



Mwangi Keng'ara & Company Advocates v Upward Scale Investment Company Limited & 2 others (Miscellaneous Application 525 of 2013) [2025] KEHC 101 (KLR) (Civ) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 101 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION 525 OF 2013
RC RUTTO, J
JANUARY 17, 2025

BETWEEN

MWANGI KENG'ARA & COMPANY ADVOCATES APPLICANT

AND

UPWARD SCALE INVESTMENT COMPANY LIMITED 1ST RESPONDENT

LINMERX HOLDINGS LIMITED 2ND RESPONDENT

JOSEPH GITAU MBURU & JOHN KANGI MUNGAI (EXECUTORS OF THE WILL OF JAMES RURIGI NJUGUNA (DECEASED)) 3RD RESPONDENT

RULING

1. Before me is a Reference filed by way of a Chamber Summons dated 11th February 2024 seeking the following reliefs:
 1. That the ruling of the Taxing Officer dated 26th January 2024 on item number 1 (instruction fees) of the amended advocate/client bill of costs dated 13/01/2023 be set aside and this Honorable Court be pleased to re-tax item 1 and allow it as drawn;
 2. That in the alternative, the ruling of the taxing officer dated 26th January 2024 as regards item number 1 (instructions fees) of amended advocate/client bill of costs dated 13/01/2023 be set aside and the amended advocate amended advocate/client bill of costs dated 13/01/2023 be remitted back for re-taxation by any other taxing officer with appropriate directions of this Honorable Court;
 3. That costs of this reference be awarded to the advocate/applicant;



2. The application is premised on the grounds on the face of it and the replying affidavit of Mercy Nduta Mwangi, advocate practicing in the applicant's firm sworn on 12th February 2024. The gist of the chamber summons is that in November 2010, the applicant was instructed by the 1st and 2nd respondents to prepare to act as their advocate in a joint venture for the acquisition of that parcel of land namely L.R. No. 209/309/1 and the development of a Block of offices thereon. That by a meeting of 7th March 2011 (minutes annexed), the applicant was appointed counsel for the entire project. Subsequently, it was instructed to prepare agreements for the appointment of various consultants engaged in the project. Those instructions were in a letter dated 16th May 2011.
3. The applicant prepared the agreement for appointment of the financial and management consultants. That it was the applicant's responsibility to ensure the protection of the investors' interest in the joint venture. This involved coordinating with five other consultants, land owners, and developers, ultimately leading to the preparation of 16 contracts. Upon execution of the agreement, the applicant drew its fee note dated 31st January 2012 and a forwarding letter of even date to the 1st and 3rd respondents.
4. Subsequently, a dispute arose over the applicant's professional fees which led to the respondents filing Nairobi HCCC No. 14 of 2013 (OS); *Linmerx Holdings Limited & another vs. Mwangi Keng'ara & Company Advocates* wherein the court on 19th November 2013 issued an order for taxation of the applicant's fees. As a result of this the applicant filed its bill of costs dated 27th November 2013 which was later amended on 13th October 2023. In support of the bill, the applicant filed affidavits sworn by Mercy Nduta Mwangi dated 5th December 2013 and 12th November 2015.
5. In response, the respondents filed a replying affidavit sworn by Joseph Gitau Mburu dated 7th April 2015. Thereafter, the taxing master delivered her ruling on 26th January 2024 wherein she taxed the Bill at
6. The applicant being dissatisfied with the findings of the taxing master urges this court to allow the reference for the following reasons: the taxing master erred in principle when she held that the applicant did not draft the financial consultant's agreement and that instructions were limited to reviewing the agreement; the applicant adduced an agreement that was explicitly drawn by the applicant; no contrary position was advanced by the respondent; the taxing master failed to ascertain the value of the subject matter to award instruction fees; the applicant acted for the employer and the financial consultant in drafting the agreement; the taxing master awarded instruction fees in the sum of Kshs. 150,000.00 that was inordinately low; the taxing master failed to consider the scope of the professional work that protected the financial consultants and employees in the joint venture project and 16 ancillary contracts
7. The application is opposed. The respondents have relied on the affidavit of Joseph Gitau Mburu, the 1st respondent's director, sworn on 18th June 2024 to urge this court to dismiss the reference on the following grounds: the amount awarded in instruction fees was fair and sufficient bereft of any error; the amount sought in instruction fees was exorbitant and unjustified; the applicant filed several bills of costs that have since been concluded; the taxation of those bills was dependant on the parties' agreements and determined with specificity; the applicant had raised references to those bills that have since been dismissed; and there should be an end to litigation.
8. The reference was canvassed through written submissions. The applicant relied on its submissions and list of authorities dated 23rd September 2024. It argued that it drafted the agreement and did not merely review it as determined by the taxing master. That the taxing master erred in failing to find that the financial consultant's agreement was independent of all other contracts. Finally, the value of the subject



matter could be discerned from the agreement at Kshs. 9,280,000.00 accounting for the principal sum and VAT. That the taxing master ought to have applied section 44 (2) of the *Advocates Act* and rules 18 (f), 21 and schedule 5 part 2 rule 1 of the regulations thereunder. It cited several authorities to urge this court to award the sum of Kshs. 318,212.36.

