



**M Mochama & Co Advocates v Kiongera (Miscellaneous Application E140 of 2022) [2024] KEHC 10722 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10722 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E140 OF 2022**

**FR OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**M MOCHAMA & CO ADVOCATES ..... APPLICANT**

**AND**

**DANIEL KAMAU KIONGERA ..... RESPONDENT**

**RULING**

**A. Introduction**

1. Before court for determination is the Advocate/Applicant chamber summons Application dated 1<sup>st</sup> August 2023, which is brought pursuant to provisions of paragraph 11(2) of the [Advocates Remuneration order](#), Section 79G and 3A of the [civil procedure Act](#) and all other enabling provisions of law. The advocate/applicant seeks for orders that;
  - a. That this court be pleased to set aside the taxing officers decision made on the 6<sup>th</sup> day of July 2023.
  - b. That this honourable court do order that the bill of costs herein be taxed afresh before a different Taxing officer or alternatively this court be pleased to substitute the amounts awarded in the disputed items ( As specified in the application).
  - c. A determination on who is entitled to party to party costs when a client has not paid for his/her case right from day one to the end.
2. The Advocate/applicant did aver that immediately after the ruling on taxation was delivered, he did file an objection to the said taxation as provided for under rule 11(1) of the Advocates remuneration order and was subsequently given the go ahead to file his reference by the taxing master (see; annexed as EMM-2).His main grouse is that the taxing master made several errors, while taxing the said advocate/client bill of costs and the said errors were brought forth in his notice of objection dated 28<sup>th</sup> July 2023



and touched on items 1 , 14, 19 , 20 and 21 of his itemized bill of costs. Further the taxing officer had also erred in finding that the respondent had paid him a sum of Kshs.116,910/= and yet that's the amount the client had already received from the Applicant/advocate and this lead to the taxing officer wrongly concluding that the advocate/applicant ought to refund the client a sum of Kshs.25,270/=.

3. The advocate/applicant urged the court to find that due to the errors specified, his bill of costs should be re-taxed afresh and what is due to the respondent be the amount awarded in the decree less the taxed advocate/client bill of costs.
4. The respondent strenuously opposed this application vide his replying affidavit dated 15<sup>th</sup> December 2023. He deponed that, they had appeared before the taxing master on 17.05.2023 and a ruling date was reserved for the 29.06.2023. On the said date, the ruling was not read and was pushed to the 06.07.2023, when it was finally delivered in his presence (having joined by video link). He was later surprised to notice that the amounts taxed as read out by the taxing master, was different from what is now found in the court file, certified proceedings and certificate of costs. The advocate/applicant had received a sum of Kshs.320,190/= on his behalf but only remitted to him a sum of Kshs.116,910/= and retained the balance of Kshs.201,280/= by illegal deductions which he objected to
5. To his knowledge the advocate/client bill of costs had been taxed at Kshs.69,140/= and after delivery of the said ruling, he had visited the registry to get certified copies, but the file was not available as the taxing master had not returned it to the registry and was away on leave. Finally, when he got the certified copy of the ruling, he was surprised to see different figures which did not tally with the pronounced ruling delivered in court on 06.07.2023 and believed the same was fabricated as the new figure indicated in the ruling was now Kshs.91,640/=. The respondent further deponed that he had no confidence in Machakos court and urged the court to move his file to Nairobi due to the inconsistency noted, bias and corruption.

### Determination

6. A challenge to the decision of the Taxing Master properly takes the form of a reference under paragraph 11 of the [Advocates Remuneration Order](#). In making such reference, a party is required to show that its case meets the principles set in jurisprudence for interference with the exercise of discretion by the Taxing Master. These principles were succinctly enunciated in [First American Bank of Kenya v Shab and Others](#) [2002] E.A.L.R 64 at 69 in which Ringera J (as he then was) observed as follows:

“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... it would be an error of principle to take into account irrelevant factors or to omit to take into account relevant factors... some of the relevant factors include the nature and importance of the cause or matter, the amount or value of this subject matter involved, the interest of the parties, the general conduct of proceedings and any direction by the trial judge...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...”

7. As to the extent to which the court will interfere with the decision of the Taxing Officer, this court is also guided by the case of [Republic v. Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna](#) [2006] eKLR, where Ojwang J. (Retired) stated 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 somewhat too high or too low; it will only interfere if it thinks the award 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."

8. The advocate/applicant has shown that indeed there were error of principle in the manner his advocate/client bill of costs was taxed and the said errors are specified in his notice of objection filed under rule 11(1) of the *Advocates remuneration Order* dated 28<sup>th</sup> July 2023. Further the taxing master also made an error in finding that the client had paid the advocate his fee to the tune of Kshs.116,910/=, when the opposite was the case as it was the advocate who had already paid the respondent the said sum in settlement of the decree, which fact was also admitted by the respondent at paragraph (4) of his replying affidavit. These errors are glaring and under the circumstances, the ruling on taxation dated 06.07.2024 is set aside and the said advocate/client bill of costs shall be taxed afresh.
9. The respondent raised serious misgiving relating to the taxed amount and cast unfounded aspersions on the conduct of the taxing master. Unfortunately, the same do not relate to the core legal question as raised by the applicant, and the courts hand is tied as to what it can make a finding on. In determining a reference from the decision of a Taxing Master, this court exercises an appellate jurisdiction. It cannot determine an issue that was not before the Taxing Master and is raised for the first time in a reference. In *Showcase Property Limited v Mugambi & Company Advocates* [2020] eKLR, the Court observed as follows:

"6. I have read the documents filed before the Deputy Registrar and in none of them did the parties raise the issue of lack of a retainer. The Client chose to respond to the Bill of Costs through its affidavit and the issue of a retainer, which is an issue of fact, was not raised. The issue was also not broached in the detailed written submissions on the matter. It is only when the Client denies the retainer that the Advocate is called upon to prove it (see *Omulele Tollo and Company Advocates v Mount Holdings Ltd* MSA CA Civil Appeal No. 75 of 2015 [2016] eKLR). In this case the issue of the retainer was not in contention before the Deputy Registrar, it cannot be raised in the reference. The reference is in the nature of an appeal and the High Court determining a reference cannot entertain a matter that was not raised before the Deputy Registrar. This position is confirmed by the fact that letter seeking reasons for the taxation dated 17th January 2020 was only in relation to the instruction fee and not whether or not there was a retainer. (Emphasis added)

10. Be that as it may, a re-taxation will also suit the respondent as the said costs will be taxed afresh.

### **C. Disposition.**

11. The Chamber summons application dated 1<sup>st</sup> August 2023 is allowed in terms of prayer (1) and (2). The advocate/client costs herein will be re taxed afresh by the chief Magistrate -Machakos law court.
12. Each party to bear their own costs of this reference.
13. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**



**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024**

In the presence of: -

Mr. Mochama for Applicant

No appearance for Respondent

Sam/Susan Court Assistant

