



**JK Kibicho & Co Advocates v Apa Insurance Co Limited (Miscellaneous Application E608 of 2023) [2024] KEHC 4658 (KLR) (Civ) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E608 OF 2023**

**CW MEOLI, J**

**APRIL 11, 2024**

**BETWEEN**

**JK KIBICHO & CO ADVOCATES ..... ADVOCATE**

**AND**

**APA INSURANCE CO LIMITED ..... CLIENT**

**RULING**

1. J.K Kibicho & Co. Advocates (hereafter the Applicant) brought the Chamber Summons dated 24<sup>th</sup> April, 2023 (the Reference) under the provisions of Paragraph 11(1) and (2) of the [Advocates \(Remuneration\) Order](#) 2009 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya. The Reference is supported by the grounds laid out on its face and the depositions in the affidavit sworn by the applicant's employee, advocate Esther Nzewa Kiuluku.
2. The prayers therein seek:
  - i. That the Ruling of the Deputy Registrar delivered on the 13<sup>th</sup> April 2023 together with the Certificate of Taxation resultant thereto be and is hereby set aside and the Applicant's Advocate Client Bill of Costs dated 5<sup>th</sup> August 2022 be taxed afresh and/or;
  - ii. That the decision of the Deputy Registrar as evidenced in the ruling delivered on 13<sup>th</sup> April 2023 with respect to the Applicant's Advocate Client Bill of Costs dated 5<sup>th</sup> August 2022 be set aside and taxed afresh by the Honourable Court;
  - iii. That this Honourable Court be pleased to reassess the Applicant's Advocate Client Bill of Costs dated 5<sup>th</sup> August 2022 and all the items therein and make a finding on the same and substitute its decision to that of the Deputy Registrar;



- iv. 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 5<sup>th</sup> August 2022 be reassessed and taxed afresh by another Deputy Registrar; and
  - v. That costs of this application be provided for. sic
3. In her affidavit which by and large echoed the grounds supporting the Reference, the advocate stated that being dissatisfied with the decision rendered by the taxing officer, the Applicant filed a notice of objection thereto, following which the Applicant was provided with a copy of the impugned decision and reasons therefor. The advocate further stated that the taxing officer erred in striking out the Advocate-Client Bill of Costs dated 5<sup>th</sup> August, 2022 (the Bill of Costs) and further erred in failing to consider the Applicant's supporting documents therein. It was her averment that the taxing officer also fell into error by failing to determine the legal fees payable to the Applicant and in finding that the Applicant was estopped from lodging the Bill of Costs.
  4. To resist the Reference, APA Insurance Co. Limited (hereafter the Respondent) filed the replying affidavit sworn by advocate Fredrick Otieno Mege on 7<sup>th</sup> July, 2023 stating that the Reference does not disclose any error which would warrant interference with the taxation ruling. The advocate went on to state that the Respondent had tendered documentation before the taxing officer, to support its averment that the Applicant's legal fees had been settled in full and which payment was not contested by the Applicant. That consequently, the taxing officer arrived at a proper finding that in light of evidence demonstrating prior settlement of the legal fees owing, the Applicant was estopped by law from raising the Bill of Costs to claim its fees. The advocate averred that the ruling was sound and ought not to be disturbed. That consequently, it would be proper for the Reference to be dismissed with costs.
  5. The court directed the parties to file written submissions on the Reference. The Applicant's counsel opened his submissions by stating that the Applicant would be abandoning prayers (ii) and (iii) of the Reference. Counsel anchored his submissions on the remaining aspects of the Reference on the decisions rendered in *Abincha & Company Advocates v Trident Insurance Company Ltd* [2013] eKLR and *Corporate Insurance Co. Ltd v Advocates* (Miscellaneous Application No. 033 of 2020 [2022] KEHC 545. To support his argument that by delving into the issue whether the Applicant was owed legal fees by the Respondent, the taxing officer assumed jurisdiction that she did not have. That the said taxing master instead ought to have referred the matter before a judge for determination of that particular issue, rather than striking out the Bill of Costs.
  6. The Applicant further faulted the taxing officer for relying on documentation being a payment voucher that was tendered by the Respondent purporting to constitute proof of payment, and which voucher did not confirm payment. That the taxing officer ought to have appreciated that the Respondent took no steps in ascertaining whether the Applicant had received the purported payment, hence no agreement on payment of fees was arrived at between the parties herein. In so submitting, counsel drew the court's attention to the decision in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR where the Court of Appeal reasoned that in order for an agreement to be binding upon the parties to it, an offer and acceptance must co-exist.
  7. In conclusion therefore, the court was urged to find that no agreement regarding legal fees subsisted between the parties and hence the taxing officer erred by not taxing the Bill of Costs. The court was urged to allow the Reference in terms of the remaining orders sought.
  8. The Respondent's counsel naturally supported the decision by the taxing officer, arguing that evidence was tendered to show that the Applicant received payment of outstanding legal fees from the



