



Muri Mwaniki & Wamiti Advocates v Sanlam General Insurance Limited (Civil Miscellaneous Application 228 of 2019) [2023] KEHC 17300 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 17300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION 228 OF 2019**

**HM NYAGA, J
MARCH 16, 2023**

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

SANLAM GENERAL INSURANCE LIMITED RESPONDENT

RULING

- 1 By a Chamber Summons dated November 3, 2021, the Applicant/Advocate has objected to the taxation of its Bill of Costs dated April 1, 2019. The taxation in question was made by Hon EM Analo the taxing officer *vide* his Ruling dated October 14, 2021.
- 2 The Applicant seeks the following prayers;
 1. That This Honourable Court be pleased to set aside the ruling of the Deputy Registrar Hon Analo delivered on October 14, 2021 (hereinafter 'Ruling') and any resultant Certificate of Taxation to the extent that it relates to the reasoning and determination pertaining to taxation of the following items in the Advocate/Client Bill of Costs dated April 1, 2019:
 - a. Item 1
 - b. Items 2-10, 12-26, 29-52, 55-59, 62-66, 69-76, 79-86, 88-89, 101-102, 115-116
 - c. Items 11,28,54,61,68,78,87,97,99,104,106,108,110,112,114,118,120
 - d. Items 27,53,60,67,77,105,107,109,111.
 - e. Items 96,98,103,113,117,119
 - f. Item 123



2. That This Honourable Court be pleased to tax the items of the Bill of Costs dated April 1, 2019 set out in j (a)-(f) above.
 3. That In the alternative to Prayer 2 above, this Honourable Court do remit the items of the Bill of Costs dated April 1, 2019 set out in 1(a)-(f) above to another Taxing Officer for taxation with direction on the taxation.
 4. That the Advocate/Applicant be awarded costs of this application.
- 3 The applicant is supported by the grounds set out on the face of it and the affidavit of Martin G Mwaniki. I will deal with some of the grounds in the course of this Ruling.
- 4 The application/reference was opposed by the Respondent/client who filed a Replying Affidavit sworn by one Sharon Mwasi, a legal officer of the Respondent.
- 5 In a nutshell, the Respondent states that the Taxing Master did not make any errors of principle in assessing the Bill of costs in question and in application of schedule 7 of the [Advocates Remuneration Order](#). That the Taxing Officer correctly taxed off the items that were not provided for under schedule 7 of the [Advocates Remuneration Order](#). That VAT is only payable on instruction fees and not the entire bill. That the Bill of Costs as taxed was not manifestly low and the Taxing Officer rightly used his/her discretion in taxing the Bill of Costs.
- 6 Parties were directed to file Written Submissions but at the time of writing this Ruling , only the Advocate/Applicant had filed theirs.
- 7 A brief history of the matter is necessary. The Advocate/Applicant had represented the client's insured in Yatta RMCC No 161 of 2007 *Duncan Musembi Mutisya vs Daniel Muthee Ngatia and 2 Others* where the claimant sought general damages and special damages of Kshs 3,200/-. The case was withdrawn on April 9, 2014 against the client's insured and judgment was entered against the 3rd defendant therein.
- 8 Subsequently, the advocate filed the Advocate-client Bill of Costs in question. Contemporaneously, the Advocate filed a Notice of Election under Paragraph 22 of the [Advocates Remuneration Order](#) electing to charge fees under Schedule V Part II thereof.
- 9 In his Ruling, the taxing officer found that in the absence of an agreement between the advocate and the client to charge fees under Schedule 5 of the Advocates Remuneration Order, then the bill was to be taxed under Schedule 7 thereof. He then proceeded to tax the Bill at Kshs 53,825/=.
- 10 In his findings the Taxing Officer found that schedule 7 of the [Advocates Remuneration Order](#) of 2006 was applicable.
- 11 It is submitted by the applicant that the Taxing Officer erred in applying schedule 7 rather than schedule 5 of the [Advocates Remuneration Order](#), which the advocate had elected to apply.
- 12 It is clear that at the time of taxing the bill, the Taxing Officer was made aware of the advocate's election to use Schedule 5 rather than schedule 7. The Notice of Election was duly filed contemporaneously with the Bill of Costs as required. It is also clear that this was brought to the attention of the Taxing Officer at the beginning of the taxation. However, the Taxing Officer ruled that the bill was taxable under Schedule 7 of the Order.
- 13 The crucial issue to be determined is whether the taxing officer correctly applied the provisions of Schedule 7 and not Schedule 5. Paragraph 22(1) of the [Advocates Remuneration Order](#) provides that:-



Liberty to advocate to elect Schedule 5; election to be communicated to client in writing

- (1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.
- (2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) of this paragraph may not by reason of his election charge less than the scale fee under the appropriate Schedule.

14 In *Aldrin Ojiambo t/a Ojiambo & Co Advocates vs Mohamedraza Hussein Jagani & Another* Misc Cause 320/2005 (U.R) at Milimani the out dealt with the issue at hand. It was held as follows:-

The paragraph speaks for itself clearly... it is not open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate.”

15 Similarly, in *Nyamongo and Nyamongo Advocates vs Protex (k) EPZ LTD*, Machakos HCMCA 176 of 2007 it was held that:-

‘It is clear from the statement above that the learned Taxing Officer was wholly unaware that together with the Bill of Costs, the Applicant also filed the letter signifying the election and in the Bill of Costs itself, the Applicant again specifically put in the heading, “Advocates Bill of Costs under Schedule V”. The Applicant fully complied with paragraph 22 (1) aforesaid and the learned Taxing Officer like in the *Aldrin Ojiambo* case (supra) acted in error. The error is however so substantial that having acted on the wrong principle, the proceedings thereafter were all conducted wrongly to the prejudice of all the parties.’

16 Having considered the said decisions, which I agree with, I am of the view that the failure by the Taxing Officer to apply the 5th Schedule as elected by the Advocate was an error in principle. As stated, the decision lay with the advocate on which schedule to apply, and he duly complied by filing a notice of election alongside the bill of costs.

17 I am thus constrained to set aside the Ruling dated October 14, 2021 and direct that the Bill of Costs be remitted back before a different Taxing Officer to tax the bill afresh.

18 I have deliberately omitted to address the other issues as they may unfairly influence the decision of the Taxing Officer who is to take over the matter thereby diminishing his impartiality and independence.

19 There will be no orders on costs of the reference.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAKURU THIS 16TH DAY OF MARCH, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

N/a for parties

