Republic & another v Medical Practitioners & Dentists Board & 2 others; MIO (Suing on Behalf of MIO (A Minor) & 3 others (Interested Parties) (Miscellaneous Application 59 & 63 of 2019 (Consolidated)) [2024] KEHC 2095 (KLR) (Judicial Review) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION 59 & 63 OF 2019 (CONSOLIDATED)

J NGAAH, J

MARCH 5, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

MEDICAL PRACTITIONERS & DENTISTS BOARD ..... 1ST RESPONDENT

PROFESSIONAL CONDUCT COMMITTEE, MEDICAL PRACTITIONERS & DENTISTS BOARD ..... 2ND RESPONDENT

AND

MIO (SUING ON BEHALF OF MIO (A MINOR) ..... INTERESTED PARTY

GEOFFREY MUIRURI KINGANGA ..... INTERESTED PARTY

AS CONSOLIDATED WITH

MISCELLANEOUS APPLICATION 63 OF 2019

BETWEEN

GEOFFREY MUIRURI KINGANGA ..... APPLICANT

AND

PROFESSIONAL COMMITTEE ..... 1ST RESPONDENT

MEDICAL PRACTITIONERS & DENTISTS BOARD ..... 2ND RESPONDENT

AND

MIO (A MINOR) ..... INTERESTED PARTY

SUNIL VINAYAK ..... INTERESTED PARTY

RULING

1. The application before court is a reference dated 26 September 2023 expressed to be brought under section 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and "rule" 11(1) and (2) of the Advocates (Remuneration) Order, 2014 (hereinafter "the remuneration order"). The prayers for orders sought are framed as follows:

    1. That the ruling of the deputy registrar dated 12th September, 2023 together with the certificate of taxation resultant thereto be and is (sic) hereby set aside and the applicant's party and party bill of costs dated 14th January 2022 be taxed afresh and/or;

    2. That the decision of the deputy registrar as evidenced in the ruling delivered on 12th September 2023 with respect to items 1, 2, 7, 13, 15, 17, 20, 22, 23, 24 of the applicant's advocate client bill of costs dated 12 September 2023 be set aside and taxed afresh by the Honourable Court;

    3. That this Honourable Court be pleased to reassess items 1, 2, 7, 13, 15, 16, 17, 20, 22, 23, 24 of the applicant's advocate-client bill of costs dated 14th January, 2022 make a finding on the same and substitute is (sic) decision to that of the deputy registrar;

    4. That in the alternative, and without prejudice to the foregoing, this Honourable Court be pleased to order that the applicant's advocate-client bill of costs dated 14th January, 2022 in respect items1, 2, 7, 13, 15, 16, 17, 20, 22, 23, 24 be taxed afresh by another deputy registrar; and

    5. That costs of this application be provided for."

2. The application is supported by the affidavit of Dr. Geoffrey Muiruri King'ang'a sworn on 26 September 2023.

4. In the affidavit, Dr. King'ang'a has sworn that on 12 September 2023, the deputy registrar delivered a ruling in respect of the applicant's party and party bill of costs dated 14 January 2022. On 25 September 2023, he filed a notice objecting to the taxation in accordance with paragraph 11(1) of the remuneration order. He was subsequently supplied with a copy of the ruling of the taxing officer.

5. He has been advised by his advocates, which advice he verily believes to be true, that the taxing officer failed to exercise the powers and discretion with which she is clothed under the remuneration order and also failed to apply the principles and formula provided in schedule VI of the remuneration order in assessment of the instruction fees.

6. In particular, the taxing officer erred by awarding getting up fees despite there being no certificate by the court to the effect that the case is a proper one for the award of getting up fees in view of the extent or difficulty of the work done as provided for under paragraph 3 of schedule VI of the remuneration order. In any event, the getting up fees is said to have been based on the grossly exaggerated instruction fees.

7. The taxing officer is said to have erred in arriving at court attendance fees in several items yet those items had not been drawn to scale.

8. The amount awarded is said to be excessive and the taxing officer is also faulted for allegedly having ignored the applicant's written submissions.

9. The 1st interested party opposed the reference and a replying affidavit sworn on 7 November 2023 by Michael Ombuoro was filed to that effect.