Respondent and which payment has not been contested. Counsel further asserted that the Applicant's argument that the learned Deputy Registrar lacked jurisdiction to determine the issue of payment of the legal fees is unfounded. That pursuant to the provisions of Rule 13(1) of the *Advocates (Remuneration) Order*, the powers of a taxing officer to tax a Bill of Costs would extend to deciding whether such costs are owing to begin with.

9. That moreover, by virtue of Section 51(2) of the *Advocates Act* prescribing the finality of a Certificate of Taxation arising from a taxed Bill of Costs, the issue whether such costs are taxable in the first place, ought to be considered by a taxing officer beforehand. Whilst citing the decision in *Corporate Insurance Company Limited v Kangethe and Mola Advocates* [2021] eKLR, counsel contended that the taxing officer acted correctly by striking out the Bill of Costs, in view of the fact that the same could not be taxed upon discovery of the fact that the fees claimed had already been settled. On those grounds, the court was urged to dismiss the Reference, with costs.
10. The court has considered the grounds in support of the Reference, the depositions in the affidavits supporting and opposing the reference, and the rival submissions and related authorities. As earlier stated, the Applicant abandoned orders (ii) and (iii) of its Reference, leaving orders (i) and (iv) of the Reference.
11. In the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held thus:

“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.”
12. The above legal position was reaffirmed in the case of *Moronge & Company Advocates v Kenya Airports Authority* [2014] eKLR similarly determined by the Court of Appeal.
13. That said, the circumstances before the court are unique, in the sense that the Bill of Costs preceding the Reference did not undergo taxation; rather, it was struck out by the taxing officer, on the grounds that the Applicant had previously received full settlement of its legal fees from the Respondent, pursuant to the final fee note which was raised by the former and dated 14<sup>th</sup> December, 2017. This decision prompted the present Reference, the Applicant essentially arguing that the decision by the taxing master to strike out the Bill of Costs was beyond her jurisdiction.
14. A brief background of the matter is as follows. The Applicant lodged the Bill of Costs, seeking a sum of Kshs. 305,530/- against the Respondent, for legal services rendered to the latter's insured by the former in Milimani CMCC No. 2361 of 2015 (the primary suit). The Bill of Costs was opposed by the Respondent, who essentially claimed that the legal fees owing to the Applicant had been settled previously, pursuant to a final fee note dated 14<sup>th</sup> December, 2017 and raised by the Applicant, for the sum of Kshs. 216,566/-. Upon hearing the parties, the taxing officer by way of the ruling delivered on 13<sup>th</sup> April, 2023, reasoned that the Bill of Costs having been lodged after the final fee note raised was settled, she had no jurisdiction to tax the said Bill of Costs. Accordingly, the taxing officer proceeded to strike out the Bill of Costs.
15. The key contention is whether the taxing officer had jurisdiction to strike out the Bill of Costs on the grounds in question. A matter peripherally raised in addition was whether the taxing officer was justified in so doing on the material proffered.



16. It is not disputed that the jurisdiction to tax or assess fees payable between advocates and their clients is bestowed upon the Deputy Registrar as a taxing officer. This is seen under Paragraph 10 of the [Advocates Remuneration Order](#) 2009 which expresses thus:

“The taxing for the taxation of bills under this Order shall be Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 of the order the taxing Officer shall be the Registrar of trade marks or any Deputy Registrar of trade marks.”

