



**Mereka & Company Advocates v National Social Security Fund
Board of Trustees (Civil Miscellaneous Application 29 of 2020)
[2024] KEHC 12668 (KLR) (Civ) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION 29 OF 2020

AN ONGERI, J

OCTOBER 17, 2024

BETWEEN

MEREKA & COMPANY ADVOCATES APPLICANT

AND

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES RESPONDENT**

RULING

1. The advocate/applicant filed a reference dated 4/4/2023 against the bill of costs dated 23/1/2020 which was taxed on 9/3/2023 at kshs.2,419,380.09 on the following grounds;
 - i. That the ruling on re-taxation of the Applicant's Bill of Costs dated 23rd January, 2020 was delivered by the Hon. Deputy Registrar on 9th March, 2023 and which taxed item 1 of the bill of Costs at Kshs.2,000,000/= as instruction fees and as such the Taxing officer erred in law and in principle by failing to appreciate the true nature of the instruction given to the Advocates by the client, the complexity of the matter, the enormous time and skill expended by the advocate and the importance of the matter to the client.
 - ii. That on 13th March 2023/ the Advocate requested for copy of the Ruling as well as filing a Notice of Objection dated 13th March 2023.
 - iii. That the Taxing Officer failed to abide with the orders of the judge in his ruling dated 17th June 2022 with respect to Election as enumerated under Schedule 5 of the Advocates
 - iv. Remuneration Order.



- v. That the amount awarded by the Taxing Master in item 1 is so manifestly low as to constitute an error of principle.
 - vi. That the Taxing Officer erred in law and principle by holding that the value of the subject matter was kshs.10,979,069 as opposed to the value contained in the settlement agreement entered into by the parties for the amount of Kshs.55,527,739/- and which ought to have been the basis of the instruction fees in addition to failing to consider the election as aforesaid,
 - vii. That there is no bar under the Advocates Remuneration Order to an Applicant who wants to proceed by way of a second reference on different grounds.
 - viii. That it is therefore in the interest of justice and fairness that the Honorable Court refers back the matter to the Taxing Officer for re-taxation and with proper direction thereof or in the alternative re-tax the Bill of cost.
2. The reference is supported by the advocate's affidavit sworn on 4/4/2023 in which he deposed as follows;
- i. That he is an Advocate of this Honorable Court in conduct of this matter, well conversant with the facts of the matter hence competent to swear the Affidavit.
 - ii. That the Applicant filed its Advocate/Client Bill of Costs dated 23rd January, 2020 seeking an amount of Kshs.25,232,750/=. Attached hereto and marked "DMM-I" is a true copy of the said Bill of Costs.
 - iii. That on 29th September 2020 the bill proceeded for taxation where it was taxed at Kshs.8991 660.25/- being dissatisfied by the said ruling of the Taxing Master, the Advocate filed a reference dated 19th November 2020 and which was upheld by the court on 17th June 2022 where the court directed that the matter be referred back to a different taxing master for re-taxation and who delivered her ruling on 9th March 2023 as per attached ruling marked "DMM-2" where she taxed the Bill of costs at a total amount of kshs.2,419,380.09.
 - iv. That being dissatisfied with the said ruling the Advocate requested for a copy of the said ruling vide his letter dated 10th March 2023 attached herein and marked "DMM-3 as well as filed a Notice of Objection requesting reasons dated 13th March 2023 marked "DMM-4,
 - v. That there is no bar under the Advocates remuneration Order to an Applicant who wants to proceed by way of a second reference on different grounds.
 - vi. That the amount awarded by the Taxing Master of kshs,2,00,000/= in item 1 is so manifestly low as to constitute an error of principle and to call for interference by this Honorable Court in addition to failing to properly address herself to the issue of Election and therefore erred in law and principle.
 - vii. That the Taxing Officer failed to appreciate the true nature of the instruction given to the Advocates by the client in addition to failing to properly consider the enormous work and research done by the Advocate and in particular failing to consider the proper number of paper work done, photocopied, printed, filed and served thereby drastically and erroneously reducing the amount taxable.
 - viii. That the Taxing Officer erred in law and principle by holding that the value of the subject matter was kshs.10,979,069 as opposed to the value of the subject matter as settlement agreement entered into by the parties for the amount of Kshs,55,5{{^}} 27,739/- and which



ought to have been the basis of the instruction fees in addition to failing to consider the election as aforesaid.

- ix. That the Taxing Officer erred in law and in principle in failing to take into consideration the written submissions filed on behalf of the Advocate/Applicant while taxing the Advocate-Client Bill of Costs.
 - x. That it is therefore in the interest of justice and fairness that the Honourable Court grant the prayers sought in the reference.
3. The client filed a replying of appeal sworn on 14/6/2023 in which he deposed as follows;
- i. That he is the Principal Legal Officer (Legal and Regulatory Affairs) of the respondent duly authorized and competent to swear this affidavit on behalf of the respondent.
 - ii. That he has read and understood the contents and import of the Applicant's Chamber Summons Application dated 4th April 2023 together with the supporting affidavit deposed by David M. Mereka on the same date and wish to respond in opposition as follows.
 - iii. That as evident from the Ruling of the taxing officer delivered on 9th March 2023, the Applicant's Bill of Cost was retaxed at Kshs.4,969,797.79 - Kshs.2,14 1,980.09 is the balance after deducting the amount already paid to the Applicant.
 - iv. That it is equally evident that ITEM I (instruction fees) was re-taxed at Kshs.2,000,000.00 which was increased by one half making a total of Kshs.3,000,000.00. The taxing officer has articulated the reasons for taxation.
 - v. That he believes that the amount of Kshs.3,000,000.00 taxed as instruction fees is fair and reasonable considering the value of the subject matter was Kshs.10,979,069.00. It is not low and does not constitute an error of principle as posited by the Applicant.
 - vi. That, moreover, matters of quantum of the amounts taxed are regarded as matters within the specialty of the taxing officer and the Court sitting on appeal/reference will intervene only in exceptional circumstances. The Applicant has not demonstrated the existence of such exceptional circumstances. There is no basis/ground on which the decision can be interfered with.
 - vii. That in response to the averment that the taxing officer failed to properly address herself on issue of election, he wishes to point out that it is manifest from the Ruling that the taxing officer not only addressed herself but correctly applied Schedule V of the Advocates Remuneration Order when re-taxing the Bill as directed by the Judge in his Ruling dated 17th June 2022.
 - viii. That regarding the issue of the value of the subject matter, he wishes to state that the taxing officer was correct in using the Judgment amount of Kshs.10,979,069.00 as the basis of determining the value of the subject matter. The Applicant did not provide any evidence of the alleged settlement amount of ksh.55,527,739.00 As correctly concluded by the taxing officer, the Applicant stated the figure in the meeting. There is no evidence of settlement between the parties. Further, the minutes the Applicant cites do not have any probative value as they are not signed by the Respondent. They do not constitute a settlement between the parties to the suit (Annexed hereto and marked CRO-1 is a copy of the Decree in HCCC 99 of 1994)
 - ix. That the reference has no merit as the taxing officer correctly and judiciously exercised her discretion and considered all relevant factors in taxing the bill. Further, the taxing officer considered the written submissions filed by parties.



- x. That litigation must come to an end. Preferring a second reference is an abuse of the court process.
4. The advocate filed further affidavit as follows;
 - i. That in response to paragraph 4 and 5 of the Respondents Replying Affidavit it is evident that the Taxing Officer taxed item 1 of the Bill of costs Ksh.2,000,000/- and not Kshs.3,000,000/- as stated by the Respondent.
 - ii. That further in response to paragraph 5, 6 and 7 of the Respondents Replying Affidavit the Taxing Officer while exercising her discretion under schedule 5 of the Advocates Remuneration Order failed to take into considerations the complexity of the matter as set out in the Advocates letter dated 25th July 2019 attached herewith and marked "DMM 1" and as such awarded an amount which was so manifestly low as to constitute an error of principle.
 - iii. That in response to paragraph 8 of the Respondents Replying Affidavit, the Taxing Officer erred in law and principle in holding that the value of the subject matter was Kshs.10,979,063/- as opposed to the settlement amount of Kshs.55,527,739/- and which ought to have been the basis of the calculation of instruction fees on Item 1 and which the Client did not object to.
 - iv. That further in response to paragraph 8 of the Respondents Replying Affidavit, the reference has high chances of success based on, among other grounds, that the amount awarded in item 1 was manifestly low as to constitute an error in principle since the Taxing Officer failed to appreciate the true nature of the instruction given to the Client, the complexity of the matter, the time taken and skill expended by the Advocate in addition to election and as already submitted in our submissions dated 1st December 2022 as attached herein and marked "DMM 2". in addition to what is stated in paragraph 6 above.
 - v. That it is therefore in the interest of justice and fairness that the honourable court grants the prayers sought in the reference.
 5. The parties filed written submissions as follows; the applicants submitted that the amount awarded by the taxing master in item 1 was so low as constitute an error of principle. The applicant argued that Schedule 6 of the Advocates Remuneration Order uses the word or which by interpretation would mean that a party can adopt any figure in order to indicate the value of the subject matter especially in this case where there are several different figures as itemized in the pleadings and the taxing officer should have taken into account the amount well over Kshs 7 Billion and which amount was part of the brief from the client to vehemently oppose at all costs among other figures by the taxing officer.
 6. The applicant submitted that the suit was filed in the year 1994 and was concluded in 2017 a period of more than 20 years, the Advocates were called upon to defend the Client against a claim as itemized above which was totaling to an amount of well over Kshs. 7 Billion.
 7. That the matter was in the public domain and had political overtones in view of the substantial amount of money and personalities involved. It was of great importance to the Client which can be deduced from the various meetings and correspondences between the Client and Advocates as shown in the minutes and correspondences attached to the Bill of costs which placed great responsibility on the Advocate to go beyond normal duties of an Advocate.



8. In support of their position the applicant cited KTK Advocate's v FINA Bank Limited (2014) eKLR where Hon. Justice Kamau where instruction fees were enhanced from Kshs.200,000 to Kshs.2,000,000/= stated that:-

“The instruction fee was thus correctly calculated on the sum of Kshs.56,337,693.70. It is also clear that under Paragraph 1 (a) of Schedule VI of the Advocate's Remuneration Order, the Taxing Master has wide and unfettered discretion to increase the instruction fees after a consideration and review of the matter. The discretion must, however, be exercised judiciously failing which the court would intervene”

9. The applicant submitted that the taxing officer erred by holding that the value of the subject matter was Kshs.10,979,069 as opposed to the value contained in the settlement agreement entered into by the parties for the amount of Kshs.55,527,739. The applicant argued that the subject matter ought to be determined from the pleadings and documents relating to the subject matter of the Bill of Cost.

10. The respondent alternatively submitted that the taxing officer was correct in using the Judgment amount of Kshs.10,979,069.00 as the basis of determining the value of the subject matter. The Applicant did not provide any evidence of the alleged settlement amount of Kshs.55,527,739.00. As correctly concluded by the taxing officer, the Applicant stated the figure in the meeting. There is no evidence of settlement between the parties. Further, the minutes the Applicant cites do not have any probative value as they are not signed by the Respondent. They do not constitute a settlement between the parties to the suit.

11. The respondent submitted further that interest and VAT should not be considered when ascertaining the value of the subject matter. The respondent indicated that that taxing master considered all the relevant factors, to wit; the nature and importance of the matter, documentation involved, responsibility entrusted on counsel, complexity of the matter, general conduct of the proceedings, and the time which the Applicant acted for the Respondent.

12. The respondent argued that the instruction fees was re-taxed at Kshs.2,000,000 and at the tail end of her ruling the taxing officer increased the total amount to Kshs.3,000,000. The respondent contended that Kshs.3,000,000 taxed as instruction fees is fair and reasonable considering the valued of the subject matter was Kshs.10,979,069.

13. The sole issue for determination is whether the instruction fees of ksh.2,000,000 is manifestly low as to warrant interference.

14. The taxing master considered the following cases;

1. Nairobi High Court Miscellaneous Civil Application No. 393 Of 2011 *[Kyalo Mbobu T/ A Kyalo and Associates Advocates Versus Jacob Juma](#)* [2015] eKLR where the court sought guidance from *[Joreth Ltd -vs- Kigano Associates](#)* (2002) 1 EA 92 in which the Court of Appeal Set out the guiding principles for increasing fees as follows:

- i. Care and labour required by the Advocate; specify the number and; length of the papers to be perused;
- ii. The nature and importance of the matter;
- iii. The value (where ascertainable) of the subject matter;
- iv. Interest of the parties; and



- v. Novelty of the matter.
2. In *Ochieng, Onyango, Kibet & Ohaga Advocates V. Adopt A Light Limited, Milimani HC Misc Cause No.729 of 2006* Warsame, J stated as follows;

“The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court.

The taxing master must consider the case and labour required in the matter, the nature or importance of the matter.

More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject and when the subject matter is unknown, the court is empowered to make what is available as a point of reference. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the court sitting on appeal will intervene only in exceptional circumstances.”

15. I find that it is not in dispute that that the suit was filed in the year 1994 and was concluded in 2017 a period of more than 20 years
16. The applicant has a right to file a reference against the second taxation since there is no bar under the Advocates Remuneration Order to an Applicant who wants to proceed by way of a second reference on different grounds.
17. have considered the nature of the brief and I find that it was complex.
18. The applicant said that the matter was in the public domain and had political overtones and this issue is not disputed by the respondent.
19. There is a dispute on the amount of the settled sum. The applicant said the sum was substantial in the tune of Kshs.55,527,739 but the Taxing officer based the instruction fees on a sum of Kshs.10,979,063/-.
20. I find that the Taxing master ought to have considered all the relevant factors, to wit; the nature and importance of the matter, documentation involved, responsibility entrusted on counsel, complexity of the matter, general conduct of the proceedings, and the time which the Applicant acted for the Respondent.
21. In the case of *Paul Ssemogerere & Olum vs. Attorney General* - Civil Application No.5 of 2001 [unreported], the Court held as follows;

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the Taxing Officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the Taxing Officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that Courts would remain accessible to only the wealthy. Also while the Taxing Officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any,



in the value of money. It is because of consideration for this intricate balancing exercise that Taxing Officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference.”

22. The amount awarded was too low and I find that a compelling reason to warrant interference.
23. There is a dispute on the settlement sum and the Taxing master ought to have considered the other factors stated above in awarding the instruction fees.
24. I enhance the instruction fees from 2,000,000 to Kshs.5,000,000.
25. The reference is allowed with costs to the applicant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

