



**Vinayak Builders Limited v Lubulellah & Associates (Miscellaneous Case E767 of 2022)
[2024] KEHC 4755 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CASE E767 OF 2022**

A MABEYA, J

APRIL 19, 2024

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA AND
THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 1962) REV. 2017)**

AND

IN THE MATTER OF TAXATION OF ADVOCATES AND CLIENT COSTS

BETWEEN

VINAYAK BUILDERS LIMITED CLIENT

AND

LUBULELLAH & ASSOCIATES RESPONDENT

RULING

1. Before Court is an application dated 23/8/2023. It was brought under Rule 11 (1) and (2) of the [Advocates Remuneration Order](#), Order 5, Order 10 Rule 11, Order 22 Rule 5 and Section 3A, of the [Civil Procedure Act](#), Order 21 Rule 9A of the [Civil Procedure Rules](#).
2. The pending prayers in the application sought that the ruling of the taxing officer delivered on 28/7/2023 be set aside and the Advocate-Client Bill of Costs dated 25/10/2022 be taxed afresh.
3. The grounds for the application were set out on the face of it and in the supporting affidavit sworn by Naran Kunvarij Vaddodiya on 23/8/2023. It was contended that the taxing master taxed the bill of costs Kshs 560,255/64 and the applicant subsequently filed a notice of objection dated 8/8/2023 requesting for reasons of the taxation. That the taxing master erred by awarding instruction fees of Kshs 200,000/= for an interlocutory application as it was just a simple application which did not raise novel issues.



4. That the taxing master erred by awarding getting up fees of Kshs 66,666/= in respect of the application yet the same never went to trial. That there was an error in awarding items 48, 51, 52 and 54 as they were not part of the bill of costs filed by the respondent. It was thus contended that the bill of costs was unfairly taxed and ought to have been set aside.
5. The respondent opposed the application vide the grounds of opposition dated 23/10/2023. The grounds were that the application was incompetent as it was filed 15 days after the notice of objection to taxation was filed and was thus outside the stipulated time under Order 11(2) of the ARO which provides that the same ought to be filed within 14 days of lodging the notice of objection to taxation.
6. That the award of the taxing master as regards instruction fees and getting up fees were within her discretion and that the scales provided under the ARO were the bare minimum and not maximum. It was thus contended that an increase of Kshs 75,000/= to Kshs 200,000= was not exorbitant as alleged by the applicant.
7. The third and final ground was that though the taxed items under numbers 48, 51, 52 and 54 were erroneously taxed, they were not material to the overall outcome of the taxation as they did not materially affect the assessment of the instruction fees as the same were properly identified and discretion was duly applied. That this Court could re-assess and tax off any erroneous items taxed in the bill of costs without remitting the matter back to the taxing officer to save costs and time.
8. The application was canvassed by way of written submissions. The applicant's submissions were dated 14/9/2023 whereas those of the respondent were dated 22/3/2023. Those submissions have been considered alongside the pleadings and evidence before court.
9. The application was brought under Rule 11 of the Advocates Remuneration Order 2014 (hereinafter "ARO 2014") which provides that: -
 - “(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
10. The impugned ruling was made on 28/7/2023 and the objection was filed on 10/8/2023 which was within 14 days after the ruling was delivered. Though it was not clear when the applicant received the



response from the taxing master, the applicant filed the instant application on 23/8/2023 within 14 days of filing the objection. It cannot therefore be said that the application was incompetent.

11. On circumstances where a Judge can interfere with the decision of a taxing master, it was held in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, that: -

“I have considered the above submissions. First, I find that on the authorities, 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 so manifestly excessive as to justify an inference that it was based on an error of principle. (See *Steel & Petroleum (E.A) Ltd v Uganda Sugar Factory* (Supra). 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 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. 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 re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment. (see *Nanyuki Easo Service v Touring Cars Ltd; Steel & Petroleum (EA) Ltd v Uganda Sugar Factory; Thomas James Arthur v Nyeri Electricity Undertakers* and *Joreth v Kigano & Associates*.)”

12. In the same case, the court held that a taxing officer had discretion to increase or reduce instructions fees. It was held that: -

“The other general principle is that it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. (See *Thomas James Arthur v Nyeri Electricity Undertakers*). In that respect, I must reject the submission made on behalf of the third defendant that the taxing officer has no discretion to reduce the basic instruction fees. On the contrary, I accept the submission made on behalf of the plaintiff that such discretion exists and that the only fees which cannot be reduced are those in respect of which it is provided that the amount thereof shall not be less than what is prescribed. An example is schedule VI (1) (g) (i): the instruction fees in matrimonial causes.”

13. In the instant case, the applicant’s main contention was that the taxing master awarded exorbitant instruction fees of Kshs 200,000/= yet the matter was not complex nor did it raise any novel issues and little time was expended in the preparation of documents and the case generally.

14. I have seen the interlocutory application dated 20/12/2017. The application sought a cocktail of orders including that the proceedings before the arbitrator be stayed, the interim award issued on 4/11/2019 be set aside and the arbitral proceedings commence de novo before a different arbitrator.

