



Makecha & Gitonga Advocates v Standard Group PLC (Miscellaneous Civil Application E081 of 2021) [2023] KEHC 551 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E081 OF 2021**

DK KEMEL, J

FEBRUARY 2, 2023

BETWEEN

MAKECHA & GITONGA ADVOCATES APPLICANT

AND

THE STANDARD GROUP PLC RESPONDENT

RULING

1. This ruling arises from a taxation by Hon. E.N. Mwenda. By his decision issued on 11th April 2022, the learned Taxing Officer taxed the Applicant/Advocate's costs in the total sum of Kshs 236, 442.10/=.
2. Aggrieved by the said decision, the Advocate lodged this reference vide Chamber Summons dated 22nd April 2022 on 25th April 2022, seeking an order that the said decision with respect to the taxation be varied or set aside and that the cost of this reference be borne by the Respondent/Client. The summons was premised on the grounds that the learned Taxing Officer erred in principle while taxing the Bill of Costs and in particular failing to apply the correct principles and awarding costs that were manifestly low to cause an injustice to the Applicant/Advocate.
3. According to the supporting affidavit, the Bill of Costs dated 26th October 2022 in the amount of Kshs. 967, 154.28/= was taxed by the learned Taxing Officer at Kshs. 236, 442.10/= and that the learned Taxing Officer erred in awarding Kshs. 135, 119/= as the instruction fees which amount was manifestly low in the circumstances of the case.
4. Upon perusal of the court record, it is noted that no response to the summon was filed by the Respondent/Client
5. Although it was indicated that the Applicant/Advocate filed their submissions, there are no such submissions on record and that the Respondent/Client also did not file its submissions.



6. This Court proceeded to fix the application for ruling and parties were instructed to file and exchange submissions.
7. I have considered the foregoing and this is the view I take of the matter.
8. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that 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; (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; (3) if the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and that the court is not entitled to upset a taxation because in its opinion, the amount awarded was high; (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary; (5) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it; (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees; (7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya v Shah and others* [2002] 1 EA 64.
9. The position was reiterated in *Karen & Associates Advocates v Caroline Wangari Njoroge* [2019] eKLR, in which the court cited the decision of the court in *Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt A Light Ltd.* HC Misc 729 of 2006 where the court stated that;

“...The taxing master must consider the case and the 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 a brief 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...”
10. In the same case, it was held that:

“The law gives the taxing master some leeway but like all discretions, it must be exercised judiciously and in line to the material presented before court.”
11. It has also been determined that the court should only intervene with the decision of the taxing officer if there is an error in principle and not in matters of quantity, as the taxing officer is more knowledgeable and suitable for making such assessments. The court will only take action in exceptional cases and should not take into account any multiplication factors when assessing costs. The costs should not be so high as to limit access to the court for those who are not wealthy. A successful litigant should be fairly reimbursed for their incurred costs, the general level of reimbursement for advocates should be sufficient to attract new individuals to the profession, and awards should be as consistent as possible. Each case should be evaluated on its own merit and factors such as the value of the property in dispute



should be taken into account. The instruction fees should reflect the amount of work done by the advocate and, when relevant, the subject matter of the case and economic conditions. It is important to consider a hypothetical counsel who is capable of handling the case effectively but unwilling or unable to demand a high fee. The fee this hypothetical counsel would accept for the case is important to consider. It is crucial that advocates are motivated, but it is also in the public interest to keep costs reasonable so that justice is accessible to all, including those who are financially disadvantaged.

12. Additional guidance on the issue of determining the value of the subject matter for the purpose of taxing a bill of costs may be found in the case of *Joreth Limited v Kigano & Associates* [2002] 1 EA 92 at 99. In this case, the Court of Appeal held that the value should be determined from the pleadings, judgment or settlement, if available, but if it is not possible to determine the value, the taxing officer has the discretion to assess an instruction fee that they consider just, taking into account factors such as the nature and importance of the case, the interests of the parties, the general conduct of the proceedings, any direction from the trial judge and all other relevant circumstances. It is not within the purview of a judge to re-tax the bill. If the judge concludes that the taxing officer has made an error in principle, the bill should be referred back to the same or another taxing officer for re-assessment with appropriate instructions. The judge should not interfere with the assessment of costs by the taxing officer unless the officer has made an error in principle. In principle, the instruction fee is a one-time, static fee that is not affected or determined by the stage of the case. The taxing officer's role is to carry out their function of assessing bills of costs and they are an officer of the superior court appointed to tax bills of costs.
13. In *Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna* [2006] eKLR, Ojwang J. (Retired), expressed himself inter alia 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. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state 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. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it



must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs...”

