant herein did not instruct the respondent herein to represent it in a suit where it sought to recover a specific amount of money. To the contrary, in HCCOMM No. E042 of 2020, the applicant herein sought to protect its interest over the suit properties, which the 1st defendant intended to sell to recover Kshs.199,718,841.82, a sum which was disputed by the applicant herein. In the premise, it is to my finding that the subject matter in the aforesaid suit is the applicant's interest over the suit properties, whose value cannot be determined or ascertained from the pleadings filed.
24. In instances where the value of the subject matter cannot be ascertained, the Taxing Officer is required to use her discretion to assess instruction fees in what she considers just, while bearing in mind all the relevant factors. That was the Court's holding in the case of *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR, cited with authority by the Court of Appeal in *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] KECA 587 (KLR) that -

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement.

25. The applicant herein argued that in taxing instruction fees, the Taxing Officer ought to have considered the fact that the respondent's work in HCCOMM No. E042 of 2020 was limited to drafting the plaint and accompanying documents. In the oft cited case of *Joreth Limited v Kigano & Associates* (supra), the Court of Appeal held that -

In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.

26. The import of the above decision is that instruction fees are not affected or determined by the stage the suit has reached. This Court is as such inclined to agree with the respondent that the fact that the applicant changed its Advocates before HCCOMM No. E042 of 2020 was determined, does not affect the respondent's instruction fees.
27. Having considered all the relevant factors, this Court finds that the learned Taxing Officer made an error in principle in taxing item No. 1 on instruction fees on the basis that the value of the subject matter in HCCOMM No. E042 of 2020 was determinable. It is important to note that even if the Taxing Officer had properly determined the value of the subject matter, she still erred in applying a 1.75% rate instead of 1.5% for instruction fees exceeding Kshs.20,000,000/=. In the premise, the taxed amount on instruction fees is hereby set aside.
28. The applicant argued that increasing instruction fees by 50% was erroneous. However, upon perusal of the Taxing Officer's ruling delivered on 29th November 2023, I note that she not only increased instruction fees by 50%, but also other legal fees by half. The provisions that set out when legal fees



can be increased by half are provided for under Schedule 6B of the Advocates Remuneration Order which states that -

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.

29. Applying the above provisions of the law to the Reference herein, this Court finds that the Taxing Officer applied the correct legal principles by increasing instruction fees and other legal fees by half, as provided for under Schedule 6B of the Advocates Remuneration Order.
30. The applicant claimed that that the Taxing Officer in taxing item No. 6 failed to account for discrepancies in the number of folios billed under Item Nos. 6 & 5, in taxing item No. 28 failed to consider that the invoice attached to the bill of costs was for Kshs.500/=, and in taxing item No. 41, that she failed to consider that no invoice was attached for filing of submissions. The applicant averred that the Taxing Officer failed to take into account the fact that the copies of the application dated 13th February 2020 billed under item No. 27 had already been billed under item Nos. 4, 6 and 8 and that the Court fees for the Notice of Motion in item No. 43 had already been billed in item No. 40. The applicant asserted that the Taxing Officer made an error worthy of this Court's interference.
31. On perusal of the Taxing Officer's ruling, I note other than Item Nos. 9, 15, 23, 29, 30, 32 & 39, I cannot ascertain whether she actually applied her mind towards verifying whether the reimbursements cited in the respondent's bill of costs relate to money which the Advocate had paid out in respect to services which he had been instructed to provide. While it is possible that the Advocate may have made the payments for which reimbursement was being sought, it is equally plausible that some of the claimed payments were not actually made.
32. In the interest of justice and fairness, it is essential for a Taxing Officer to verify if disbursements claimed in a bill of costs were actually paid by Advocates on behalf their clients. In this case, the Taxing Officer taxed all the other items as drawn on grounds that they were reasonably drawn to scale without confirming that such payments were actually made. Verification is necessary to ensure accuracy and fairness. Therefore, this Court holds that the lack of verification constitutes an error in principle, as it cannot be assumed that all claimed disbursements were made without proper evidence.
33. The applicant asserted that levying VAT on all taxed sums by the Taxing Officer including Court fees and disbursements was improper. It is not in contest that in taxing the respondent's bill of costs, the Taxing Officer subjected instruction fees, other legal fees and the 50% increase thereof to VAT. On this issue, this Court concurs with the Court's finding in the case of *Mumias Sugar Company Limited v Tom Ojienda & Associates* [2019] eKLR where it was held as follows –

I also find that the learned taxing officer erred when she levied VAT on all the taxed sums, which include Court Fees and other disbursements.

Where a party had paid Court Fees or other disbursements, the said payments would not attract VAT when a Bill of Costs was being taxed.

When Court Fees or other disbursements have been paid, if any such payment attracts a levy such as VAT, the said levy would have already been paid.



If the payment was made by the advocate, he would be seeking reimbursement from the client. In the event, such reimbursement of money which had already been paid, would not ordinarily attract VAT.

Where any particular disbursement is being claimed by an advocate, the taxing officer who allows such a payment to be recovered, should ensure that he or she verifies that such money had been disbursed.

And if the taxing officer were to order that VAT be paid on any particular disbursement, the said taxing officer would need to give reasons why VAT was payable on the said disbursements.

34. Further, Section 13(5) of the *Value Added Tax Act* provides that -

In calculating the value of any services for the purposes of subsection (1), there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:

Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.

35. In view of the foregoing decision and the above provisions of the law, I hold that it is only instruction/professional fees that attract VAT. The Taxing Officer however subjected instruction fees, other legal fees and the 50% increase to VAT thus making an error in principle warranting this Court's inference.

36. It is not disputed that the applicant paid the respondent Kshs.74,000/= as payment for legal services in HCCOMM No. E042 of 2020. However, it is manifest that in taxing the respondent's costs, the Taxing Officer did not take into account the said sum and subtract it from the total costs awarded to the respondent, which I find to be improper.

37. Having disturbed the award on instruction fees, the resultant effect is that it will impact the 50% increase in legal fees and the VAT amount.

38. In the result, I find that the application dated 18th December 2023 is partially successful. It is allowed in the following terms -

- i. The Taxing Officer's ruling delivered on 29th November 2023 in respect of the respondent's Advocate/Client bill of costs dated 27th October 2021 is hereby set aside save for the taxation in respect to item Nos. 9, 15, 23, 29, 30, 32 & 39;
- ii. The said bill of costs is hereby remitted to another Taxing Officer in the Commercial and Tax Division for re-taxation of the items thereon save for item Nos. 9, 15, 23, 29, 30, 32 & 39; and
- iii. There shall be no orders as to costs.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:



Ms Chepchumba for the applicant

Mr. Atunga for the respondent

Ms. B. Wokabi – Court Assistant.

