



**Friends Church (Quakers) Nairobi Yearly Meeting v Onsongo & Company Advocates
(Miscellaneous Civil Application 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136,
137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154,
155 & 156 of 2019 (Consolidated)) [2023] KEHC 2361 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2361 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

**MISCELLANEOUS CIVIL APPLICATION 124, 126, 127, 128, 129, 130, 131,
132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147,
148, 149, 150, 151, 152, 153, 154, 155 & 156 OF 2019 (CONSOLIDATED)**

RE ABURILI, J

MARCH 17, 2023

BETWEEN

FRIENDS CHURCH (QUAKERS) NAIROBI YEARLY MEETING ... APPLICANT

AND

ONSONGO & COMPANY ADVOCATES RESPONDENT

RULING

1. This judgment is in respect the Client/Applicant's Reference dated 19th November, 2020 seeking the following reliefs:
 - a. The decision of the taxing master made on 27th August, 2020 taxing the bill of costs dated 31st July, 2020 in the sum of Kshs 48, 459.00 be set aside.
 - b. The court finds that the taxing master erred in taxing of Kshs 48,459.00 from item 1 of the advocate-client Bill of Costs Dated 31/8/2020.
 - c. The honourable court be pleased to re-assess the fees due to item No.1 of the advocate-client bill of costs dated 31/7/2020 taxed at Kshs 48,459.00 on 27th August, 2020 and make a finding on the same.
 - d. In the alternative and without prejudice to the foregoing, the costs be taxed afresh before a different taxing master.
 - e. Costs of the application.



2. The Reference is predicated on the fact that the taxing master erred in exercising her discretion to award exorbitant instructions fees contrary to established legal principles in that; she failed to consider the evidence of instructions fee as tabled in court in which it had been agreed that the fees was Kshs 25,200/-, an application for stay was made in the High Court and the fee was only chargeable on that suit and not the stayed suits and finally that the taxing master overlooked the fact that the respondent did not file any pleadings in the suit subject of this Reference nor did he take any steps to prosecute the suit.
3. It was asserted that the professional fees intended to be earned by advocates should be reasonable and lastly that, the taxing master did not indicate any complex elements that required extensive research and the length of time taken on the matter.
4. The respondent filed grounds of opposition to the Reference contending that:
 - a. The Reference is incompetent, abuse of the court process and should be dismissed.
 - b. The decision of the taxing officer did not award costs of the application.
 - c. The taxation and all consequential orders were set aside vide ruling delivered on 18th November, 2021.
 - d. The ruling delivered on 18/11/2021 set aside the earlier ruling of 20/4/2021.
5. The application was canvassed by way of written submissions. Both parties complied.
6. The applicant identified the following issues for determination:
 - a. Whether there is an error on the face of the record in the ruling of the taxing officer dated 27/8/2020.
 - b. Whether the taxing officer erred in taxing the bill of costs where there is a valid agreement.
 - c. Whether the taxing officer erred in her assessment of the advocate-client bill of costs dated 31/7/2019.
7. On the first issue, it was submitted that the taxing officer found that fees had been agreed at Kshs 25,200/- whereas the taxing master erred and made an error by adding VAT of 16% on the value of Kshs 41,775/- instead of Kshs 25, 200/-. That if this is allowed, it will cause harm to the applicant.
8. On the 2nd issue, it was argued that by letter dated 12/11/2014, the parties herein agreed that the fees payable to the respondent in form of legal fees on all the matter under review was kshs 25,200. That since the letter contains the agreement on legal fees, this should be taken as an agreement on fees in terms of Section 45 of the *Advocates Act*.
9. That in the existence of the agreement and the taxing master having acknowledged its existence, the taxing officer acted ultra vires by proceeding to tax the light of the express provisions of Section 45(6) of the *Advocates Act*.
10. On the third issue, it was submitted that the taxing master failed to take into account the relevant factors to wit; the evidence that fees had been agreed upon at 25,200/-, that the advocate did not file any pleadings in the suit subject of the reference nor did he take any steps to prosecute the suit and finally that the taxing master ignored the ruling which upheld the agreement of 12/11/2014.
11. That the taxing master never gave any justification for the award of Kshs 48,459/-and therefore the manner in which the figure was arrived at was through assumptions. Reliance was placed on the case of



Republic v Minister of Agriculture & 2 others Ex parte Samuel Muchiri wa' Njuguna & 6 others [2006] eKLR.

