



Njeru Nyaga & Company Advocates v Majestic Security Systems Limited (Miscellaneous Application E006 of 2022) [2023] KEHC 762 (KLR) (Judicial Review) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E006 OF 2022
AK NDUNG’U, J
FEBRUARY 9, 2023**

BETWEEN

NJERU NYAGA & COMPANY ADVOCATES APPLICANT

AND

MAJESTIC SECURITY SYSTEMS LIMITED RESPONDENT

RULING

1. The Application before this court is by way of a Chamber Summons dated 28th March 2022, under Rule 11(1) and (2) of the *Advocates Remuneration Order*. The Respondent’s (Majestic Security Systems Limited) sought for the orders:
 - i. That this Honourable Court be pleased to allow this reference against the decision on taxation of the Taxing Officer Honourable E.C. Chelule made on 15 March, 2022.
 - ii. That the Ruling on Taxation delivered by the Taxing Officer Honourable E.C. Chelule on 15th March, 2022 with respect to item 1 on instruction fees of the Bill Applicants of Costs dated 21st December, 2021 be set aside.
 - iii. That item 1 of the Applicant’s Bill of Costs dated 21st December, 2021 be assessed by this Honourable Court in such other sums as may appear to be reasonable.
 - iv. That in the alternative, this Honourable Court remits item 1 of the Applicant’s Bill of Costs dated 21st December, 2021 to another Taxing Officer for re-taxation.
 - v. That cost of and occasioned by this Reference be provided for.
2. The Application was supported by the Affidavit sworn by Rahab Karei Mukiyama, the Director of the Respondent Company. In sum, it was the Respondent’s case that on 21st December, 2021 the



Applicant filed their Bill of Costs which was taxed, ex-parte before Honourable E.C Chelule on 23rd February 2022 (sic). The Respondent aggrieved by the said Ruling on taxation and in particular on item 1 on instruction fees, filed this instant Application/Reference.

3. The grounds relied on were that the Learned Taxing Officer failed to take into consideration the nature of the matter, the actual work done, the interests of the parties, as well as the general conduct of the proceedings in assessing item 1 of Bill the Applicant's Bill of Costs.
4. The Respondent maintained that the Bill of Costs emanated from Judicial Review No. 424 of 2016 where it (Respondent) was named as an Interested Party, and supported the Judicial Review Application, where no substantive orders were sought against them (Respondent) therein. According to the Respondent, the Taxing Officer proceeded on the erroneous assumption that they (Respondent) opposed the judicial review application, hence committing an error in principle in taxing the instruction fees at Kshs. 150,000/=, an amount which was grossly excessive and premised on a wrong exercise of discretion.
5. That despite finding that the matter was not complex or novel, the learned Taxing Officer awarded an amount of instruction fees that was inexplicably and manifestly non justified; and save to state that the amount awarded was based on the work done by the Applicant, the Taxing Officer erred in principle by failing to specify the nature of responsibility borne by the Applicant's counsel.
6. In response, and opposing the Application(Reference), the Applicant's (Njeru, Nyaga & Co. Advocates) through their Replying Affidavit dated 26th April 2022, averred that it represented, as advocates, the Respondent in Misc. Application No. 424 Of 2016 case where judgment was delivered on 25th January 2018. That the Respondent did not appear in court to contest the Bill of Cost despite service; and that the Respondents do not dispute being offered legal service by the Applicant. The applicants hold the position that legal fees are due once instructions are given and asked for a valuation of the land at current value to justify the value and scope of work done. The Applicant maintained that the Respondent has failed to pay the moneys owed to them and asked this court not to set aside the Taxed Bill of Cost.
7. In advancing their cases, the parties filed written submissions. The Respondent in supporting the Application through their written submissions dated 7th July 2022 conceded that taxation is a discretionary power and should be exercised judiciously. It is a power which is bestowed upon the taxing officer and guided by well laid down rules and settled principles in accordance with Rule 16 of the *Advocate Remuneration Order*. That however, the taxing master did not exercise her discretion judiciously. Reliance was placed on the cases of *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W Njuguna & 6 others* [2006] eKLR, and *Republic vs Kenyatta University & Another, Ex parte Wellington Kihato Wamburu* [2018] eKLR.
8. The Applicants (Njeru, Nyaga & Co. Advocates), in opposing the Application, filed their written submissions dated 28th July 2022. It was their submission that the Taxing Officer judiciously exercised her discretion in accordance with Rule 16 of the *Advocate Remuneration Order* in the 15th March 2022 ruling. That the Taxing officer was well guided by the principles in the case of *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR quoting the case of *Eastland Hotel Limited v Wafula Simiyu & Co. Advocates NRB CA Civil Appeal No. 105 of 2014* [2014] eKLR.
9. Further, that the Court of Appeal in the case of *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 (2005) eKLR, discussed the principle followed in dealing with a reference.



