



**William Chengo Kenga t/a Kenga & Company Advocates v Chimega (the Representative of Florence Chimega - Deceased) (Miscellaneous Application E055 of 2021) [2023] KEHC 955 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E055 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 19<sup>th</sup> November 2021 seeks the following orders:
  1. That the decision of the taxing master delivered on 27<sup>th</sup> October 2021, in so far as the same relates to the reasoning and determination pertaining to the Applicant's Bill of Costs dated 2<sup>nd</sup> June 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 2<sup>nd</sup> June 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 2<sup>nd</sup> June 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 19<sup>th</sup> November 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 2<sup>nd</sup> June 2021 which was subsequently taxed in the sum of ksh 314,000/- as exhibited in the ruling dated 27<sup>th</sup> October 2021.

3. The Application is opposed; In the grounds of opposition dated 3<sup>rd</sup> February 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(a) and (b) of the Advocates (Remuneration) Order which specifically deals with the prosecution or defence of a suit and not an appeal as it was in the present case. That the appropriate law applied in an appeal is schedule 6 rule 1 (j). Counsel urged the court to allow instruction fees at ksh 50,200/-; items 6, 12 and 28 of the Bill of Costs at ksh 1665/- as it were; and item 7 (d) at ksh 1900.
6. It was counsel's submission that there was no provision for adding up half of the fees in an appeal and that that amount should be struck off. Regarding VAT, counsel argued that there being no receipt of the same, it is thus not payable. He relied on the cases of *National Bank of Kenya Limited v TSS Investments Limited & 3 others* MSA HCC no 10 of 2016; *Republic v Ministry of Agriculture & 2 others Ex-parte Samuel Michiri W'Njuguna & 6 others* [2006] eKLR; *Saqib Shabbaz & 2 others v Kenya Revenue Authority & 2 others* [2021] eKLR.
7. Counsel urged the court to reassess the Bill of Costs at a figure not exceeding ksh 121, 265/-.

### **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. After considering the application, the grounds of opposition and submissions, the singular issue for determination is whether there are sufficient grounds to warrant this Court to interfere with the taxing officer's ruling dated 27<sup>th</sup> October 2021.
10. 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 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 24<sup>th</sup> 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. In this case, the Respondent/Applicant raises issue with item no 1 of the Bill of Costs and the award for VAT. On the former, the argument is that the taxing officer relied on the wrong principles. To the Respondent/applicant the appropriate scale in an appeal such as this one would have been schedule 6 paragraph 1 (j) which provides:

“To present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than ksh 25,200. /=”

12. The Taxing Officer identified the taxing provisions as Schedule 6 Paragraph 1(b) of the *Advocates Remuneration Order* (2014) which provides as follows:

“(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and...(Emphasis mine).”

13. The above provisions are vivid; the value of the subject matter having been determined from the settlement between the parties, I find no basis in the Respondent/applicant’s argument on the applicable provisions of the law.

14. Regarding VAT, it is now settled that an advocate-client bill attracts VAT as envisaged under section 5 of the *Value Added Tax Act*, 2013. I am particularly guided by the decision in *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR where Onguto J (as he then was) stated;

“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”

15. The bill in question is an advocate-client bill, I therefore find that the taxing officer was correct in awarding VAT as she did.



16. In the premises, I find the application unmerited and is hereby dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**S.M. GITHINJI**

**JUDGE**

**In the presence of; -**

Mr Gikandi Ngibuini for the Applicant

Mr Kenga for the Respondent

