**Mbai Waweru Advocates v Invesco Assurance Co Ltd (Miscellaneous Civil Application E197 of 2021) [2023] KEHC 2031 (KLR) (Civ) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2031 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E197 OF 2021**

**CW MEOLI, J**

**MARCH 9, 2023**

**BETWEEN**

**MBAI WAWERU ADVOCATES ..... APPLICANT**

**AND**

**INVESCO ASSURANCE CO LTD ..... RESPONDENT**

**RULING**

1. For determination is the chamber summons dated October 22, 2021by Mbai Waweru Advocates (hereafter the Applicant) seeking that the decision of the taxing officer dated September 30, 2021 on the bill of costs dated April 23, 2021 be set aside and the bill of costs be placed before a different taxing officer for taxation; or alternatively that the court in exercise of its inherent jurisdiction be pleased to re-tax the bill of costs dated April 23, 2021 afresh. The summons is expressed to be brought inter alia under Paragraph 11(2) & 4 of the *Advocates Remuneration Order*, on grounds on the face of the thereof amplified in the supporting affidavit sworn by Kairu Timothy Waweru, counsel for the applicant.

2. The gist of counsel's affidavit is that theapplicant filed a bill of costs dated April 23, 2021 and urged the court to tax the same at Kshs. 93,562.50/- however vide the taxing officer's decision delivered on September 30, 2021, the bill was taxed at Kshs. 53,348.00/- aggrieved by the said ruling, the Applicant filed this reference. That the taxing officer misapprehended and misapplied the principles on taxation and failed to apply the correct principles in Schedule 7 of the *Advocates Remuneration Order* 2006, 2009 & 2014, notably by failing to increase Item No. 1 by one half as provided for under Schedule 7 of the *Advocates Remuneration Order* 2006. He further deposes that the learned taxing officer failed to appreciate that Items 3, 4, 6-8 and 10-15 are provided for under Schedule VII of the *Advocates Remuneration Order* 2006, 2009 & 2014. In conclusion, he asserts that the taxing officer failed to appropriately apply the law when determining the bill of costs and thereby arrived at an improper decision.

3. The chamber summons was canvassed by way of written submissions. Counsel for the applicant essentially reiterated the contents of his affidavit material in his submissions and no useful purpose will be served by rehashing the submissions here. The Respondent did not file any response and or participate in the taxation or the instant proceedings despite service.

4. The court has considered the grounds of the reference as well as rival material and submissions. Equally, the court has perused the record herein. In *Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd* [1972] EA 162, Spry, V-P. stated at p.164 that:

> " 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 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."

5. The Court of Appeal in that case proceeded to lay down some principles to undergird the exercise of discretion by taxing officers in the assessment of costs as follows:-

> "
>
> " (a) that costs be not allowed to rise to such a level as to limit access to the courts to the wealthy only;
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> (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
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> (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
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> (d) that so far as practicable there should be consistency in the awards made."
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> See also *Rodgers Mwema Nzioka v The Attorney General & 9 others* (2007) eKLR and *Rogan Kamper v Grosvenor* (1978) eKLR.

6. The foregoing was affirmed by Ojwang J (as he then was) in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* (*supra*). The learned Judge observed that:-

> " Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated, and which are logical and conscientiously conceived. It is not enough to set out 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... Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that ends to be usurious; so far as possible, the taxing officer should apply the test of comparability; the taxing officer should endeavour to achieve objectivity when considering ill-defined criteria such as public policy, interests affected, importance of matter to parties, or importance of matter to the public; the taxing officer should clearly identify any elements of complexity in the issues before the Court – and in this regard should revert to the perception and mode of

analysis and determination adopted by the trial judge; the taxing officer ought to describe accurately the nature of the responsibility which has fallen upon counsel; the taxing officer should state clearly the nature of any novel matter in the proceedings; the taxing officer should determine with a measure of accuracy the amount of time, research and skill entailed in the professional work of counsel."

7. Similarly Ringera, J (as he then was) in *First American Bank of Kenya v. Shah & others* [2002] 1 E.A. 64 at p.69 to the stated;-

> " First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.... Of course it would be an error of principle to take into account relevant factors or to omit to consider relevant factors. And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and 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. Needless to state not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the Court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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."

