



**Zadok Furniture Systems Limited v Lubulellah & Associates  
Advocates (Miscellaneous Civil Application E082 of 2021)  
[2023] KEHC 1363 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E082 OF 2021  
A MSHILA, J  
FEBRUARY 10, 2023**

**BETWEEN**

**ZADOK FURNITURE SYSTEMS LIMITED ..... APPLICANT**

**AND**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

**Background**

1. Before the Court are two Applications to be canvassed together. The 1<sup>st</sup> Application is a Chamber Summons dated February 7, 2022 which was brought under Paragraph 11(2) of the [\*Advocates Remuneration Order\*](#) for orders that;
  - a. The decision/Ruling of the Taxing Officer delivered on 14<sup>th</sup> January, 2022 on the Respondent's Advocate-Client Bill of Costs dated 4<sup>th</sup> February, 2021 be set aside and/or reviewed as it relates to the reasoning and determination pertaining item numbers 1, 2, 3, 5, 15, 16, 21, 22, 35, 63, 64, 68, 72, 76, 86, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 116, 120 and 123 on the Applicant's Bill of Costs.
  - b. The Court to re-assess the instruction fees due to the Advocate/Respondent in respect of item No. 1 of the Advocate-Client Bill of Costs dated 4<sup>th</sup> February, 2021 and make a fresh finding on the same.
  - c. In the alternative and without prejudice to the foregoing, the Court to remit the Advocate-Client Bill of Costs dated 4<sup>th</sup> February, 2021 for review and reconsideration by the Taxing



Officer with appropriate directions in respect of items 1, 2, 3, 4, 5, 9, 10, 13, 16, 18, 22, 23, 25, 28, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 65 and 69 thereof.

- d. The Court to adjust the figures and re-assess the costs due to the Advocate/Respondent in the taxation cause as is presented in the Client/Applicant's submissions dated and filed on October 29, 2021.
  - e. The costs of this Application be provided for.
2. The Application was supported by the sworn Affidavit of Abdirizak Roba who stated that the Taxing Officer erred both in law and in fact by failing to consider and/or take into account payments that the Client had already paid to the Advocate and proved by documentary evidence.
  3. The Taxing Officer acted contrary to well-settled principles of law and also misdirected herself on the applicable principles of law.
  4. The Taxing Officer abused her discretion by awarding a grossly excessive instruction fees to the Advocate Respondent herein.
  5. The Taxing Officer misdirected herself on her discretion and awarded an instruction fee which is manifestly high as to amount to unjust enrichment of the Advocate.
  6. The Respondent's Advocate-Client Bill of Costs dated February 4, 2021 arose from instructions to act for the Client in Milimani High Court Commercial Case No. 462 of 2013: *Zadok Furniture Systems Ltd. & Another v Fina Bank & Another*, the subject matter being a loan facility for Kshs 65, 000, 000, and for instructions to act for the Client in a counterclaim. In the said Bill of Costs, the Advocate sought a total of Kshs 7, 717, 322.14 from the Client herein.
  7. The Taxing Officer considered the Bill of Costs together with responses and submissions from the Applicant herein and delivered a Ruling on 14<sup>th</sup> January, 2022 in which she taxed the said Bill at Kshs 5, 202, 260.53.
  8. It is in the interest of justice and fairness that the Court grants the orders sought.
  9. The 2<sup>nd</sup> Application is a Notice of Motion dated February 23, 2022 brought pursuant to Section 51 of the *Advocates Act* Chapter 16 of the Laws of Kenya; Rule 13A Advocates Remuneration Rules; Section 3A, 63(e) of the *Civil Procedure Rules*; and Order 41 rule 1 of the Civil Procedure Rules. The Applicant sought the following orders;
    - a. The Court to enter Judgment against the Respondent on the amount of Kshs 5,202,260.53/- certified on the Certificate of Taxation herein dated January 27, 2022, together with interest at the rate of 14% per annum from February 17, 2021, being the date of service of the bill upon the Respondent, until payment in full.
    - b. A Decree issues in respect of the sum of Kshs 5, 202, 260.53 certified on the Certificate of Taxation dated January 27, 2022, together with interest at the rate of 14% per annum from the February 17, 2021 until payment in full, and that the Applicant be at liberty to execute for recovery of same in such manner as a Decree of this Court.
    - c. The costs of this Application be provided for.
  10. The Application was supported by the sworn Affidavit of Eugene Lubale Lubulellah who stated that the Advocate's and Client Bill of Costs herein has been taxed and a Certificate of Taxation issued therefrom. The Advocates wish to proceed and realize the costs taxed herein by way of execution hence



judgment and Decree are required therefrom. It is therefore just and fair that the orders sought herein be granted.