10. According to Mr Ombuoro, the suit out of which the party and party bill of costs arose was an application by the ex parte applicant seeking to quash the decision of the Professional Conduct Committee of the Medical Practitioners and Dentists Board. According to that decision, the applicant and the 2nd interested party were held culpable of medical negligence in a procedure involving Michael Isaac Ochieng, who is named as the 1st interested party in these proceedings. They were ordered to enter into a mediation with the 1st interested party with a view to compensating him.

11. The award by the taxing officer on instruction fees and getting up fees is said to have been pegged on the nature and importance of the cause or matter; the value of the subject matter; the interest of the parties and the general conduct of the parties. Other considerations said to have been taken into account were the complexity of issues raised, time taken in research, the skill expended and the volume of documents involved.

12. As far as items 7, 13, 15, 17, 20, 22, 23 and 24 are concerned, Mr. Ombuoro has sworn that the items were found to have been drawn to scale.

13. Besides the 1st interested party, there does not appear to be any response from any other party.

14. The applicant and the 1st interested party have, in their submissions, largely rehashed the depositions in their respective affidavits.

15. I must mention at the very outset that the prayers in the reference appear somewhat confusing. While the first prayer speaks of a party and party bill of costs dated 14 January 2022, which is the bill that is sought to be taxed afresh, the rest of the prayers, in particular prayers 2, 3 and 4 refer to an advocate-client bill of costs. Prayer 2, in particular, says that the advocate-client bill of costs is dated 12 September 2023.

16. The taxing officer's ruling which is the ruling in issue in these proceedings is on party and party bill of costs dated 14 January 2022. It is this ruling and the bill of costs that both Dr. King'ang'a and Mr. Ombuor have made reference to in their respective affidavits.

17. It follows that prayer 2 cannot be granted to the extent that it is seeking this Honourable Court's intervention in a non-existent bill of costs.

18. Prayer 3 would fail for the reason that even if the applicant is assumed to have made reference to the party and party bill of costs rather than advocate-client bill of costs, he is seeking this Honourable to tax the bill of costs afresh. This the court cannot do because it has been held in **Joreth Limited v Kigano & Associates (2002) eKLR** that this is the province of the taxing master. In that case the Court of Appeal noted as follows:

> ...it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master 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. It was stated by the predecessor of this Court in the case of Steel Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:
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> > "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."

19. The Court of Appeal held that the judge to whom a reference had been made erred in reassessing the instruction fees.

20. Only two prayers and the prayer for costs are left for consideration. These prayers are 1 and 4. And I will only consider prayer 4 because first, it is an alternative to the preceding prayers and, secondly, both parties agree, and it is apparent from the ruling of the taxing officer, that it is the party and party bill of costs dated 14 January 2022 that is in issue and not an advocate-client bill of costs.

21. The applicant has reiterated in his submissions that, having held that the applicable law was schedule 6A (1) (j) of the Advocates Remuneration Order, 2014 which provides the instruction fees as Kshs. 100,000/=, the learned taxing officer erred in awarding the sum of Kshs. 500,000/= on this particular item.

22. The taxing officer's ruling is also faulted because it did not clearly state the nature of the matter or any novel matter in the proceedings or any elements of complexity or the time it might have taken in research.

23. While relying on the decision in Republic versus Minister for Agriculture & 2 Others, ex parte; Samuel Muchiri Wa Njuguna & 6 Others (2006) eKLR, the learned counsel for the applicant submitted that it is not enough for the taxing master to generally state the complexity of the matter, the time spent on it, the research done or the skill deployed.

24. On the principles of taxation which, it is urged the taxing officer ought to have followed, the learned counsel for the applicant cited the decision in Makula International versus cardinal Nsubuga & Another (1982) HCB 11 where the court stated 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."

25. Finally, it was submitted that the taxing officer failed to exercise her discretion in accordance with the settled principles.

26. On the 1st interested party's part, it was submitted that this court should be hesitant in interfering with the discretion of the taxing officer in her assessment of the party and party bill of costs. Counsel for the 1st interested party relied on the decision of Mbogo & Another versus Shah (1968) EA 15 where it was held that an appellate court will not interfere with exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and, as a result, arrived at the decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion resulting in an injustice.