12. On the part of the respondent advocate, it was submitted that the law governing the advocate-client bill of costs is found in paragraph B of Schedule 7 of the *Advocates (Remuneration) Order, 2014*. That in arriving at the figure of Kshs 48,459/-, the taxing officer considered the necessary and proper attendances to the client, court disbursements and correspondences and that the letter dated 12/11/2014 was in reference to each of the suits.
13. On the issue that the reference lacks merit, it was argued that the applicant has failed to demonstrate that the taxing master exercised her discretion injudiciously, improperly or wrongly or that she acted on wrong principles. The respondent advocate relied on the following cases in support of his argument: *Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another* [1972]EA 162, *Visser v Gubb* 1981 (3) SA 753(C) 754H-755C, *Bank of Uganda v Banco Arabe Espanyol* SC Civil Appln 23 of 1999 a per Mulenga J, and *Republic v ministry of Agriculture & 2 others* (*supra*).
14. It was submitted that as per the letter of 12/11/2014, the sum of Kshs 25,200/- was in reference to each suit and the taxing master was alive to this fact.

Analysis and determination.

15. I have considered the parties' respective positions in the matter. The guiding Principles to be applied by this court while sitting on a Reference from the decision of a taxing master were stated in the case of *Republic v Ministry of Agriculture* (*supra*) 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.”

16. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal stated as follows:

“On 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.”

17. In *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] EA 492 it was held that:

“Where there has been an error in principle, the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the Court will interfere only in exceptional cases.”

18. From my analysis, the sole issue arising for determination is whether the learned taxing master erred by assessing the instructions fees at the sum of Kshs 48, 459/= and applying this assessment to all the



other 31 cases filed by the respondent advocate thus Misc Application Nos. 125-156 of 2019, light of the agreement by way of letter dated 12/11/2014 which allegedly fixed the sum at Kshs 25,200/-

19. It is common ground that the regulation of remuneration for advocates falls under the *Advocates Act* and the Advocates (Remuneration) Order. Section 45 of the *Advocates Act* thereof provides that:

“Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

- a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
- b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;
- c. before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

20. The letter stated above is instructive and ought to be examined to ascertain whether the terms indeed fixed the fees for the advocate and whether the said fees is applicable to all the other matters in the series as filed by the respondent advocate.

21. I will first deal with the aspect of whether the orders in this casefile applies to all matters in the series. the answer lies in the court record itself. On 2/1/2019 when this matter came up before Hon Odawo, Deputy Registrar, both parties’ counsel appeared and Mr. Onsongo advocate for the advocate submitted as follows in the presence of Mr. Aron holding brief for Mr. Oluoch for the Client:

“Mr. Onsongo: we had agreed to stand over matters as we negotiate to 13/11/2019. if not, we shall proceed...to apply to whole series.”

“Mr Aron:I confirm.”

Court: Taxation on 13/11/2019. This is to apply to Misc 124/19 up to 156/19. Parties have agreed to put in written submissions if they don’t agree 2/10/19.”

22. On 13/11/2019 when the matter came up for taxation, Mr. Onsongo for the applicant advocate and Mr. Ragot advocate holding brief for Mr. Opondo appeared and Mr. Onsongo submitted that they were negotiating but were unable to agree so the matter should proceed verbally. He asked the court for another taxation date and stated that let this apply to whole series. Mr. Ragot advocate confirmed the position and the Deputy Registrar Hon A. Odawo fixed the matter for taxation on 5/12/2019 stating that similar orders to apply to the whole series.

23. Again, the matter came up for taxation on 5/12/2019 before the Deputy Registrar Hon. B. Omollo who adjourned the taxation to 5/3/2020 as the respondent’/client’s counsel asked for documents intended to be relied on by the advocate applicant who stated that they only had a letter of instruction and which they would supply within a week. The Deputy Registrar directed that similar orders would apply to Misc. Application Nos. 125-156 of 2019.

24. When finally, the parties agreed to canvass the taxation by way of written submissions on 7/7/2020 during the mention on the latter date, the Deputy Registrar observed that the matters had not been