### **Applicant's case**

11. It was the Applicant's case that the Award of Instruction Fees of Kshs 1, 300, 000/= and total of Kshs 5, 202, 260.53/= Awarded by The Taxing Officer on the Advocate's Bill of Costs is so manifestly high/excessive that it amounts to an injustice to the Client/Applicant
12. The Applicant submitted that the taxing officer considered the number of years the matter had been in Court in increasing the instruction fees. This amounted to a consideration of irrelevant factors which led to the taxing master awarding grossly excessive instruction fees.
13. Further, the learned taxing officer awarded instruction fees twice both on the original instructions and on the counterclaim, thereby running into or making an error of principle and awarding manifestly excessive fees on the Advocate's Bill of Costs. It is trite law that instruction fees are a static item and ought to be awarded or taxed only once.
14. On the issue of costs of the Client's application, the Applicant submitted that the Court ought to be guided by the legal principle under Section 27 of the *Civil Procedure Act* that costs follow an event, are granted to the successful party, and the Court has absolute discretion (to be exercised judicially) whether or not to award costs. It is thus the Applicant's submission that since the Client has demonstrated the merits of its application by showing that the taxing officer erred both in law and fact, the Client is entitled to the costs of this application as the successful party.
15. The Advocate sought judgment and decree in the sum of Kshs 5, 202, 260.53/= together with interest at the rate of 14% per annum from February 17, 2021 until payment in full. The interest awardable to the Advocate ought to be at Court rates (14%) per annum from 30 days after the date of service of the Bill of Costs upon the Client and not from February 17, 2021 as indicated by the Advocate. In support of this proposition, Rule 7 of the *Advocates Remuneration Order* provides that: -

“ An Advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full”
16. The Applicant submitted that should the court allow the Advocate's application, the interest on the decretal sum ought to be calculated from the date of the delivery of a ruling on the Client's reference.

### **Respondent's case**

17. It was the Respondent/Advocate's case that the Bill of Costs as drawn and filed reflects the value of the instructions, the subject matter, the complexity of the matter, the requisite professional skill, the volume of documents involved, the time and diligence expended and overall is fair in every aspect. Therefore, this fee ought to be increased, and was increased, 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 of the case.
18. In *Peter Muthoka and Another v Ochieng Onyango Kibet and Obaga* [2010] eKLR, it was held that in suits where a party is seeking orders against a bank exercising its Statutory Power of Sale the value of the subject matter is the value of the suit property in question and not the value of the accrued debt.



