



**African Marine and General Engineering Company Limited v Sharia  
Nyange Njuguna and Company Advocates (Miscellaneous Judicial  
Review E007 of 2022) [2024] KEHC 9755 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9755 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS JUDICIAL REVIEW E007 OF 2022  
DKN MAGARE, J  
JULY 22, 2024**

**BETWEEN**

**AFRICAN MARINE AND GENERAL ENGINEERING COMPANY  
LIMITED ..... APPLICANT**

**AND**

**SHARIA NYANGE NJUGUNA AND COMPANY ADVOCATES . RESPONDENT**

**RULING**

1. This is a ruling on an application dated 26/9/2023 seeking to set aside or vary the ruling on taxation dated 14/9/ 2023. The application was initially filed in Misc. Civil E271 of 2023. I directed that the same be transferred to this case.
2. The application was premised inter alia on the reason that the award of Kshs. 3,321,471.97 under instruction fees was excessive and failed to consider Kshs. 1,300,000/- paid by the Applicant to the Respondent in legal fees and disbursements in respect of JR No. E001 of 2020 and Procurement Administrative Review Board Application No. 126 of 2020.
3. The Respondent filed a replying affidavit. The application was opposed on the grounds inter alia that the Applicant had not established the reasons for seeking to set aside the award of costs.
4. It was also deposed that the payment cheques for Kshs. 300,000/- was made in respect of filing fees and not legal fees and cheque No. 000839 was made in respect of the Applicant's sister company, Alba Petroleum Limited in a different matter.



## Submissions

5. The Applicant filed submissions and further submissions in support of their application. It was submitted that the value of the subject matter was unknown and the taxing master proceeded on matters not relevant and also committed an error of principle in arriving at the award.
6. They cited inter alia, the case of *Joreth v Kigano & Associates* (2002) EA 92. On this it was submitted that the taxing officer ought to have relied on the pleadings which were seeking prerogative orders.
7. In support of the error in principle committed by the taxing master, they relied on *Republic v Commissioner of Income Taxes ex parte Ukwala Supermarkets & 2 Others* (2018) eKLR to submit that the award was so high as to deter access to justice.
8. On their part, the Respondents submitted that the costs as awarded were well based on the materials before court and took into consideration relevant factors and therefore were not improper. They relied on *Stanam Singh Babra v Joseph Mungai* (2012) eKLR.
9. It was further submitted for the Respondent that the taxing master properly exercised her discretion and in accordance with the principles of taxation of the bill of costs. They relied inter alia on *Tom Ojienda v County Government of Meru* (2021) eKLR.

## Analysis

10. I have perused the impugned application. I note that the Applicant was the ex-parte Applicant in Judicial Review Application No. E001 of 2020.
12. I note that the Bill of Costs dated 11/10/2020 arose from Advocate-client Bill of Costs filed to this court. The Taxing Master allowed the bill of costs on 14/9/2023 at Kshs. 3,321,471.97/=.
13. In *Donholm Rabisi Stores (firm) V EA Portland Cement Ltd* [2005] eKLR Waweru J held:

“Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.
14. Rule 11 of the *Advocates Remuneration Order* provides in extenso doth:
  - “(1) (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.
15. The Applicant herein was aggrieved and preferred this application. The Taxing Officer, upon delivering a decision on the Bill of Costs was *functus officio*.
16. However, the Judge would not be *functus officio*. The Applicant herein or either party in the taxation proceedings had the leeway to file a reference before the Judge if aggrieved. However, the Reference was to be filed within the same taxation proceedings and not as a fresh application.
17. I have perused the ruling of the taxing master and the record basis of which the ruling was made. I find that the taxing master erred in not considering the fact as pleaded that the Judicial Review application had been determined at leave stage.
18. On the payment cheques, it is settled that fees does not constitute fees agreement. In [\*Corporate Insurance Company Limited v Kang'ethe and Mola Advocates\*](#) [2021] eKLR Majanja J stated as follows:
- ...settlement of the Advocates Fee Note constituted an agreement on the terms proposed in the fee and based on the first principles of the law of contract, the offer by the Advocates contained in fee was accepted by the Applicant who paid the consideration by way of settling it. If there is any outstanding interest, the Advocates are entitled to claim it through a suit for recovery. In other words, 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.
19. This position was similarly analyzed in the case of [\*Sifa International v Board of Trustees NSSF\*](#) [2018] eKLR, where it was held as follows:
- “The law firm has deposed in the replying affidavit that the agreement reached on 6. 8. 2010 was binding on both parties. It is my considered view again that it is not open for the advocate to do and afresh bill of costs merely on account of the demand for the refund being demanded by the applicant. His fee note dated 11<sup>th</sup> June 2010 was construed to contain the entire costs for services rendered. Once the same was negotiated and agreed, the final figure reached then became the fees due and payable. The advocate seems to want to rely on this agreement and ran away from it at the same time...The demand letter does not in my view vitiate the agreement reached between the parties on 6<sup>th</sup> August 2010 in respect of that bill... The parties having compromised the fee note of 11<sup>th</sup> June 2010 are bound by the terms of that agreement thus calling the application of the provisions of section 120 of the [\*Evidence Act\*](#) into play. For this reason, I am persuaded to and in favour of the applicant that the bill of costs dated 7<sup>th</sup> December 2016 violates the principle of estoppel by deed...”
20. Further, I note that the taxing master did not bring out what would constitute the legal fees amount paid and the legal fees owing. This was necessary since the parties had disputed fees raised and fees paid. The court ought to have made a finding on what would be due to the advocate based on what was claimed and what was paid.



21. Consequently, the taxing master failed to consider the nature of the proceedings being judicial review. The application is thus merited. The court will not go into the arena of fees paid. The court is to determine the subject matter in relation to the case at hand, not other parties. The court should place reliance on documents filed in the primary file and agreements on fees made between the parties. However, reliance should not be placed on materials showing the subject matter which were not pleaded.
22. The court should also consider the stage at which the matter was. The proceedings before the board and other proceedings in other courts have no effect on the value of the subject matter.
23. Therefore, the taxing master shall tax the matter having regard to the subject matter as disclosed in the pleadings, the complexity of the case and whether it was contentious.

### **Determination**

12. In the upshot I make the following orders:
  - a. Application dated 26/9/2023 is hereby allowed.
  - b. The Bill of Costs shall be remitted for fresh taxation before a taxing master other than Hon. Rita Orora.
  - c. The costs of the reference shall abide the outcome of the taxation.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22<sup>ND</sup> DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Isika for the Applicant

Ms. Nyange for the Respondent

Court Assistant – Jedidah