27. It was submitted that, in arriving at her decision, the learned taxing officer considered the nature and importance of the cause or matter, the amount or value of the subject matter, the interest of the parties, the general conduct of the parties, complexity of the issues raised, time research and skill expended in the volumes of documents involved.

28. On whether the decision of the taxing officer should be set aside and the bill taxed afresh, the learned counsel for the 1st interested party relied on Otieno, Ragot & Company Advocates versus Kenya Airports Authority (2021) eKLR where it was held that matters of quantum of taxation are purely within the province, competence and discretion of the taxing officer and that this Honourable Court will not interfere with an award of quantum by the taxing officer unless there is an error of principle or the discretion was improperly exercised.

29. It would appear from these submissions that the common question between the parties is that of the exercise of discretion by the taxing officer; whether, in taxing the bill of costs as she did, the taxing officer properly exercised her discretion and if so, whether this Honourable Court would be in order to interfere with it.

30. It is not in doubt that the taxing officer has been clothed with discretion to enhance instruction fees beyond the basic fee prescribed by the remuneration order. This discretion is expressly provided in schedule VI (1)(j) of the remuneration order which reads as follows:

> (j) Constitutional petitions and prerogative orders
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> To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—
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> (i) where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
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> (ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000 (Emphasis added).

31. It is apparent from schedule VI (1) (j) that in exercising his or her discretion, the taxing officer will consider such factors as "the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate".

32. Kipkorir, Titoo & Kiara Advocates versus Deposit Protection Fund Board [2005] eKLR is one, among several decisions, in which this point has been underscored. In this case, the Court of Appeal considered the question of exercise of discretion by the learned taxing officer and the circumstances under which the judge to whom a reference has been made, may disturb the exercise of that discretion. The Court noted that the appellant was defending the suit and so the instruction fees provided in schedule VIA (1) (d) (of the Advocates Remuneration Order) was the instructions fees calculated under sub-paragraph (1) (b) of schedule VI subject to the discretion of the taxing officer to increase or reduce it.

33. On the particular question of exercise of discretion, the Court noted as follows:

34. In exercising its (sic) discretion, the Taxing Officer is required to consider the matters specified in proviso (i) of schedule VIA (1) which states:

> "Provided that:
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> i. the taxing officer, in the exercise of his discretion shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a discretion by the trial judge, and all other relevant circumstances".

35. The court noted that once a reference is made to the judge, the judge will not interfere with the exercise of the taxing officer's discretion unless she or he has erred in principle. This is what the Court said:

> On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
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> > "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

36. The court went further to give instances of what may be deemed to be an error of principle as, for example, those cases where the costs allowed are manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles or wherethe taxing officer has over-emphasised the difficulties, importance and complexity of the suit. In this regard, the court made reference to Devshi Dhanji v Kanji Naran Patel (No. 2), [1978] KLR 243 where it was held that it would be an error of principle if "...the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1)."

37. In Premchand Raichand Ltd versus Quarry Services of East Africa Ltd (No. 3) (1972) EA 162, the following were outlined as principles of taxation:

(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,

(b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,

(c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and,

(d) so far as practicable there should be consistency in the award made and

(e) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

38. Turning back to the taxing officer's decision, there is no doubt the taxing officer appreciated the law and, more particularly, the principles to bear in mind and the factors to consider in exercising her discretion to increase instruction fees. This is explicit in her ruling where she noted as follows:

> "The prayers sought were prerogative orders which fall under schedule 6(i)(j) of the Advocates Remuneration Order 2014.

> In determining an instruction fees (sic), it must be related to the value of the work done by an advocate.
>
> Advocates should be fairly, appropriately and justly rewarded for their fees bearing in mind the skill they exercised.
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> The court has discretion to enhance the instruction fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. The court must ensure that the advocates instruction fees is to seek(sic) and has more and no less than reasonable compensation for the professional work done.
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> Bearing in mind all the aforesaid factors and the reasons herein and in exercise of the discretion vested in me, I am fully convinced that the amount sought by the advocate applicant is reasonable.
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> In public law litigation, the amount involved is not the sole determinant when it comes to costs. Judicial review suits are not money suits as they merely seek declaratory reliefs and orders.
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> Taking into account the time taken in this matter, of the work done and the nature of the dispute herein, I am of the considered view that, the Kshs. 500,000/= is reasonable instruction fees under the circumstances. I proceed to allow item 1 is drawn."