15. Respectfully, that was not an application that could have been easily dismissed as simple. Contrary to the applicant’s submission, the application raised novel issues that called for proper preparation before the same could be drafted, filed and prosecuted.

16. In any case, as quoted in the above authority, the taxing master had discretion to weigh the nature of the claim and its importance, and also take consideration of the value of the subject matter. The



grounds of that application were serious and weighty and touched on inter alia the impartiality of the arbitrator, excessive jurisdiction of the arbitrator, competency of the arbitrator, and abuse of the right to fair hearing. Those are not simple issues for determination. The same were raised and argued for the interest of the applicant who cannot now turn around and weigh down the importance of the application and the orders sought therein.

17. For those reasons, I find no justification in interfering with the award of the taxing master as regards instruction fees. Though the instructions fees were increased, I find that the assessment was arrived at within the borders of the guiding principles and the same was not so high so as to warrant the interference of this Court. I say so noting that the value of the subject contract in the arbitration proceedings was Kshs 99,029,537/54.
18. This was a matter that involved colossal amounts of money and was quite evidently important to the applicant. I also note that the taxing master correctly relied on Schedule 6 of the ARO (2014) and awarded Kshs 150,000/= for instruction fees.
19. I however note that there was an error in the final computation. Though the taxing master had earlier awarded instruction fee of Kshs 150,000/= in her reasoning, she tabulated the same as Kshs 200,000/= in the final computation. There was evidently an error in the final computation and this court will only interfere with the decision only for purposes of rectifying the error that is apparent on the face of it. To that end, the computation of Kshs 200,000/= for instruction fees is hereby set aside and the award for Kshs 150,000/= as instructions fees is hereby upheld.
20. The second substantive ground for the application was that the taxing master erroneously awarded getting up fees in respect of the application yet the same never went to trial.
21. Schedule 6 (2) of the ARO 2014 provides for getting up fees and states: -

“2. Fees for getting up or preparing for trial

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that—

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned...”

22. It then follows that fees for getting up can only be awarded where a case has been confirmed for hearing. This was similarly the finding in Ngati & 3 others v Embakaso Village Craft Curios & Jua



Kali Association & 7 others (Environment & Land Case 614 of 2012) [2023] KEELC 21068 (KLR) (26 October 2023) (Ruling) wherein it was held that: -

“As a matter of principle, I beg to agree with the Applicants that an award of “Getting up Fees” can only be decreed and awarded where the suit has been confirmed for hearing and indeed proceeded for hearing. Simply put, no award for “Getting up Fees” can be made if and where the suit was never confirmed for hearing.”

23. I note that the bill of costs before the taxing master related to an interlocutory application seeking to set aside the arbitrators award. There is nothing to show that the matter was confirmed for hearing and the ruling of the arbitral tribunal was not a part of the Court record for consideration. An award for getting up fees can only issue in a matter that is confirmed for hearing, and actually proceeds for hearing.
24. On matters application, I find and hold that there is no room for getting up fees. All that is provided for is instruction fees as well as attendances. Having been an interlocutory application, I find that the taxing master erroneously applied a wrong principle in awarding getting up fees.
25. The third and final ground in the application was that the taxing master erred in awarding items 48, 51, 52 and 54 as they were not part of the bill of costs filed by the respondent.
26. I have seen the bill of costs dated 25/10/2022. Indeed, the last item was number 31 and there existed no item numbers 48, 51, 52 and 54 which were awarded at a total sum of Kshs 11,300/=. I do agree with the respondent’s submissions that the same were erroneously included.
27. From the foregoing, it is quite evident that the application before Court is merited and partly successful. I am however inclined to agree with the respondent’s submission that this Court can re-assess and tax off any erroneous items without necessarily remitting the matter back to the taxing officer.
28. In First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, the court found that it would be a waste of judicial time and costs to remit back a bill of costs to the taxing officer with directions that they should determine the instructions fees. I do associate myself with that decision and I find it fit to determine this matter with finality.
29. In the end, I find that the application is partly successful and I hereby order as follows: -
 - a. The Taxing Master’s decision in the ruling delivered on 28/7/2023 taxing instruction fees at Kshs 200,000/= be and is hereby set aside.
 - b. Item 1 is re-assessed from Kshs 200,000/= to Kshs 150,000/=.
 - c. Item 2 is hereby taxed off.
 - d. Items 48, 51, 52 and 54 are hereby taxed off.
 - e. The respondent’s bill of costs dated 25/10/2022 is hereby re-assessed as follows: -
 - Total Kshs 189,420/=
 - Add ½ Kshs 94,710/=
 - Total Kshs 284,130/=
 - Add 16% VAT 45,460.80/=
 - Total Kshs 329,590.80/=



- f. The applicant is hereby awarded costs of the reference assessed at Kshs 20,000/-.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2024.

A. MABEYA, FCI ARB

JUDGE

