



REPUBLIC OF KENYA



**George Miyare t/a Miyare & Co. Advocates v Kikambala Housing Estate Limited & 2 others
(Miscellaneous Application 166 of 2021) [2024] KEHC 16932 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 16932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 166 OF 2021**

F WANGARI, J

APRIL 11, 2024

BETWEEN

GEORGE MIYARE T/A MIYARE & CO. ADVOCATES ADVOCATE

AND

KIKAMBALA HOUSING ESTATE LIMITED 1ST CLIENT

OSMAN ERDINC ELSEK 2ND CLIENT

DENIS ELSEK - ELSEK & ELSEK (K) LIMITED 3RD CLIENT

RULING

1. This ruling is in respect of the chamber summons application dated 5th April, 2023 and filed on 13th April, 2023. The same is brought under the provisions of paragraph 11 of the [Advocates \(Remuneration\) Order, 2009](#) and all enabling provisions of the law. It is seeking the following orders: -
 - a. The taxing officer's ruling delivered on 1st March, 2023 be reviewed and/or varied
 - b. The honourable court be pleased to re-tax/re-assess the Advocate/Applicant's bill of costs dated 3rd August, 2021;
 - c. Costs.
2. The grounds in support of the application are amongst others that the decision/award of the Taxing Office dated 1st March, 2023 is contrary to the law (the [Advocates \(Remuneration\) \(Amendment\) Order, 2014](#)) practice and precedent; hence it is illegal and inimical to public policy. In reducing the instruction fees assessed under item 1 of the bill of costs to 75%, the Taxing Officer erroneously ignored the well settled principles of taxation that instruction fees is not affected by the stage the suit has reached; and that once an advocate has taken instructions and represented the client in court, he is entitled to full instruction fees.



3. The application is further supported by an affidavit sworn by one Esther Mwikali, an advocate in the Applicant's firm. The averments therein majorly restate the grounds in support of the application and produces annexures in support thereof.
4. Despite having been given time to file Replying Affidavit as per the proceedings dated 6/12/2023, the Respondent failed to do so and the application is deemed as unopposed. However, it must be dealt on merits. There was no further appearance by the Respondents.
5. Directions were taken that the application be disposed of by way of written submissions. Only the Applicant complied by filing detailed submissions and cited various authorities in support of its positions. The Applicant's submissions are dated 16/2/2024 and filed on 27/2/2024.

Analysis and Determination.

6. I have considered the application, the response, the submissions together with the authorities relied upon by the Applicant as well as the law. The single issue for determination is whether this court ought to interfere with the Taxing Master's decision.
7. The role of this court on a reference from taxation by the Taxing Master is clearly delineated. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal held as follows: -

“...On 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...”
8. Did the Taxing Master err in principle when he made the assessment that he did? Was the value of the subject matter ascertained? It is settled that the value of the subject matter can be ascertained from pleadings, judgement or settlement if any. In the present case, the Taxing Master held that the matter is still ongoing and this is not controverted. Similarly, this is a contested matter and as such, it cannot be said that the matter was or has been settled. That leaves only pleadings to ascertain value of the subject matter.
9. In *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal held as follows: -

“...We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment 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 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...”
10. The Taxing Officer cited paragraph 1(1) of the *Advocates Remuneration Order, 2014* (ARO) to assess instructions fees. Schedule 6 of the *ARO* provides for costs of proceedings before the High Court. Under paragraph 1, [b] of the Order, it guides the Taxing Officer on how to determine instructions fees when one sues or defends a suit which is determined in a summary manner. Accordingly, the Taxing Officer is obligated to fix instruction fees at 75% of the subject matter. The Taxing Officer did state that the matter was withdrawn and taxed the instruction fees at Kshs 56,250/=. The Applicant has not controverted the issue of withdrawal and as guided by the Court of Appeal, I have no reason to



interfere with the Taxing Master's assessment. All in all, the Taxing Officer has the discretion either to increase or reduce instruction fees.

11. The discretion can only be interfered with if it shown that the Taxing Officer did not exercise his discretion judicially or that he exercised it improperly. In the South African case of *Visser v Gubb* 1981 (3) SA 753 (C) 754H – 755C it was held 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...”

12. Similarly, I find no error on assessment under item 36. The court has come to the inescapable conclusion that indeed the Taxing Master exercised his discretion judiciously and properly and has no reason to interfere with the finding on instruction fees.

13. Even if the court were to find the Taxing Master's assessment to have been in error (which it has not), would it have proceeded to re-tax or re-assess the bill of costs? I understand that there are two schools of thought. The first school is where the court having found that that Taxing Officer was in error, it proceeds to re-assess the bill of costs. The other school is the one that proceeds to refer the matter back to the Taxing Officer with specific instructions and/or directions. Was I to find the Taxing Master's decision in error, I would have referred the matter to the same officer or another one occupying the same rank. It has been held time and again that the Taxing Master's decision ought not to be easily and lightly interfered with. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'Njuguna & others* [2006] eKLR it was held 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 is somewhat too high or too low; it will only interfere if it thinks the award is 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...”

14. There is no evidence that the Taxing Master exercised his discretion capriciously or whimsically. I find that it would be unjust to interfere with the discretion of the Taxing Master.

15. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Application dated April 5, 2023 is devoid of merit and the same is hereby dismissed;
- b. Each party to bear its own costs.

Orders accordingly.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2024.

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F. WANGARI

JUDGE

In the presence of;

Mr. Miyare Advocate for the Applicant

N/A for the Respondent

Mr. Barille, Court Assistant