39. In coming to this decision, the learned taxing officer cited the decisions in Premchand Raichand Ltd versus Quarry Services of East Africa Ltd (supra), Joreth Limited versus Kigano & Another Joreth Limited versus Kigano & Another (2002) E.A 92 and Republic versus Minister for Agriculture & 2 Others; ex parte Samuel Muchiri W'Njuguna & 6 Others (supra).

40. But as I have said before whenever references such as the instant one are brought to my attention, it is one thing to lay out the principles of taxation and factors that inform the exercise of discretion in taxation of a bill of costs. It is another thing, altogether, to demonstrate how those principles or factors have been applied in any particular taxation. In other words, it is not enough for the taxing officer merely to set out the principles of factors to be considered in a taxation without demonstrating those principles have been applied or how the relevant factors have been taken into account in the particular case before her.

41. To be precise, the taxing officer must go further and demonstrate, with respect to any particular bill of costs at hand, the nature of the matter and how complex it might have been and whether it raised any novel question; the amount of time spent in disposing the matter, and, where it is obvious from the pleadings, the value of the subject matter.

42. To simply say, as the learned taxing officer said in her ruling in this matter, that "bearing in mind all aforesaid factors and in exercise of discretion vested in me, I am fully convinced that the amount sought by the applicant is reasonable" is not sufficient.

43. Considering that the instruction fees was enhanced because, among other things, the learned taxing officer considered the time taken in determination of the dispute, it was incumbent upon her to demonstrate, inter alia, the time it took to resolve the dispute. Similarly, she could not enhance the instruction fees by stating that she has the discretion to enhance the fees because of the complexity of the matter without showing how complex the matter was or whether the matter required any particular skill, out of the ordinary, to be deployed by counsel in the determination of the suit.

44. It was never established, for instance, that the applicant before the taxing officer deployed a considerable amount of industry or that the matter consumed an inordinately long time. Neither was it even suggested in that decision that large volumes of documentation had, to be clarified, assessed and simplified.

45. While I agree with the decision in Mbogo versus Shah (supra) together with the rest of the decisions to the effect that the appellate court cannot interfere with exercise of discretion, unless it can be shown that there was a misdirection on some matter resulting in a wrong decision, I am satisfied that, in the instant case, the learned taxing officer erred in principle by failing to link what has been prescribed in the remuneration order as necessary considerations guiding exercise of discretion with the case out of which bill before her arose. Of the many considerations that the taxing officer was bound to take into account in exercise of her discretion, there is none that stood out as unique to the bill of costs out of which the impugned ruling, the subject of this reference, arose.

46. Enhancing the instruction fees without justification is, in my humble view, tantamount to an error in principle. In Kenya Power and Lighting Ltd versus Msellem (supra) it was held that if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

47. That said, the assessment of getting up fees was pegged upon instruction fees. Having found that the instruction fees was not properly assessed, the assessment of getting would logically fall. I decline the suggestion by the applicant that getting up fees can only be awarded if there is a certificate to that effect. The reference to certificate in Paragraph 3 of Schedule VI relates to appeals and not originating suits such as the judicial review proceedings.

48. As for the rest of the items in the bill of costs, besides items 1 and 2, the applicant has not provided any proof that the assessment of those items is inconsistent with the scale of fees prescribed by the advocates remuneration order. All I can see from his pleadings and affidavit is a general allegation that the items were not taxed to scale.

49. For reasons I have given, I would allow the applicant's application to the extent that the party and party bill of costs is remitted to taxing officer for a fresh taxation of items 1 and 2 only. The taxation shall be by a taxation officer different from the one whose taxation has been impugned. The applicant will have costs of the reference. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 5 MARCH 2024

Ngaah Jairus

JUDGE