10. I have considered the Application, response, and party's submissions. The issue for determination is whether the Taxing Master applied the correct legal principles in her assessment of the Instruction fees awarded.
11. The Respondent is disputing the decision of the Taxing Master delivered on 15th March 2022 with respect to item 1 on instruction fees. The grounds relied upon are that the Learned Taxing Officer failed to take into consideration the nature of the matter, the actual work done, the interests of the parties, as well as the general conduct of the proceedings in assessing item 1 of the Applicant's Bill of Costs.
12. It is now trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In *Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W' Njuguna* [2006] eKLR, Hon. Justice J.B. Ojwang (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 interference that it was based on an error of principle.” [Emphasis mine]
13. Differently put, before the court can interfere with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong. This means that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling.
14. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well settled. The court in the case of *First American Bank of Kenya vs. Shah and Others* [2002] 1 EA 64 set the applicable principles. 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 practise 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 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. The position was reiterated in *Karen & Associates Advocates vs. Caroline Wangari Njoroge* [2019] eKLR, in which the Court cited the decision of the Court in *Ochieng, Onyango, Kibet and Ohaga Advocates vs. Adopt 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...”

In the same case, it was held that:

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

15. The nature of the suit to which the subject costs relate was a judicial review application seeking prerogative orders. The fees chargeable thereof are provided for under 6A(1)(j)(ii) of the *Advocates Remuneration Order* which provides:

“Where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000.”

16. In her assessment of the instructions fees, the Taxing master expressed herself as follows:

“The suit in question was filed on the 9th of September 2016 and a final determination of the same was made on the 25th January 2018. This matter therefore was disposed off (sic) within one and a half years of filing. The Applicant has not set out any particular factors that rendered the matter complex as to warrant an increase in the figure as provided under schedule 6 (1)(j).

I have carefully considered the instructions fees sought vis-a-vis the time in which the suit was determined and the work done by the Applicant herein and I am satisfied that the sum of Kshs 150,000/- is reasonable in the circumstances. (emphasis added).

I hereby tax off Kshs 72,750/-”

In *Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna* (supra) Ojwang, J (as he then was) while remitting the matter for fresh taxation in a judicial review matter observed that;

1. 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;



2. The taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
 3. The taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;
 4. So far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
 5. Objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
 6. 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;
 7. Where responsibility borne by advocates is taken into account, its nature is to be specified;
 8. Where novelty is taken into account, its nature is to be clarified;
 9. Where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form. (emphasis added).
17. It follows then, that it is not enough for a Taxing Master to give a general narrative of complexity of a matter, the scope, the level of responsibility, novelty of the matter, time spent, research done or skill deployed. The Taxing Master must employ some degree of specificity. Only then can the exercise of discretion to increase or decrease fees be said to have been exercised judiciously as per the demands of the law. As held in *Republic -vs- Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'njuguna & 6 Others* (*supra*);
- “... 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.....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...”
18. In the instant matter, and applying the above criteria, despite the Taxing Officer clearly making a finding that no particular factors were set out rendering the matter complex, still went ahead to allow an enhanced figure in instruction fees beyond the set Ksh. 100,000 under the relevant remuneration schedule. Without any justification for enhancement of the instruction fee, the Taxing Officer wrongfully exercised discretion and this creates a fertile ground for this court to interfere with the exercise of the discretion.



19. With the result that the Chamber Summons dated 28th March 2022 is successful. The finding made by the Taxing officer in respect of instruction fees payable is set aside. I proceed to tax the instruction fee at Ksh 100,000. All other items in the bill of costs as taxed by the Taxing officer, which in any event were not challenged, remain undisturbed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

A.K. NDUNG’U

JUDGE