19. Accordingly, had the Taxing Master actually based the value of the subject matter upon the true, disclosed and pleaded value of the suit property being Kshs 90,000,000 as verified and pleaded by the Client itself, and not the lesser sum of Kshs 39,400,000, as she did, the Taxing Master would have actually arrived at a much higher instruction fee which would have been the true and applicable instruction fee.
20. The Learned Taxing Officer correctly applied her mind by appreciating the value of subject matter, its complexity, industry put and time taken on the matter, so as to arrive at a fair remuneration that is commensurate to the work done by the Advocate, and that is why she exercised her discretion to increase the instruction fee by a small margin.
21. Further to the above, it is trite law that a Counter-Claim is a Separate and Independent suit from a claim by a claimant and is subject to a separate instruction fees. In the case of *Odera Obar & Co. Advocates v U Design & 2 others* [2016] eKLR, the court held that the instruction fees in respect to the counter-claim is independent of the instruction fees in relation to the plaint. Likewise, in the case of *Kagwimi Kang'ethe & Co Advocates v Nairobi Mamba Village Limited* [2015] eKLR, the court held that the Taxing Master proceeded on the correct principle that the Plaint and Counter-claim were separate claims and could stand independent of each other.
22. It was the Respondent's submission that the Applicant erroneously submitted that because the Advocates firm was not the first on record in the underlying suit, it is not entitled to full instruction fees. Quite to the contrary, the law is quite trite that an advocate is entitled to full instruction fees once instructed, and the outcome or stage of proceedings reached are irrelevant. The issue of there having been other Advocates on record for the client before Lubulellah & Associates does not in law disentitle Lubulellah & Associates to full fees in the Client's matter.
23. It was the Respondent's submission that the monies allegedly paid by the Client to the personal account of a former partner of the Advocate firm of Lubulellah & Associates Advocates, are not and cannot be legally recognized as money received by the firm in the ordinary course of business ("client's money"), as the same were never deposited into the firm's Client Account but rather were deposited into a former partner's Personal Account.
24. The Respondent argued that the consequence of an Advocate receiving a client's money into his personal account is that the said advocate will be personally liable to refund the said money to the client as was held in the case of *Henry Kipkorir Kimutai v Weda Ambrose Otieno & another* [2018] eKLR.
25. The issue of interest on an Advocates taxed costs is premised under Rule 7 of the Advocates Remuneration Order and it is settled that such interest be computed one month from the date of delivery of the fee note or bill.

### **Issues for determination**

26. After considering both Applications and the written submission, the issues framed for determination are;
  - a. Whether the decision/Ruling of the Taxing Officer delivered on January 14, 2022 should be set aside?
  - b. Whether the Court should re-assess the instruction fees due to the Advocate/Respondent in respect of item No. 1 of the Advocate-Client Bill of Costs?
  - c. Whether the Advocate-Client Bill of Costs dated February 4, 2021 should be remitted for review and reconsideration by the Taxing Officer?



- d. Whether judgment should be entered as per the Certificate of Taxation together with interest at the rate of 14% per annum from February 17, 2021 and a decree issued?

## Analysis

**Whether the decision/Ruling of the Taxing Officer delivered on January 14, 2022 should be set aside; Whether the Court should re-assess the instruction fees due to the Advocate/Respondent in respect of item No. 1 of the Advocate-Client Bill of Costs?**

**Whether the Advocate-Client Bill of Costs dated February 4, 2021 should be remitted for review and reconsideration by the Taxing Officer?**

27. The jurisdiction of this court to intervene in the decision of Taxing Officer, is limited. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal explained 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.”
28. It was the Applicant’s argument that the amount of instruction fees awarded and the total sum awarded to the Advocate is so excessive that it amounts to unjust enrichment of the Advocate.
29. This court can only interfere in the decision of the taxing master if its shown that:
- The taxing master has misdirected himself;
  - Applied wrong principles; and
  - The amount taxed is extremely excessive or extremely low.
30. The above basic principles for taxation matters are set out in the *Premchand Raichand Ltd & Another versus Quarry Services East Africa Ltd* (1972) EA 162. In the words of Spry, VP;
- “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, and particularly where he is an officer of great experience merely because it thinks the award somewhat to high or too low: it will only interfere it thinks that the award is too high or too low as to amount to an injustice to one party or the other”
31. While determining the instruction fee, the Taxing Officer appreciated the law regarding the assessment of the instruction fee as was held by the Court of Appeal in *Joreth Ltd v Kigano & Associates* [2002] eKLR that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and 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. In light of this holding, the Taxing Officer determined the value of the subject matter from the award of the arbitrator of Kshs118, 467, 835.56.
32. The Applicant/Client took issue with the Advocate/Respondent joining the arbitral proceedings midway when other Advocates had already done much of the work thus the Respondent herein was



not entitled to full instruction fees. This court associates itself fully with the holding by the Court of Appeal in *Joreth Ltd v Kigano & Associates* (*supra*) where the Court held that,

“The instructions fees is an independent and static item, it is charged once only and it is not affected or determined by the stage the suit has reached.”