17. The question remains whether such jurisdiction extends to other matters, including deciding on the validity of a Bill of Costs, on grounds of payment of the legal fees sought, as was the case here. Upon its study of relevant authorities, the court did not come across any pronouncement by the Court of Appeal on this specific subject. In the High Court case of [Ngugi Mwangi & Co. Advocates v Alloy Steel Castings Limited](#) [2018] eKLR, the court citing [Abincha & Company Advocates v Trident Insurance Company Ltd](#) (2013) e KLR found that the taxing officer did not have the jurisdiction to determine the question of retainer arising from a bill of costs before such officer.
18. However, in [Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited](#) (2017) eKLR the Court of Appeal stated that the taxing master has the necessary jurisdiction to deal with the question of fact whether a client-advocate relationship (retainer) had been created between the parties. The Court of Appeal stated therein that:

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the [Advocates Act](#) and the [Advocates Remuneration Order](#). The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered.....

The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.” (Emphasis added).

19. The question whether fees had been settled, and hence jurisdiction to tax a bill of costs is to my mind a question primarily of fact, which sometimes does arise during taxation of specific items in a proper bill of costs. In my view, the factual question whether fees had in fact been settled prior to the filing of a bill of costs and by which an agreement on fees between the parties could be construed is not far removed from the question of retainer. By parity of reasoning, based on the decision in [Wilfred N. Konosi](#) (*supra*), the taxing officer would have jurisdiction to inquire into the question of payment if raised prior to taxation.
20. Concerning whether the taxing officer’s factual findings were well founded, the court has taken time to review the material presented before the taxing officer. In supporting the assertion that payment had been made on the fee note in respect of the primary suit, the Respondents exhibited in the affidavits



of Ruth Mbalelo copies of the fee note issued by the Applicant to the Respondent dated 14.12.2017 seeking the total sum of Kes. 216,566/-; the claim fee voucher dated 26.07.2022, and by which the claim, less payable tax was processed for payment by the Respondent ; bank confirmation of electronic transfer of the cumulative sum of Kes. 1,671,163/- which related to several fee notes including that in respect of the primary suit; and a letter dated 28.07.2022 to the Applicant Advocates informing them of the electronic transfer of the sums in question.

21. On the part of the Advocates, the affidavit sworn by Esther Nzewa Kiuluku attached the Advocate's notice of taxation dated July 29, 2022 which included the fee note claimed in respect of the primary suit. This notice was apparently hand delivered to the Respondent on September 30, 2022, two months after the date of the asserted electronic transfer of funds by the Respondent to the Advocates.
22. This court having perused the foregoing material is inclined to agree with the findings of the taxing master. A fee note in respect of the primary suit was served upon the Respondents in 2017. The Respondent's material evidencing proof of settlement of the said fees in July 2022 appears credible. Apart from the taxation notice delivered two months after settlement, the Advocate has not tendered any credible rebuttal of the fact that the subject fees claimed for the primary suit were settled via a composite payment by the Respondent. The proven facts to my mind are that the advocate sought a specific sum in respect of the primary suit; the sum was settled; and notice thereof served upon the Advocate. Hence the subsequent taxation notice is of no moment so far as the fees relating to the primary suit are concerned. Issues relating to whether or not an agreement had been reached are moot; the Respondent paid the very sum claimed in the Advocates fee note of 2017 in respect of the primary suit. In the circumstances, it is the court's view that the Advocate's bill of costs was properly struck out.
23. In *Corporate Insurance Company Limited v Kangethe and Mola Advocates* [2021] eKLR the High Court held that:

“I find that the issue of fees was duly settled when the fee note was paid as such the Deputy Registrar does not have jurisdiction to tax the bill under section 45(6) of the *Advocates Act* as the settlement constitutes an agreement between the parties.”
24. For all the foregoing reasons the court finds no merit in the reference which is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Advocate /Applicant: Mr. Sikuku

For the Respondent: Mr. Ndegwa h/b for Mr. Mege

