



Patricia Wambui Mwai t/a Wambui Mwai & Associates Advocates v Mwangi (Miscellaneous Civil Application E034 of 2023) [2025] KEHC 1889 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E034 OF 2023
DKN MAGARE, J
FEBRUARY 3, 2025**

BETWEEN

**PATRICIA WAMBUI MWAI T/A WAMBUI MWAI & ASSOCIATES
ADVOCATES APPLICANT**

AND

ESTHER WANGARI MWANGI RESPONDENT

RULING

1. This ruling is in respect of the Chamber Summons dated 13.9.2024. The Reference arose from the taxation of the Bill of Costs dated 28.7.2023 which is said to have arisen from Nyeri CMCCC No. 132 of 2011 in which the Applicant as advocate represented the Respondent as client.
2. The Applicant seeks an order that the ruling of the Taxing Officer dated 4.9.2024 be set aside and the Bill of Costs taxed afresh.
3. The Applicant contends that the Taxing Officer erred in principle contrary to Schedule 7(1) of the Advocates Remuneration Order 2014.
4. It is further stated that the Honourable Taxing Officer finding that the moment an advocate is instructed, the advocate is entitled to a fee however minimal.
5. The Advocate further deposed that the court took into consideration extraneous matters in dismissing the bill of costs.

Submissions

6. The Applicant filed submissions dated 18.10.2024. It was submitted that the advocate was entitled to instruction fees the moment he or she is instructed in a matter. Reliance was placed on *Housing Company of East Africa Ltd vs Board of Trustees NSSF & another HCCC No. 543 of 2007.*



7. The Applicant submitted that she was instructed before filing a notice of appointment of advocates and had time to familiarize with the case, make copies of the pleadings, draft an application, draft the notice of appointment of advocate and generally advise the client.
8. On the part of the Respondent, she filed submissions dated 29.10.2024. It was her submission that the Taxing Officer was correct in her ruling since the Applicant had done no work after filing the Notice of Appointment of Advocates. Reliance was placed on *Joreth vs Kigano & Associates (2002) eKLR* to submit that instructions fees would not be awarded as there was no work done.

Analysis

9. The issue is whether the learned taxing officer erred in her taxation of the Applicant's Bill of Costs.
10. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles were laid down in the case of *First American Bank of Kenya vs Shah and Others [2002] 1 EA 64.*, as follows:
 - (1) that 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;
 - (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
 - (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
 - (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
 - (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
 - (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
 - (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.



assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject...”

...The law gives the taxing master some leeway but like all discretions, it must be exercised judicially and in line to the material presented before court.”

11. One of the parameters the Taxing Officer must consider is the labour required in a given case. This does not apply to labour that has already been done. It is labour that will be required after the onset of the work and this is determined at the time of taking instructions but depends on whether the advocate undertook the action to completion or stopped before completion. The position was reiterated in *Karen & Associates Advocates vs. Caroline Wangari Njoroge* [2019] eKLR, in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet and Ohaga Advocates vs. Adopt Light Ltd. HC Misc 729 of 2006* where the court stated that;

...The taxing master must consider the case and the labour required in the matter, the nature or importance of the matter more so the amount or value of the subject matter involved, the interest of the client in sustaining or losing a brief and the complexity of the dispute.

12. Therefore, this Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.
13. The court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account.
14. Similarly, the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.
15. The discretion allowed to the Taxing Officer is unfettered, allowing the taxing officer to assess such instruction fees as 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. On instruction fees, in the case of *Joreth Limited vs. Kigano & Associates* [2002] 1 EA 92 at 99 the Court of Appeal held thus:

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. It is



not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. 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. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.

16. Therefore, this 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, or that it was based on an error of principle. In *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 Others* (2006) eKLR Ojwang, J (as he then was) expressed himself inter alia 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 somewhat too high or too low; it will only interfere if it thinks the award 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. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”



17. The fulcrum of the above dispositions is that the advocate's instruction fees is to seek no more and no less than reasonable compensation for professional work done. The taxation of advocate's instruction fees should avoid any prospect of unjust enrichment for any particular party or parties and so far as possible, comparability should be applied in the assessment of advocate's instruction fees based on objectivity. I wish to add that the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another. I therefore agree with the decision in *Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna* (supra) that:

“... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...”

...it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction...if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode...if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner...”

18. In the ruling the learned Taxing Officer noted that the advocate did not work after filing the Notice of Appointment of Advocates. The Applicant projected instruction fees as Kshs. 65,000/-. As was held in *First American Bank of Kenya vs. Shah and Others* (supra), the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it.

19. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in *Makula International vs. Cardinal Nsubuga & Another* [1982] HCB 11 where the Court pronounced itself as follows:

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

20. All these authorities place the interference of the Judge on matters of taxation as an exception and not the general rule. In this case, the court notes that indeed the Advocate was instructed to come on record. This fact was not controverted. The Objection to Taxation dated 9.6.2024 and filed by the Respondent refuted items numbers 1, 2 and 3. The finding that the Advocate did no work was without basis.

21. This court also notes that upon filing the Notice of Appointment of Advocates, the Applicant prepared a draft application which is annexed to the Bill of Costs. The instructions to the application



were clearly to seek reinstatement of the dismissed suit in CMC No. 132 of 2011 and it was not proper for the Taxing Officer to find no instruction fees when the Respondent did not dispute instructing the Applicant. The Advocate's fees was not pegged on the determination or success of the matter and once instructions were given and accepted, fees would accrue. In my view, failure to serve a Notice of Appointment was not indicative of lack of instructions as service was secondary to taking instructions and filing and it is the filing that placed the Advocate on record, not the service thereof.

22. There were discrepancies in the Ruling of the of the Taxing Officer and as urged by the Applicant, the Taxing Officer appeared to find that the items except the instructions fees were drawn to scale but proceeded to dismiss the entire bill of costs as an abuse of the court of process. This was without basis and this court must intervene. The decision by the Taxing Officer failed to consider relevant matters and instead diverted into the arena of irrelevant matters.
23. Consequently, I find a basis to disturb the finding arrived at by the Taxing Officer. Accordingly, this reference is merited. As the Bill of Costs was dismissed and not taxed, I set aside the dismissal and refer it back for taxation.

Determination

24. In the upshot, I issue the following orders:-
 - a. The ruling and order of the taxing officer dated 4.9.2024 be and is hereby set aside, and the bill of costs dated 28.7.2023 is remitted back for taxation by a taxing officer of this court.
 - b. The taxation be listed before the Deputy Registrar on 19th February, 2025.
 - c. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF FEBRUARY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Wambui Mwai for the Applicant

Respondent – absent

Court Assistant – Jedidah