- consolidated hence the series submissions should be filed in each of the 32 matters. On 9/7/2020 Mr. Onsongo Advocate confirmed that he had filed submissions in all the series matters and Mr. Opondo counsel for the respondent client agreed that a date for ruling could be fixed and the same was fixed for 27/8/2020 with an order that similar orders to apply to HC Misc 125-145;147 to 156 of 2019.
25. It is on that basis that vide her ruling of 27/8/2020, the Deputy Registrar taxed the bill of costs in this matter.
 26. Later on 01/12/2020, parties' advocates were present and Ms Mumbembe counsel for the client respondent requested the court to make an order for consolidation of this matter with Misc 126-156 of 2019 leaving out Misc 125 of 2019 as it arose from the matter in the High Court unlike the rest of the matters in the series. Mr. Onsongo counsel for the advocate applicant conceded and by consent, the matters were accordingly consolidated except Misc 125 and 146 of 2019, the latter matter having been transferred to Kericho.
 27. It should be noted that the consolidation was done after the taxation of advocate client bill of costs in this file and which taxation order is what was the subject of this reference which was initially challenged by the advocate on account that it was incompetent and that it was filed late hence the ruling by Hon Justice Ochieng delivered on 20th April, 2021 to the effect that the reference was not incompetent.
 28. Having found that throughout the proceedings herein the parties agreed to have this file act as the lead file and orders therein to apply to all matters in the series 125-156 of 2019 and having found that this matter was consolidated with all the other matters in the series Misc 126-156 except Misc 125 and 146 of 2019, I find that the orders that were made on taxation in this matter applied to all matters in the series and therefore any orders that I shall make in this matter shall apply to all the matters in the series with necessary modifications. With regard to the two files which were not consolidated, the orders shall apply to each of those files with necessary modifications to the respective files.
 29. I now proceed to consider the letter which is alleged to have fixed the advocate client legal fees. The relevant part of the letter is paragraph 7 which states as follows:
 - a. An amount of Kshs 50,000/- has been disbursed on cheque number 100198 dated 9th September, 2014.
 - b.
 - c. Your instruction fees of Kshs 25,000/- and additional amounts depending on the number of attendances in court already made and disbursements are acceptable to us.
 30. The taxing officer on her part found and held that:

As per the letter of instructions dated 12th November, 2014 annexed to the applicant's affidavit, the instructions fee was pegged at Kshs 25,200/-
 31. This therefore means that the taxing officer found the letter to have fixed the instructions fees between the advocate and client.
 32. Further, Ochieng J (as he then was) in his ruling of 20th April, 2021 at paragraphs 25-26 held;

However, in the event that I was called upon to determine the merits of the reference, I would begin by making a finding that there was an agreement between the advocate and the client on the issue of instructions fees.



The agreed sum was Kshs 25,200/-.

33. In the above ruling and finding by Ochieng J striking out the reference as had been filed by the client has not been reviewed and or set aside, the learned Judge further found that the Taxing Officer erred by enhancing the Agreed Instructions Fee of Kshs 25,200 to the figure of Kshs 41,775 and stated further that the bill of costs having been between advocate and client, once the same was taxed, there would be no basis for adding thereto one half thereof, to the taxed amount.
34. For the reasons above, I am also persuaded that there was an agreement governing the fees payable between the advocate and the client parties hereto vide the letter of 12/11/2014. The sum fixed therein was Kshs 25,200/=. The advocate has not filed any cross reference asking for enhancement of the taxed bill for this court's consideration.
35. I note that the reason for the dissatisfaction with the figures arrived at by the taxing officer is that upon the taxing officer settling on the agreed instructions fees, she increased it by half and further found that Value Added Tax was chargeable on the fees so she awarded 16% VAT on the total sum which she found to be Kshs 48, 459. It is not clear how she arrived at this figure from my own calculation as no explanation is given and even if there was an explanation then it is not clear. For example, ½ of Kshs 25,200 is Kshs 12,600 whose total is Kshs 37,800. 16% VAT on this total is 6,048 which when added to the total sum is Kshs 43848 and not Kshs 48,459.
36. On the other hand, now that the agreed fees is Kshs 25,200, VAT of 16% on this figure which I find is chargeable would be Kshs 6,300/- thus bringing the entire sum to Kshs 31,500/-. The sum of Kshs 48,459/- is therefore mathematical error caused by accidental slip as the taxing master did not state the purpose of the excess sums of money beyond 31,500.
37. That mathematical error can be rectified under section 99 of the *Civil Procedure Act* on Amendment of clerical or arithmetical mistakes in Judgments, Decrees and Orders, which amendment can be done by the court on its own motion or on application of any of the parties. I therefore find that there was an error apparent in the ruling and order of the taxing master wherein she gave the totals as 48,459 instead of 31,500.
38. In the end, I find the reference dated 19th November, 2019 is merited to the extent stated above and hold that the sum of Kshs 25,200- is the proper instructions fee due to the respondent plus VAT @16% totaling Kshs 31,500 which is due to the advocate respondent. I therefore set aside the order granting Kshs 48,459 and substitute it with an order awarding the advocate a sum of Kshs 25, 200 agreed fees plus 16% VAT total Kshs 31,500/=.
39. The orders made in this ruling apply mutatis mutandis to all the matters in the series as consolidated by this court by consent of parties on 1/12/2019 namely, Misc 126-145, 147-156 all of 2019.
40. These orders shall also apply to the series matters in Misc Civil Application Nos 125 and 146 of 2019 with necessary modifications.
41. As the instructions fees charged in the agreement was so modest, I order that each party do bear their own costs of this Reference.
42. This ruling to be printed and the Order to be extracted and filed in all the series files.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

