



**Lubulellah & Associates Advocates v Vinayak Builders Limited**  
**(Commercial Miscellaneous Application E599 of 2022)**  
**[2024] KEHC 6287 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6287 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL MISCELLANEOUS APPLICATION E599 OF 2022**

**MN MWANGI, J**

**MAY 15, 2024**

**BETWEEN**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**VINAYAK BUILDERS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion application dated 13<sup>th</sup> July, 2023 pursuant to the provisions of Section 51 of the *Advocates Act* Chapter 16, Laws of Kenya, Rule 13A Advocates Remuneration Rules, Sections 3A & 63(e) of the *Civil Procedure Act* and Order 41 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders -
  - i. That the Court be pleased to enter Judgment against the respondent on (sic) the amount of Kshs.1,136,093.30 certified on the Certificate of Taxation herein, together with interest at the rate of 14% per annum from the 18<sup>th</sup> September, 2020, being 30 days from the date of service of the Bill of Costs both dated 18<sup>th</sup> August, 2020, until payment in full;
  - ii. That a Decree issues in respect of the sum of Kshs.1,136,093.30 as certified on the Certificate of Taxation herein, together with interest at the rate of 14% per annum from the 18<sup>th</sup> September, 2020 until payment in full, and that the applicant be at liberty to execute for recovery of the same in such manner as a Decree of this Honourable Court;
  - iii. That this Honourable Court does assess the costs awarded to the Advocates/Applicants herein in its Ruling rendered on the 22<sup>nd</sup> March, 2023 on the Bill of Costs dated 18<sup>th</sup> August, 2020; and that judgment be entered on the said amount and it be added to the amount of Kshs. 1,136,093.30 in the Taxing Master's Certificate of Costs; and



- iv. That the costs of this application be provided for and be included in amounts stated hereinabove.
2. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Edgar Wendoh Lubulellah, an Advocate of the High Court of Kenya who is in conduct of this matter on behalf of the applicant. In opposition thereto, the respondent filed a replying affidavit sworn on 6<sup>th</sup> October, 2023, by Naran Kunvarij Vaddodiya, the respondent's Director.
3. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 14<sup>th</sup> February, 2024 by the law firm of Lubulellah & Associates Advocates, whereas the respondent's submissions were filed by the law firm of Tito & Associates Advocates on 13<sup>th</sup> February, 2024.
4. Mr. Lubulellah, learned Counsel for the applicant cited the provisions of Section 51(2) of the Advocates Act and submitted that a Certificate of Costs is final as to the amount of fees due to an Advocate in a matter, once it is not challenged within the permitted time under the Advocates Remuneration Order, and where there is no dispute on retainer and/or a reference thereon is dismissed as is the case herein, the only thing left is for the entry of judgment. He referred to Rule 7 of the Advocates Remuneration Order and the decisions in *Alex Otieno Omayo t/a Omayo & Co. Advocate v Piedmont Investments Ltd* [2018] eKLR and *Muri Mwaniki & Wamiti Advocates v John Ngigi Ng'ang'a & another* [2014] eKLR, and further submitted that interest on an Advocate's costs is awardable at 14% per annum, applicable from 30 days after the date of service of either the Block Fee Note or the Bill of Costs.
5. Counsel urged this Court to enter judgment on the Certificate of Taxation for Kshs.1,136,093.30 together with interest at the rate of 14% per annum from 18<sup>th</sup> September, 2020 being 30 days from the date of service of the Bill of Costs upon the respondent, in view of the fact that the respondent does not dispute service of the said Bill of Costs. On the issue of alleged payments made to the applicant by a third-party, Mr. Lubulellah cited the case of *Mercy Nduta Mwangi t/a Mwangi Keng'ara Advocates v Invesco Assurance Company Limited* [2021] eKLR, where it was held that it is not open to a Court to start evaluating the Certificate of Taxation and reach a conclusion that any fees had already been paid, as the issue of full payment is supposed to be determined during taxation.
6. Mr. Lubulellah relied on the case of *Mercy Nduta Mwangi t/a Mwangi Keng'ara Advocates v Invesco Assurance Company Limited* (supra) and contended that when it comes to a dispute that payment was made to the Advocate firm, the client should before or separately after taxation of the costs, file a suit seeking for the Advocate to render an account. He contended that such an allegation as the one being made by the respondent cannot be the basis of objecting to payment for a separately taxed bill where no such claim for account has been filed. He stated that the respondent has filed such a claim in Nairobi HCCOMM MISC. APP No. E401 of 2022, thus the said issue cannot be raised in this matter as that would offend the doctrine of res sub judice.
7. Mr. Lubulellah referred to the case of *Matiri Mburu & Chepkemboi Advocates v Occidental Insurance Company Limited* [2017] eKLR and asserted that the respondent's failure to lodge a valid and/or competent Notice of Objection to Taxation specifying the disputed items is contrary to the mandatory requirement to do so under Paragraph 11(1) of the Advocates Remuneration Order. He relied on the case of *Joseph Cheruiyot & 3 others v Richard Kimutai A. Mibei* [2021] eKLR and submitted that the provisions of paragraph 11(1) of the Advocates Remuneration Order cannot be ignored or wished away, since filing of a Notice of Objection to taxation is a fundamental step for a party seeking to file a