8. With the foregoing principles in mind, the court has reviewed the grounds argued before it. The applicant's reference relates to Items 1, 3, 4, 6-8 and 10-15 in the bill of costs dated April 23, 2021. Firstly, the applicant's grievance regarding the award on instruction fees in Item 1 of the bill of costs is that the taxing officer failed to increase Item 1 in the bill of costs by one-half as prescribed under the Schedule 7 of the *Advocates Remuneration Order* 2006. In *Nanyuki Esso Services v Touring and Sports Club* (1972) E.A 500 the Court of Appeal stated that:-

> " In deciding whether a claim falls under any particular head, one must look at the substance of the claim and not the way it is expressed, but if a claim , or any part of it, clearly does not fall under any particular head , it must be treated under one of the residuary heads.".

9. The same court in *Joreth Limited v Kigano and Associates* [2002] 1 E.A 92 stated that:

> " We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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."

10. The taxing officer while correctly guided by the dicta in *Joreth Limited* proceeded to award Kshs. 25,200/- under Item 1. And in so doing expressed herself in part as follows;-

> " I have carefully considered the bill of costs filed by the Applicant herein. This is a matter the Applicant was instructed in the year 2007 and the same concluded in the year 2019 hence

the applicable *Advocates Remuneration (Amendment) Orders* are those of 2006/2009 and that of 2014.

Item No. 1 – Instruction Fees

It is not disputed that the Applicant herein was duly instructed by the Respondent as per the Respondent's letter dated August 23, 2007. The value of the subject matter cannot be discerned from the pleadings. This matter was dismissed for want of prosecution in the lower court.

The Law

The applicable law therefore is Schedule 7(2) of the *Advocates Remuneration (Amendment) Order* 2006 which states as follows.....

This item is therefore taxed at Kshs. 25,000.00 (Kshs. 19,300.00) is hereby taxed off." (sic)

11. A perusal of the record and material presented before the taxing officer for purposes of the taxation, reveals that the Applicant was duly instructed by the Respondent to defend Nairobi Milimani CMCC No. 9953 of 2006 in December 2006. The taxing officer correctly directed herself when she applied schedule 7 (2) of the *Advocates Remuneration Order* 2006 in assessing the taxable amount under Item 1 as the value of the subject matter could not be ascertained. However, the bill of costs was in respect of an Advocate-Client relationship. The *Advocates Remuneration Order 2006* at Paragraph B provides that; -

> " As between advocate and client the minimum fee shall be –
>
> (a) the fees prescribed in A above, increased by one-half; or
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> (b) the fees ordered by the court, increased by one-half; or
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> (c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences.

12. The implication of the foregoing provision of the *Advocates Remuneration Order*, is that all taxable or awardable Items under Part A of Schedule VII as between advocate-client are to be increased by one-half. Thus, the award of fees under item 1 ought to have been increased by one-half. That increase would affect item 2 on VAT chargeable.

13. Secondly, in respect of Items 3, 4, 6-8 and 10-15 relating to drawings and attendances, the taxing officer in her ruling while addressing herself to the foregoing items stated in her ruling as follows; -

> " Items No. 3, 4, 6-8, 10-15
>
> These items are taxed off as they are not provided for under Schedule 7 of the *Advocates Remuneration Order* 2006/2009 and 2014. Furthermore the Applicant does not describe the pleadings he attended to file in chambers." (sic)

14. Items 3 & 4 relate to drawing whereas Items 6-8 & 10-15 relate to various attendance by counsel in chambers in respect of Nairobi Milimani CMCC No. 9953 of 2006. Under Schedule 7 of the *Advocates Remuneration Order* 2006, 2009 and 2014 there is no provision for fees in respect of drawing of pleadings such as memorandum of appearance and defence. However, concerning attendances to chamber and or hearing the schedule explicitly provides for the same (See;- Schedule 7 (6) and (7). The taxing officer in her ruling seems to have construed the attendances by the applicant to relate

attendances for purposes of filing pleadings. This was an erroneous deduction as the items in question related to attendances by counsel in chambers in respect of Nairobi Milimani CMCC No. 9953 of 2006.

15. The Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR stated as follows;-

> " 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:
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> "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".

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel (No. 2),* [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - *D'Souza v Ferrao* [1960] EA 602. The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji v Kanji Naran Patel (No. 2)* (*supra*).

16. In the result, the applicant's reference is found to be merited and is allowed with costs. The decision of the taxing officer dated September 30, 2021 set aside and the bill of costs will be taxed afresh before a different taxing officer.

**DELIVERED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF MARCH 2023**

**C.MEOLI**

**JUDGE**

**In the presence of:**

Mr. Kamau for the Applicant

Respondent: N/A

C/A: Carol