9. The respondents filed their joint written submissions dated 3rd October 2024. The respondents rehashed the contents of their replying affidavit, citing several authorities to urge this court to dismiss the reference with costs.
10. I have considered the applications, the affidavits, the annexures thereto and the law. The Court in *First American Bank of Kenya vs. Shah & others* (2002) 1 E.A.64 set out circumstances in which a Judge of the High Court may interfere with the taxation of a taxing master to include where the taxation is based on an error of principle. Failure to consider relevant factors was held to be an error of principle. In *Donholm Rabisi Stores (Firm) vs. EA Portland Cement Ltd* [2005] eKLR the court observed:

“taxation of costs whether those costs be between party and party or between Advocate-client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order and that the court will not be drawn into arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates Remuneration Order’.
11. I am therefore reminded to be slow to interfere with the findings of the taxing master unless it can be demonstrated that the taxing master acted in error on principle or failed to consider relevant matters thereby affecting the outcome of the taxing master’s findings. In other words, this court should exercise caution and interfere sparingly with the decision of the taxing master.
12. It is not in dispute that the applicant and the respondents held an advocate client relationship. Arising from it, the applicant filed an amended bill of costs dated 13th October 2023 and a ruling of the taxing master delivered on 26th January 2024. In particular, the applicant is aggrieved by the findings on instruction fees which the taxing master held as follows:

“In taxing instruction fees, I am guided by the principles of taxation in *Premchard Reichald vs. Quarry Services of EA ltd and clients EALR* [1972] EA 162 (sic) and *Joreth Limited vs. Kigano Associates* [2002] eKLR (sic).

The advocates (sic) instructions in this matter were limited to reviewing the agreement to the appointment of a financial consultant. It is also noted that the advocate did not draft the agreement herself, but was limited to reviewing an existing agreement. I thus considered the value of the subject matter to be limited to the scale of work as per the instruction fees. I opine that Kshs. 150,000/- is adequate as instruction fees for reviewing the agreement especially keeping in mind that the advocate filed 15 other bills of costs related to work done in the construction process. I have also considered the length of time it took to (sic) bill to be taxed. Both parties are aware of the said bills referred to herein.

Item 1 is taxed at Kshs. 150,000/=.

All other items are taxed as drawn since they are unopposed and drawn to scale.

The bill is taxed as follows:

Instruction fees Kshs. 150,000/=

Other legal fees Kshs. 17,321/=

Kshs. 167,321



VAT Kshs. 26,771.36

Kshs. 194,092.36

Disbursements Kshs. 805.00

Kshs. 194,897.36

The bill is taxed at Kshs. 194,897.36/= an amount of Kshs. 256,835.60 is taxed off.”

13. It is not disputed that the applicant acted for the parties. By a meeting of 7th March 2011, the applicant was appointed counsel for the entire project by the 1st respondent. Subsequently, it was instructed to prepare agreements for the appointment of various consultants engaged in the project. Those instructions were contained in the letter dated 16th May 2011 where the 1st respondent appointed the applicant according to the terms of reference outlined in the applicant’s letter of 7th March 2011.
14. Under those terms, the applicant expressed that the scope of work entailed inter alia, drawing of the agreement for the joint venture. I do confirm that those are the terms of reference referred to by the 1st respondent in its letter of 16th March 2011 and it cannot therefore renege from those terms.
15. The applicant argued that it prepared the agreement for appointment of the financial and management consultants. A cursory perusal of the annexures in support of this assertion, this court notes that the applicant drew and prepared a financial agreement. I say so because it was drawn and filed by Mwangi Keng’ara & Co. Advocates as indicated in the jurat part of the agreement. The advocate was thereafter charged for velo binding the agreement on 6th February 2012 in the sum of Kshs. 480.00. That agreement was forwarded on 15th April 2011 to the 3rd respondent for execution and subsequently on 4th May 2011, 27th May 2011, 7th September 2011 and 31st January 2012.
16. The above facts were not disputed by the respondent. No evidence was advanced to demonstrate that the applicant did not provide these services. The respondent did not rebut this evidence with uncontroverted proof. All the respondent stated was that the same never happened. I also find that the filing of multiple bills did not matter. It remained the duty of the taxing master to evaluate the work done on each bill based on its own merits. Based on the record availed before me, I find that the taxing master erred in failing to find that the applicant executed the work as per the instructions. It was therefore entitled to instruction fees drawn to scale. Though the taxing master awarded Kshs. 150,000.00, it is not clear how she arrived at the said figure.
17. The applicant computed that the value of the subject matter was Kshs. 9,280,000.00 which this court affirms. The instruction fees are therefore derivative from that value. The Advocates (Remuneration) (Amendment) Order 2009 is applicable based on the date the instructions were issued and executed. Under schedule 1 of the First scale, the applicable scale, instruction fees are charged as follows:

On the first 5,000,000.00 @ 1.5% = Kshs. 75,000.00
On the remaining 4,280,000.00 @ 1.25% = Kshs. 53,500.00
Total – Kshs. 128,500.00
18. An award under this scale does not benefit from an increment by half contrary to the applicant’s suggestion. That would only have applied if the matter was litigious. It is therefore disallowed. As the other items are indeed drawn to scale, I will not interfere with those other findings. That is to say other legal fees at Kshs. 17,321.00 and disbursements totaling Kshs. 805.00. combining the legal fees and instruction fees, the same attracts a 16% VAT at Kshs. 23,331.36.



19. Consequently, the award of the trial court is set aside and substituted with an award of Kshs. 169,957.36. As this appeal partially succeeds, each party shall bear its own costs of the appeal.

It is so ordered.

RHODA RUTTO

JUDGE

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

For Appellant:

For Respondent:

Court Assistant:

