



**Kenga t/a Kenga & Company Advocates v Chimega the representative
of Florence Chimega (Deceased) (Miscellaneous Application
E056 of 2021) [2023] KEHC 1017 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E056 OF 2021
SM GITHINJI, J
FEBRUARY 16, 2023**

BETWEEN

**WILLIAM CHENGO KENGA T/A KENGA & COMPANY
ADVOCATES. APPLICANT**

AND

**ROSELYNE MWANATUMU CHIMEGA THE REPRESENTATIVE OF
FLORENCE CHIMEGA (DECEASED) RESPONDENT**

RULING

1. The respondent/applicant's chamber summons application dated November 19, 2021 seeks the following orders:
 1. That the decision of the taxing master delivered on October 27, 2021, in so far as the same relates to the reasoning and determination pertaining to the applicant's Bill of Costs dated June 2, 2021 and the consequent Certificate of Taxation issued be set aside.
 2. That this honorable court be pleased to refer the matter back for re-taxation of the applicant's Bill of Costs dated June 2, 2021 with proper and appropriate directions thereon.
 3. That in the alternative, this honourable court do exercise its inherent jurisdiction and be pleased to re-tax the applicant's Bill of Costs dated June 2, 2021 afresh and/or make appropriate directions for taxation afresh.
 4. That the costs of this application be awarded to the applicant.



2. The application is premised on the grounds that the taxing officer's decision on taxation is based on an error of principle resulting to an award that is manifestly excessive. In support of the application is an affidavit sworn on November 19, 2021 by Mr. Gikandi Ngibuini, counsel for the respondent/applicant. He deposed therein that the respondent/applicant was served and opposed the Advocate-client Bill of Costs dated June 2, 2021 which was subsequently taxed in the sum of Kshs. 164,000/- as exhibited in the ruling dated October 27, 2021.
3. The Application is opposed; in the grounds of opposition dated February 3, 2022, the applicant/respondent averred that the application is misconceived, bad in law, vexatious, frivolous, embarrassing, incompetent, prejudicial and an abuse of the court process and ought to be dismissed.
4. The Application was canvassed by way of written submissions.

The Respondent/Applicant's Submissions

5. Counsel submitted that the taxing officer erroneously applied schedule 6 rule 1 of the *Advocates (Remuneration) Order* which specifically deals with ordinary suits and appeals. To him, the appropriate scale in an application for leave to file an appeal out of time as was the case herein, would be under the sub heading "Appeals" part viii of the Advocates Remuneration Order, 2014 which prescribes the basic fee as Kshs. 3000/-.
6. Counsel added that since there was no evidence of payment of V.A.T that item should equally be knocked off. He relied on the case of *National Bank of Kenya Limited v TSS Investments Limited & 3 others* MSA HCC No. 10 of 2016.
7. Counsel urged the court to reassess the Bill of Costs at a figure not exceeding Kshs. 10, 000/-.

The Applicant/Respondent's Submissions

8. Citing, paragraph 11 of the *Remuneration Order*, 2014, counsel for the applicant/respondent argued that the application is premature as the respondent/applicant should have sought reasons on the contested items prior to filing the present application. Counsel added that the application does not disclose the items being objected to and on what grounds as stipulated under paragraph 11 of the *Remuneration Order*. He relied on the case of *Tom Ojienda v County Government of Meru* cited in the case of *National Bank of Kenya Limited* MSA HCCC No. 10 of 2016.

Analysis and Determination

9. I have considered the application, the grounds of opposition and submissions; the sole issue for determination is whether there are sufficient grounds to warrant this court to interfere with the taxing officer's ruling dated October 27, 2021.
10. In the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal stated that: -

“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.”

Further, the Court of Appeal explained;

“It is true that the taxing officer did not record the reasons of the decision on the items objected to after the receipt of the respondent's notice. It seems that the taxing officer



decided to rely on the reasons in the ruling of taxation dated 24th February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.”

11. It is now settled that an Advocate-client bill attracts V.A.T as envisaged under section 5 of the *Value Added Tax Act*, 2013. The Respondent/applicant’s argument to knock off V.A.T lacks legal basis. Onguto J (as he then was) in *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR explained;

“On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the applicant herein by the respondent herein. The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other. True, legal services were rendered but it is not the Advocate who was being compensated herein. The Master could only have awarded VAT if the Bills were Advocate- Client Bills or if there was tendered evidence before the Master that the plaintiff had paid VAT and was consequently entitled to indemnity. But yet that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred. In the result, I would not return the Bills to the master for re-assessment but would direct that the item of VAT be completely and wholly taxed off”

12. The respondent/applicant’s case is that the Bill of Costs being the result of an outcome of an application for leave to file appeal out of time, the appropriate scale under the *Advocates Remuneration Order*, 2014 would have been paragraph viii under the sub-heading Appeals on schedule 6. That relevant part reads:

“Appeals

- (a) To present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs 25,200
- (b) To counter-claim, a fee under subparagraph (a) or (b), as appropriate
- (c) Matters arising during proceedings—
...
(viii) to present or oppose any other application not otherwise provided for...”

The Taxing Officer identified the taxing provisions as Schedule 6 Paragraph 1 “Other Matters” of the *Advocates Remuneration Order* (2014) which provides as follows:

“Other Matters ;-



To sue or defend in any case not provided for above; such sum as may be reasonable but not less than—...”

13. In my view, an application for leave to appeal out of time, as correctly argued by the respondent/applicant, is not an appeal. It is an application that comes before an appeal. It does not fall within the scope of matters arising during appeal proceedings. It would not therefore be proper to rely on the scales provided under that paragraph on “Appeals”. In the circumstances, I am inclined to find that the taxing master did not err in relying on paragraph 1 on “Other Matters” as she did.
14. The outcome is that the application lacks merit and is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF FEBRUARY, 2023.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Gikandi Ngibuini for the Applicant

Mr Chengo for the Respondent