Reference, hence failure to do so is not a technical issue which can be overlooked under the provisions of Article 159(2)(d) of *the Constitution* for the sake of substantive justice.

8. Counsel relied on the Court of Appeal case of C.B. Gor & Gor v Oriental Commercial Bank Limited (formerly known as Delphis Bank Limited) [2018] eKLR and stated that a Taxing Officer has jurisdiction to determine any Preliminary Objection and applications raised in the taxation of a Bill of Costs, including an objection as to limitation of action. For this reason, the Taxing Officer was not wrong when she proceeded to determine the objection as to limitation of actions and the propriety of the Bill of Costs before her as a Taxing Officer. He further stated that the limitation of actions period for an Advocate's fees starts to run from the date of termination of the suit or termination of instructions of the Advocate as was stated by the Court in the case of Abincha & Company Advocates v Trident Insurance Co. Limited [2013] eKLR.
9. Counsel stated that in this case, the taxation proceedings emanated from the services rendered by the respondent to the applicant in HCCOMM No. 571 of 2011 (OS) between Vinayak Builders Limited v Bellevue Development Co. Ltd, which proceedings were still ongoing as at the time of taxation and filing of a Reference. Counsel asserted that the said suit culminated into various orders in favour of the applicant, with the last orders obtained by the applicant under the instrumentality of the respondent were the consent orders issued by Tuiyott J., on 12<sup>th</sup> July, 2017. He asserted that the applicant's Bill of Costs was not time barred as the applicant neither ceased to act for the respondent nor were its services terminated 6 years before the said Bill of Costs was filed.
10. Mr. Lubullela referred to the case of Wakini Kiarie & Company Advocates v Kenya Orient Insurance Co. Ltd (supra) and stated that the respondent failed to tender any evidence before the Taxing Officer of its termination of the respondent's retainer or the termination of the proceedings before the High Court six years prior to the filing of the Bill of Costs dated 18<sup>th</sup> August, 2020 thus the Court cannot make an assumption that the Bill of Costs was filed outside the limitation period.
11. Ms. Bakari, learned Counsel for the respondent relied on the case of Abincha & Co. Advocates v Trident Insurance Co. Ltd (supra) and submitted that the question of validity of a fee agreement does not concern taxation, as it is a completely different issue hence the correct procedure is that the Taxing Master must refer the matter back to the Judge for the Judge to determine the validity of the fee agreement after which depending on the Judge's determination, the Taxing Officer may or may not tax the Bill of Costs. She contended that in this case, a question for validity of a fee agreement arose and the Taxing Officer proceeded to make a finding that she had jurisdiction to determine the same, and in determining the said issue, the learned Taxing Officer acted ultra vires, thus the ruling delivered on 25<sup>th</sup> November, 2022 is null and void and the same should be vacated.
12. Ms Bakari submitted that the Taxing Master overlooked a number of things while assessing the applicant's Bill of Costs, such as failing to consider the affidavit by Dr. Wilfred Akhonya Mutubwa, a former partner in the applicant's law firm, which had been annexed to the applicant's supporting affidavit. She argued that the said affidavit explained the agreement between the parties and confirmed that legal fees had already been paid in accordance with the agreement by the parties. It was stated by Counsel that the Taxing Officer erred in finding that Majanja J., had already ruled on a Notice of Motion application in Misc No. E187 of 2021 which sought to address the Advocate-Client relationship between the Advocate and the client, and dismissed the said application. She indicated that no such application was ever determined by Justice Majanja during the pendency of the suit referred to above.
13. It was submitted by Counsel for the respondent that despite there being no issue and/or dispute as to whether there existed an Advocate-Client relationship between the parties herein, the Taxing



