



**Simiyu & Wekesa Advocates v Nzoia Sugar Company Limited
(Miscellaneous Application E019 of 2022) [2025] KEHC 3492 (KLR)
(Constitutional and Human Rights) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E019 OF 2022**

**EC MWITA, J
MARCH 21, 2025**

BETWEEN

SIMIYU & WEKESA ADVOCATES ADVOCATE

AND

NZOIA SUGAR COMPANY LIMITED CLIENT

RULING

1. This is a reference from the decision of the taxing officer dated 1st November 2022 on the advocate-client bill of costs dated 5th April 2022. In that ruling, the taxing officer allowed instruction fee of Kshs 500,000, which the advocate argues was inordinately low to amount to a wrong principle. The advocate also contests the amount allowed on items 2, 5, 6, 10, 15, 21, 35, 60 and 61 and asks this Court to set aside the taxing officer's decision and retax those items afresh.
2. The reference is supported by an affidavit and written submissions. The advocate argued that the taxing officer misapprehended the subject matter, erred in principle in holding that instruction fee is dependent on the stage the matter had reached given that the petition was settled by the parties and as a result of the instruction fee allowed, the tax officer erred on getting up fee which is dependent on instruction fee.
3. The advocate further blamed the taxing officer for disallowing fee due to the advocate for presenting and prosecuting interlocutory applications (items 6), erred in disallowing costs on correspondence (Items 5 and 15); fees for filing of pleadings (item 60); attendance costs (item 61) and disallowing costs for holding meeting with the client. The advocate urged the Court to allow the reference with costs.
4. The client opposed the reference through a replying affidavit and written submissions. The client maintained that the taxing officer did not err in her decision; that instructions were to defend



interlocutory application as the main petition was not defended due to an out of court settlement and that the taxing officer did not misdirect herself on matters of principle, or material provisions of the Remuneration Order on any of the items in the bill of costs.

5. When the reference came up for hearing, Mr. Opwaka, learned counsel for the advocate, informed the Court that they were only contesting taxation on items 1 and 2 thus, abandoned the rest of the items. Counsel relied on their written submissions and bundle of authorities and urged the Court to allow the reference.
6. Mr. Walubengo, learned counsel for the client, also relied on the replying affidavit and written submissions and urged the Court to dismiss the reference.
7. I have considered the reference, the response, arguments by counsel for the parties and the decisions relied on. I have also perused the decision of the taxing officer.
8. The principle underlying award of costs was well explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya* ILR (1921) 48 Cal. 427 as follows:

We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.

(See also *Vinod Seth v Devinder Bajaj & another* (C. A. No. 481 of 2010))

9. Parties who engage in court, often incur costs. They instruct advocates to represent them who, in turn, are entitled to reasonable professional fee for work done. In other words, the advocate should be sufficiently remunerated for the professional work done on behalf of the client. This is done through taxation of advocate-client bill of costs where the advocate and the client have not agreed. Remuneration Orders fix the amount a party or advocate is to charge based on the subject matter of the dispute or other factors and considerations.
10. Quite often, the issue turns on instruction fee, the amount a party pays the advocate on issuing instructions to the advocate to act for him or her. The principle is that costs recompense and indemnify an advocate for what is the legal expenses the advocate incurred in prosecuting the client's case. In that respect, taxation of a bill of costs (advocate -client or even party and party), is an exercise of discretion by the taxing officer.
11. In that regard, the law is settled that this Court will not interfere with exercise of discretion by the taxing officer, unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162); *Rogan-Kemper v Lord Grosvenor (No.3)* [1977] KLR 303; [1977] eKLR: *Bank of Uganda v Banco Arabe Espaniol*, (Civil Application No. 29 of 2019)).



12. I agree with the position espoused in *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR, that:

[T]he court will not interfere with the exercise of the taxing master's discretion unless it appears that such discretion has not been exercised judicially or it was exercised improperly or wrongly, for example, by disregarding factors which she should have considered, or considering matters which were improper for her to have considered, or she had failed to bring her mind to bear on the question in issue, or she had acted on a wrong principle. The court will however interfere where it is of the opinion that the taxing master was clearly wrong or in circumstances where it is in the same position as, or a better position than the taxing master to determine the very point in issue.

Instruction Fee

13. The advocate has challenged the taxing officer's decision on grounds that she erred in principle and misapprehended the intrinsic matters in allowing instruction fee of Kshs. 500,000. Further, that the taxing officer erred in principle that instruction fee is dependent on the stage the matter had reached thus, arrived at an award that was inordinately low, calling for this Court's interference.
14. In the advocate-client bill of costs, the advocate sought instruction fee of Kshs 3,000,000. However, the taxing officer allowed instruction fee of Kshs 500,000. According to the advocate, the taxing officer applied a wrong principle in assessing instruction fee. The advocate's grievance is that in allowing instruction fee of Kshs. 500,000, the taxing officer erred in principle by holding that instruction fee is dependent on the stage the matter had reached; that the petition was settled by parties thus, allowed instruction fee that was manifestly low yet instruction fee is earned in full and does not depend on the stage of the matter.
15. I have perused the advocate-client bill of costs and the decision of the taxing officer. The bill of costs arose from petition No. 143 of 2016 which means the applicable Order is the Advocate Remuneration Order 2014. Indeed, the taxing officer applied that Order in taxing the bill of costs.
16. On instruction fee, Schedule 6 I (j) of the *Remuneration Order* 2014, provides for a minimum instruction fee of Kshs. 100,000 for prosecuting or opposing petitions. The advocate was opposing a petition filed against the client. According to the bill of costs, the petition had sought general orders intended to stop recruitment of the client's managing director.
17. Although the Remuneration Order allows a minimum instruction fee of Kshs. 100,000 for presenting or defending a petition, the taxing officer can increase or reduce that amount depending on the complexity; nature and importance of the matter; amount of the subject matter and interest of the parties, among other factors.
18. There is no dispute that the applicable *Remuneration Order* was the 2014 Order. From the impugned decision, the taxing officer considered the matter generally and the guiding principles, exercised her discretion and allowed instruction fee of Kshs. 500,000, a significant increase from the minimum amount of Kshs. 100,000.
19. In the circumstances, I do not find any error on the part of the taxing officer in allowing instruction fee of Kshs. 500,000 having increased it from the minimum of Kshs. 100,000 allowed by the Remuneration Order. The taxing officer exercised her discretion and I see no reason to interfere with that discretion.



20. Although the taxing officer stated that the matter was not heard to conclusion having been settled by parties, the position in law is that instruction fee is paid once and is payable on instructions being given. This notwithstanding, the amount allowed by the taxing officer as instruction fee was within the law. I am unable to fault the taxing officer on her finding with regard to instruction fee.
21. The next grievance is on item 2, getting up fee. The advocate argued that the taxing officer's error on instruction fee affected getting up fee. Getting up fee is one-third of instruction fee allowed. The taxing officer allowed getting up fee based on the allowed instruction fee of Kshs. 500,000. Having found no error on instruction fee, it goes without saying that there cannot be an error on getting up fee.
22. In the circumstances, having considered the reference, the response and arguments by parties, the conclusion I come to, is that the reference has no merit. It is declined and dismissed. Each party will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025

E C MWITA

JUDGE