14. While remitting the matter for fresh taxation, the learned Judge in the above matter gave the following guidelines:

- i. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;
- ii. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;
- iii. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
- iv. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;
- v. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
- vi. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;
- vii. where responsibility borne by advocates is taken into account, its nature is to be specified;
- viii. where novelty is taken into account, its nature is to be clarified;
- ix. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.

15. I wish to add that the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another. I therefore agree with the decision in *Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W’Njuguna & 6 Others* (2006) eKLR that:

“... It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria...”

16. And that:

“...it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed costs...complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction...if novelty is involved in the main proceedings the nature of it must be identified and set out in a conscientious mode...if the conduct



of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming, the details of such a situation must be set out in a clear manner...”

17. I note from the ruling of the learned Taxing Officer that the Advocate/Applicant indicated that the claim was a straightforward copyright infringement issue and it did not proceed to trial as the same was dismissed for want of prosecution. It was on that basis that the learned Taxing Officer, while relying on Schedule V of the [Advocates Remuneration Order](#) exercised his discretion and awarded Kshs 100,000/ = as instructions fees.

18. As was held in *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64, the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it. In *Opa Pharmacy Ltd v Howse & McGeorge Ltd* Kampala HCMA No. 13 of 1970 (HCU) [1972] EA 233, it was held:

“Whereas the taxing officer is given discretion of taking into account other fees and allowances to an advocate in respect of the work to which instructions fees apply, the nature and importance of the case, the amount involved, the interest of the parties, general conduct of the proceedings and all other relevant circumstances and taking any of these into consideration, may therefore increase the instruction fees, the taxing officer, in this case gave no reason whatsoever for doubling the instruction fee. Had the taxing officer given his reasons at least there would be known the reason for the inflation. As it is he has denied the appellant a reason for his choice of the figure, with the result that it is impossible to say what was in the taxing officer’s mind. The failure to give any reason for the choice, surely, must, therefore, amount to an arbitrary determination of the figure and is not a judicial exercise of one’s discretion.”

19. The principles guiding taxation were similarly reiterated by the Court of Appeal of Uganda in [Makula International v Cardinal Nsubuga & Another](#) [1982] HCB 11 where the court pronounced itself as follows:

“The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.”

20. Ultimately, it appears that the deciding factor for the learned Taxing Officer was the lack of evidence provided to justify the fees being claimed by the Advocate/Applicant. The officer relied on Schedule V of the [Order](#), which outlines two methods of calculating fees. Part I of the schedule allows an advocate to charge fees at an hourly rate or rates agreed upon with their client. In Part II thereof, it is stated that:

Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.



21. In this case, the Advocate/Applicant, did not avail any documents to ascertain whether there was a clear indication from their end to the Respondent/Client on the exact legal fees they aim to charge for their professional skills. A perusal of the court record does not indicate that such document exists. According to the Advocate/Applicant, the owed instruction fees was Kshs. 500,000/=.
22. It is not in doubt that the matter was dismissed for want of prosecution and it is clear from precedents that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable, the learned Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.
23. The learned Taxing Officer gave his reasons for the taxation and applied his discretion based on his incapability to ascertain the subject value of the claim. I do concur with his reasoning on the ruling that the matter at hand was a straightforward copyright infringement claim. I believe the awarded instruction fees took into consideration the amount of work put in by the Advocate/Applicant in advancing his client's case.
24. In the result, i find that the learned Taxing Officer did not commit an error of principle or wrongly exercise his discretion when he assessed the instruction fees payable to the Applicant/Advocate at Kshs. 100,000/=. This reference lacks merit. It is hereby dismissed with costs to the Respondent/Client.
- 25 It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF FEBRUARY, 2023

D.K. KEMEI

JUDGE

In the presence of:

No appearance for Mwangi for Applicant/Advocate

No appearance for Respondent/Client

Kizito Court Assistant

