



**Aguko Osman & Company Advocates v Georgiou & another (Miscellaneous Application E410 of 2024) [2024] KEHC 12455 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12455 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E410 OF 2024**

**PM MULWA, J**

**OCTOBER 17, 2024**

**BETWEEN**

**AGUKO OSMAN & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**MICHALIS GEORGIU ..... 1<sup>ST</sup> RESPONDENT**

**MERCY NELIMA SIMIYU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Two applications are before the court for determination. The Advocate/Applicant's Notice of Motion dated 28<sup>th</sup> February 2024 seeking entry of judgment in the sum of Kshs. 992,948.40 as taxed by the court and the Respondent's Chamber Summons dated 1<sup>st</sup> March 2024 seeking a stay of the certificate of taxation.
2. The Notice of Motion is brought under Sections 1A,1B and 3A of the Civil Procedure Act, Order 51 Rule (1) of the Civil Procedure Rules. It seeks to adopt the certificate of taxation issued and dated 28<sup>th</sup> February 2024 as the court's final decree.
3. The application is premised on the grounds on the face of it as well as the supporting affidavit of Gad Aguko sworn on 28<sup>th</sup> February 2024. He avers that the Advocate's bill of costs dated 29<sup>th</sup> May 2023 and amended on 2<sup>nd</sup> June 2023 was taxed at Kshs. 992,948.40 on 16<sup>th</sup> February 2024 and a certificate of taxation issued on 28<sup>th</sup> February 2024. There are no stay orders and thus he is entitled to the fruits of the judgment. He avers the Respondent will not be prejudiced.
4. Opposing the application Mercy Nelima Simiyu with the authority of Michalis Georgiou filed the replying affidavit sworn on 29<sup>th</sup> April 2024 together with the grounds of apposition dated 18<sup>th</sup> March



2024. She contends the application is premature and ought to be held in abeyance to await the outcome of the reference.

5. The Respondent's Chamber Summons application dated 1<sup>st</sup> March 2024 is brought under Sections 3A and 14 of the *Civil Procedure Act* and Rule 11 of the Advocates Remuneration Order and seeks the following orders:
  - i. That the Ruling of the Taxing Master delivered on 16<sup>th</sup> February 2024 with respect to Item 1 of the Advocates bill of costs dated 29<sup>th</sup> May 2023 be set aside/quashed and vacated and all the consequential orders.
  - ii. The court exercises its inherent jurisdiction and be pleased to re-tax item 1 of the Bill of Costs dated 29<sup>th</sup> May 2023.
  - iii. In the alternative to prayer 2, the Court refer the bill of costs dated 29<sup>th</sup> May 2023 for re-taxation of item 1 or make directions for a fresh taxation
  - iv. That the court do consider and be pleased to set off the sum of Kshs 603,500.00 from the re-taxed bill of costs
  - v. That costs be provided for.
6. The application is founded on the grounds set out on its face and on the supporting affidavit dated 1<sup>st</sup> March 2024 sworn by Mercy Nelima Simiyu. The Respondent contends the taxing master erred in principle and law by failing to consider that no defence was filed and as such apply the import of Schedule 6 Section 1(a) on instruction fees. And also, to consider the payment of Kshs 603,500.00 made to the Advocate.
7. The Advocate opposed the application and filed grounds of opposition dated 10<sup>th</sup> April 2024, that the application fails to disclose a competent reference, it is premature and its effect is to appeal the decision of the Taxing Master.
8. By the court's directions, the applications were canvassed by way of written submissions. The Respondents' submissions are dated 3<sup>rd</sup> June 2024. The Advocate did not file submissions.

### **Analysis and determination**

9. The court has considered the two applications, the pleadings herein, the written submissions, the impugned ruling, the cited authorities and the obtaining legal provisions. The issues for determination are whether the said applications are merited.

### **Application dated 1<sup>st</sup> March 2024**

10. For good order I will deal with the Chamber Summons dated 1<sup>st</sup> March 2024. It is now well established that paragraph 11 of the Advocates Remuneration Order is the only avenue for addressing complaints arising from tax rulings. The law provides that any objection of the Taxing Master's decision ought to be brought within 14 days after the decision. This application having been filed on 1<sup>st</sup> March 2024 was brought within the stipulated timelines.
11. The Respondents challenged the taxation of the bill of costs on the basis that the Taxing Officer failed to adhere to the laid down principles, awarded excessive amounts on the instructions fees and also failed to consider the amount paid to the advocate.



12. The principles governing the interference with the exercise of the Taxing Master's discretion is well settled and was reiterated by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004, [2005] eKLR 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.”

13. The court will not interfere with the decision of the taxing master in cases where its view of the matter differs from that of the Taxing Master, but interference should only be if it is satisfied that the taxing master erred in principle or law. The question this Court has to address is whether the ruling delivered amounted to an error in principle.

14. According to the Respondent the Taxing Master failed to consider that the suit HCCOMM E560 of 2021 was undefended and the principles of paragraph 1(a) ought to apply. In determining the value of the subject matter the Taxing Master applied the principles laid out in the case *Joreth Ltd v Kigano & Associates* [2002] eKLR. She determined the subject matter was ascertained from the plaint at Kshs 26,500,000.00. It was on that amount that the Deputy Registrar applied the provisions of Schedule 6 Paragraph 1 (b) and taxed the same at Kshs 505,000.00. The Respondent alleges the instruction fees on item 1 ought to be taxed at 328,250.00 being 65% of the 505,000.00 as the matter was undefended.

15. From the record, the Respondent in HCCOMM E560 of 2021 filed a notice of appointment, replying affidavit to the Notice of Motion dated 29<sup>th</sup> April 2021 and submissions. The motion was the subject of the bill of costs filed by the Advocate. The Respondents having filed a Replying affidavit to the application, I am not persuaded that the application was undefended. My view is that the bill of costs ought to be taxed as per the provisions of Schedule 6 paragraph 1(b) of the Advocate Remuneration Act. I find the Deputy Registrar applied the appropriate schedule and did no err in taxing the instruction fees.

16. Turning to the second issue, the Respondent complains the Deputy Registrar erred in failing to consider the further affidavit dated 22<sup>nd</sup> January 2024 which was filed in compliance with the court directions to ascertain the amounts paid. The statement of account provided the amounts paid was Kshs 1,123,650.00 out of which 603,500.00 was used to pay for legal fees. On this issue, the deputy registrar ruled as follows:

“I have considered the evidence on payments which have been provided by both parties on the issue of payments made to the applicant. The Taxing Officer was unable to determine conclusively the amount paid to the applicant herein as both parties have confirmed that the applicant represented the respondent in several matters. In the circumstances, the Taxing Officer was unable to discern what payments were made in reference to which matters from the evidence provided. The issue to be considered before the Hon. Judge.”

17. I have perused the attached annexures in the replying affidavit sworn by Ms. Nelima dated 10<sup>th</sup> July 2023. From the statement of accounts, it is evident that some money was paid through the I & M Bank, NCBA bank and sent directly to the Advocate through his MPesa Number 0726963431. The Respondents have adduced evidence that Kshs. 1,123,650.00 was paid to the Advocate out of which 603,500.00 was in respect to the claim subject to the Bill of Costs. The transactions are not denied by the Advocate save only to mention that the money was being paid for several cases.



18. The evidential burden of proof shifted to the Advocate to demonstrate that the payments were not in respect to this case and that they were entirely for a different transaction. In *Joruth Enterprises Ltd v Barclays Bank of Kenya Ltd ML HCCC No. 231 of 2010 [2020] eKLR* the court held:

“The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

19. The advocate failed to discharge the evidential burden. In the circumstances, I find that the Advocate was paid a sum of Kshs 603,500.00 towards legal fees in furtherance of the instructions issued herein. The Respondents urged the court to consider this amount in the taxed bill of costs which amount ought to be deducted from the assessed amount.

20. The Deputy Registrar had left this issue to the Judge to determine the amount of legal fees paid to the Advocate. As a consequence, it is my finding that the amount of Kshs. 603,500.00 ought to be deducted from the sum of Kshs. 992,948.40. The amount due and payable to the advocate is 389,448.40. Therefore, the Respondents Chamber Summons dated 1<sup>st</sup> March 2024 only succeed in relation to prayer 4.

#### **Application dated 28<sup>th</sup> February 2024**

21. The Taxing Master’s decision was issued on 16<sup>th</sup> February 2024 and a certificate of taxation was issued on 28<sup>th</sup> February 2024. It is settled law that where a bill of costs has been taxed and a certificate of costs issued, the only bar to adoption and execution of the same is where the same has been set aside or stayed.

22. In the interest of justice, I have taken into account the tenets of Article 159(2) (b) and (d) of *the Constitution*, which states that justice should not be delayed and that justice should be administered without undue regard to procedural technicalities. I have as well considered the overriding objectives of the court to facilitate just, and expeditious resolutions of disputes.

23. In order to conclude this matter, this court believes it is appropriate to decide on the prayer for entry of judgment rather than asking the Advocate to approach this court again, which would be a waste of judicial time. For that reason, I find the application for judgment is merited save that the amount is reviewed to Kshs. 389,448.40.

24. Consequently, judgment is hereby entered against the Respondents in favour of the Applicant for the sum of Kshs. 389,448.40.

25. I Make the following final orders:

- i. The Chamber Summons dated 1<sup>st</sup> March 2024 only succeeds in relation to prayer 4.
- ii. The application dated 28<sup>th</sup> February 2024 succeeds and judgment is hereby entered against the Respondents in favour of the Advocate/Applicant for the sum of Kshs. 389,448.40.
- iii. Each party will bear their own costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**P. MULWA**



## **JUDGE**

In the presence of:

Mr. Mabuka for Advocate/applicant

Mr. Kimosop for Client

Court Assistant: Carlos