Officer still went on to determine this issue, hence determining issues that were outside the scope of what had been referred to her for determination. Ms. Bakari asserted that the Taxing Officer also erred by awarding the applicant exorbitant instruction fees of Kshs 500,000/= and getting up fees of Kshs.166,666.00, which amounts are unfair and unjustified considering the fact that the said Bill of Costs arose from a Constitutional Petition that was dismissed in its preliminary stages, was not complex, did not raise any novel issues nor was it certified complex by the trial Court. In addition, the respondent was not a primary party in the said proceedings. It was stated by Counsel that the Taxing Officer ought not to have awarded the applicant getting up fees since the Constitutional Petition was summarily dismissed before pretrial directions were taken and before it was certified ready for hearing.

#### **ANALYSIS AND DETERMINATION.**

14. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether judgment should be entered against the respondent for Kshs. 1,136,093.30 as certified on the Certificate of Taxation, together with interest at the rate of 14% per annum from the 18<sup>th</sup> September, 2020; and
  - ii. Whether this Court should assess the costs awarded to the applicant in the ruling delivered on 22<sup>nd</sup> March 2023.
15. In the affidavit filed by the applicant, Mr. Lubulellah deposed that the applicant filed an Advocate - Client Bill of Costs dated 18<sup>th</sup> August, 2020 that was taxed by the Taxing Master in the sum of Kshs.1,136,093.30. He averred that the said Bill of Costs was served on the respondent, thus the respondent had notice of the outstanding fees payable. It was stated by Counsel that the applicant wishes to proceed and realize the costs awarded in the Taxation.
16. The respondent in its replying affidavit contended that it raised a Preliminary Objection dated 7<sup>th</sup> November, 2022 on grounds that the applicant's Bill of Costs was time barred pursuant to the provisions of the Statute of Limitations Act, and that the Taxing Officer vide a ruling delivered on 17<sup>th</sup> March, 2023 found that the said Bill of Costs was not time barred, thereby dismissing the said Preliminary Objection.
17. The respondent deposed that in dismissing its Preliminary Objection, the Taxing Officer assumed jurisdiction to determine whether the applicant's Bill of Costs was statute barred, which issue, does not concern taxation, and is outside the Taxing Officer's jurisdiction. The respondent contended that the Taxing Officer ought to have referred the matter back to the Judge for determination after which, depending on the Judge's determination, the Taxing Officer may or may not tax the Bill of Costs.
18. The respondent asserted that after dismissing the applicant's Preliminary Objection, the Taxing Officer proceeded to tax the applicant's Bill of Costs vide a ruling dated 22<sup>nd</sup> March, 2023 at Kshs.1,136,093.30. The respondent argued that the said Bill of Costs was unjustifiably and unreasonably taxed, thus leading to a miscarriage of justice.

Whether judgment should be entered against the respondent for Kshs. 1,136,093.30/- as certified on the Certificate of Taxation, together with interest at the rate of 14% per annum from the 18<sup>th</sup> September, 2020.
19. The applicant is seeking for this Court to enter judgment in its favour as against the respondent in terms of the Certificate of Taxation dated 11<sup>th</sup> July, 2023 issued by the Taxing Officer. This Court has jurisdiction to enter judgment provided that the Bill of Costs has been taxed, the Taxing Master has



issued a Certificate of Costs, and the retainer is not disputed pursuant to the provisions of Section 51(2) of the [Advocates Act](#) which states as hereunder –

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

20. On perusal of the respondent’s replying affidavit and written submissions, I note that the respondent has not addressed the issues raise in the application herein, instead it is trying to challenge the Taxing Officer’s ruling. I would like to point out at this juncture that what is before this Court is neither a reference nor a challenge to the Taxing Officer’s ruling delivered on 22<sup>nd</sup> March, 2023 that gave rise to the Certificate of Costs dated 11<sup>th</sup> July, 2023. If at all the respondent was interested in challenging the said ruling for one reason or another, it ought to have followed the procedure laid down under Rule 11 of the Advocates Remuneration Order in order to properly invoke the jurisdiction of this Court to set aside the said ruling.

21. Since that is not the case, it is my considered view that the contents of the respondent’s replying affidavit and written submissions are of little to no probative value in respect to the instant application. Pursuant to the provisions of Section 51(2) of the [Advocates Act](#), a Taxing Officer’s Certificate of Taxation is final as to the amount of the costs covered unless it is set aside by a Court of competent jurisdiction. In *Lesinko Njororge & Gathogo Advocates v Invesco Assurance Co. Ltd* [2021] eKLR, the Court in allowing an application similar to the instant one held that –

“The procedure provided in section 51(2) of the [Advocates Act](#) aids expeditious disposal of cases relating to recovery of advocate-client costs as long as: (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs; (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate. The application may be commenced by way of a Notice of Motion which in law is potent tool for originating a suit.”

22. In this case, the applicant’s Bill of Costs dated 18<sup>th</sup> August, 2020 was taxed vide a ruling dated 22<sup>nd</sup> March, 2023 at Kshs.1,136,093.30. Subsequently, a Certificate of Costs dated 11<sup>th</sup> July, 2023 was issued by the Taxing Officer. The respondent has not placed any evidence before this Court to demonstrate that the Taxing Officer’s Certificate of Costs dated 11<sup>th</sup> July, 2023 has been stayed, varied and/or set aside. If this Court finds that there is no dispute on retainer, it can go ahead and enter judgment in favour of the applicant against the respondent in terms of the said Certificate of Costs. The respondent submitted that there was no issue and/or dispute on whether there existed an Advocate-Client relationship between the parties herein, which in my considered view means that there is no dispute on retainer.

23. In the light of the above, I am satisfied that all the conditions set out in Section 51(2) of the [Advocates Act](#) have been met by the applicant, hence this is a suitable case for me to exercise my discretion in its favour. In the premise, it is my finding that the applicant has made out a case to warrant judgment being entered in its favour as against the respondent for the sum of Kshs. 1,136,093.30.



24. On the issue of interest, Regulation 7 of the Advocates (Remuneration) Order provides that –

“An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

25. As stated in the above provisions, in order for an Advocate to charge interest, a period of one month must have elapsed after the bill was delivered to the client, and the claim for interest should have been raised before the amount of the bill has been paid or tendered in full. On perusal of the applicant’s affidavit of service sworn on 26<sup>th</sup> October, 2022 by Josephat Kutekha Khatikwi, a licensed Court Process Server, and filed on 27<sup>th</sup> October, 2022, it is evident that the applicant’s Bill of Costs was served on the respondent on 25<sup>th</sup> October, 2022 via email. Further, a claim for interest on the taxed costs at fourteen (14%) per cent per annum was made in the application herein, and the respondent is yet to pay the applicant either in part or wholly, the amount taxed by the Taxing Officer in her ruling delivered on 22<sup>nd</sup> March 2023. This Court finds that the claim for interest at fourteen percent (14%) per annum is payable.

Whether this Court should assess the costs awarded to the applicant in the ruling delivered on 22<sup>nd</sup> March 2023.

26. The jurisdiction to tax and/or assess costs lies with the Deputy Registrar pursuant to the provisions of Paragraph 10 of the Advocates Remuneration Order which states as follows-

“The taxing officer for the taxation of bills under this Order shall be the 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 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.”

27. In view of the above provisions, this Court has no jurisdiction to assess/tax costs, as doing so will amount to usurping the powers of the Taxing Officer and leaving a dissatisfied party in its wake, with no recourse in the event it wants to challenge the assessed/taxed costs. Furthermore, I have perused the Taxing Officer’s Ruling delivered on 22<sup>nd</sup> March, 2023, and it is manifest that no costs were awarded by the Taxing Officer in the said ruling, the Taxing Officer only taxed the applicant’s Bill of Costs. This Court finds in the negative in respect to the prayer for this Court to assess the costs of successfully prosecuting the Bill of Costs dated 18<sup>th</sup> August, 2020 and arguing the Preliminary Objection dated 7<sup>th</sup> November, 2022.

28. The upshot is that the instant application is partly merited and the same is allowed in the following terms –

- \*\*i. Judgment is hereby entered for the applicant against the respondent for the sum of Kenya Shillings One Million, One Hundred and Thirty-Six Thousand and Ninety-Three, and 30 cents (Kshs.1,136,093.30.)
- ii. The amount in (i) above shall accrue interest at the rate of fourteen per cent (14%) per annum to be calculated from 23<sup>rd</sup> November, 2022 until payment in full;
- \*\*iii. Costs to the applicant.

It is so ordered.



DATED, SIGNED and DELIVERED at NAIROBI on this 15<sup>th</sup> day of May, 2024. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

Mr. Wanyonyi h/b from Mr. Ogendo for the client/applicant

Mr. Wendoh h/b for Mr. Lubullelah Eugene for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

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