33. Similarly, in *First American Bank of Kenya v Shah and others* [2002] 1 EA. This position was emphasized in *JM Njenga & Co. Advocates v Kenya Tea Development Agency Limited* [2011] eKLR where it was stated that a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee and that a client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates notwithstanding that he can recover only one instruction fee in a Party and Party Taxation unless there is a certificate for more than one counsel.
34. It was also the Applicant’s argument that while it presented documentary evidence of payment of Kshs2, 500, 000/= and Kshs6, 400, 000, the taxing master declined to consider the same in her ruling. Based on the evidence before the Court, some of these payments were made directly to Willy Mutubwa and some payments made to the firm of Lubullellah & Associates. It therefore cannot be said that Willy Mutubwa received funds on behalf of the Respondent. In any event this was not an issue raised in the Notice of Objection.
35. This court, for the above reasons is satisfied that the Learned Taxing Officer correctly applied her mind by appreciating the value of subject matter, its complexity, industry put and time taken on the matter, so as to arrive at a fair remuneration that is commensurate to the work done by the Advocate, and exercised her discretion to increase the instruction fee by a small margin.
36. The Applicant has failed to prove that the Taxing Officer did commit an error in principle in assessing the costs and finds no good reason in setting aside nor remitting the Ruling for review or reconsideration.

**Whether judgment should be entered as per the Certificate of Taxation together with interest at the rate of 14% per annum from February 17, 2021 and a decree issued?**

37. Section 51(2) of the *Advocates Act* reads as follows;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
38. The issue of retainer cannot arise since the Applicant does acknowledge that the Respondent took over the matter halfway. In the Applicant’s words;

“Having joined the arbitral proceedings midway when other Advocates had already done much of the work, the Respondent herein was not entitled to full instruction fees.”
39. The Certificate of Costs having not been set aside judgment be and is hereby entered for the Advocates against the Client for the sum of Kshs 5,202,260.53/- certified on the Certificate of Taxation herein dated January 27, 2022.



40. On the issue of interest, the applicable law is found at Rule 7 of the Advocates Remuneration Order provides that: -

“An Advocate may charge interest at 14% per annum on his disbursements and costs. whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

41. The applicant has not availed any document or stated in the annexed supporting affidavit that it had submitted a fee-note to the respondent indicating that it would attract interest at the rate of 14% per annum;

42. In the case of *Kerongo & Company Advocates vs Africa Assurance Merchant Co. Limited* [2019] eKLR the court held;

‘An advocate who does not provide proof that he had raised the issue of interest before the amount in the Bill of Costs has been paid or tendered in full will not be paid the interest chargeable under Rule 7 of the Advocates Remuneration Order. As the advocates herein had not demonstrated that they had raised the issue of interest as aforesaid, they could not therefore be awarded interest at fourteen (14%) per cent per annum.’

43. Therefore, in line with Rule 7, the applicant is found to have failed to furnish proof that it had raised the claim for interest with the respondent; the prayer for interest at 14% p.a to start accruing one month after 17<sup>th</sup> February, 2021, is therefore disallowed.

#### **Findings and determination**

44. In the light of the foregoing this court makes the following findings and determinations;

- i. The 1<sup>st</sup> application dated February 7, 2022 seeking to set aside or review of the decision/Ruling of the Taxing Officer delivered on January 14, 2022 is found to be devoid of merit and it is hereby dismissed with costs to the Respondent/Advocate.
- ii. The 2<sup>nd</sup> application dated February 23, 2022 is found to be partially meritorious and is hereby partially allowed;
- iii. The Certificate of Taxation dated January 27, 2022 in the sum of Kshs 5,202,260.53 is hereby adopted as a Judgment of this court.
- iv. There shall be no order as to interest at 14% p.a as prayed.
- v. A Decree to issue in respect of the sum of Kshs5,202,260.53 certified on the Certificate of Taxation dated January 27, 2022, and the Applicant shall be at liberty to execute for recovery of the certified costs.
- vi. The Respondent/Client shall bear the costs on both applications.

Orders Accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. A. MSHILA**

**JUDGE**



**In the presence of;**

Wendoh for the Advocates

Kuria for the Client/Respondent

Lucy-----Court Assistant

