Hamilton Harrison & Mathews v Ngengi (Miscellaneous Civil Application 428 of 2017) [2023] KEHC 3759 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION 428 OF 2017

EC MWITA, J

APRIL 20, 2023

BETWEEN

HAMILTON HARRISON & MATHEWS ..... ADVOCATE

AND

MUMBI NGENGI ..... CLIENT

RULING

Introduction

1. This ruling determinations two applications. Chamber Summons dated 10th June 2021 by the client challenging the taxing officer's decision dated 5th May 2021 (First application) and Notice of Motion dated 5th July 2021 by the advocate, seeking entry of judgment on taxed costs, (Second application).

Background

2. The background leading to these applications is that the client instructed the advocate to represent her in HCCC Misc. Appl. 547 of 2012. The matter concerned insolvency proceedings with respect to Blue Shield Insurance Company Limited in which the client was a director and shareholder and was interested in ending the receivership.

3. The advocate raised the fee note dated 23rd December 2013 for Kshs. 1,495,000.00 which was paid in December 2014; The fee note dated 1st October 2014 for Kshs. 1,356,600 of which the client paid Kshs. 1,000,000 and the deposit request note dated 6th April 2016 for Kshs. 1,581,460 which factored in the outstanding balance from the previous fee note.

4. The client declined to pay the outstanding balance which forced the advocate to file advocate/client bill of costs dated 19th October 2017 drawn against two proceedings to wit; HC Misc. No. 547 of 2012 and JR No. 269 of 2014.

5. In a ruling dated 6th November 2018, the taxing officer struck out the bill of costs on the premise that there was a retainer agreement between the parties and that the client's claim that she did not issue instructions with respect to JR A. No. 269 of 2014.

6. Dissatisfied, the advocate filed a reference against the taxing officer's ruling of 6th November 2018. In a ruling dated 7th February 2020, the Court partly set aside the taxing officer's decision. The Court found that there was no retainer agreement with respect to HC Misc. No. 547 of 2012. The Court further found that since Misc. No. 547 of 2012 and JR A. No. 269 of 2014 were consolidated and heard together and a single ruling delivered, the taxing officer was right to strike out the items relating to JR A. No. 269 of 2014.

7. Subsequently, the taxing officer considered the bill of costs in HC Misc. No. 547 of 2012 and in a ruling dated 5th May 2021, allowed instruction fee at Kshs. 5,000,000, triggering the present applications.

First application

8. The first application, is brought under rule 11 of the Advocates Remuneration Order, seeking to set aside taxing officer's decision with respect to Item 1 on instruction fees in the Advocate-Client bill of costs dated 19th October 2017 and that the bill of costs be taxed afresh.

9. The application is premised on the grounds on its face, the supporting affidavit by Paul Maingi Musyimi on 10th June 2021 and written submissions dated 22nd October 2021.

10. The client argues that the taxing officer erred in principle by misapplying the relevant provisions of the Advocate Remuneration Order and allowed erroneous amount. In the client's view, the subject matter was a winding up petition in which Schedule 6 (A) (f) was applicable. The client again argues that since this (bill of costs dated 19th October 2017) was advocate-client bill of costs, Schedule 6(B) of the Advocate Remuneration Order was applicable in determining the increase.

11. The client asserts that instruction fees ought to have been taxed at Kshs. 37,800 and, therefore, the taxing officer erred by taxing allowing instruction fees of Kshs. 5,000,000, as he enhanced the instruction fees by 132% without good reason.

12. The client again asserts that instruction fee was manifestly and excessively enhanced thus the taxing officer improperly exercised his discretion calling for this court's interference. It is the client's view that the amount of work done and due diligence exercised was not complex to justify the increase of instruction fee by 134%. the client argues that the taxing officer assumed that the advocate fully defended the client's case and resolved the insolvency petition yet the company is still battling insolvency,

13. The client relies on Peter Muthoka & another v Ochieng' & 3 others (CA Civil Appeal No. 328 of 2017) [2019] eKLR, that judicial discretion ought to be exercised on settled principles and that it may be interfered with either where it is shown or where it is manifest from the case as a whole that it was exercised improperly; Satnam Sigh Bahra v Joseph Mungai Gikonyo T/A Garam Investments & another (Civil Suit 467 of 2002) [2012] eKLR, that research by an advocate is not necessarily indicative of complexity of a matter; and Kamunyori & Company Advocates v Development Bank of Kenya Limited (CA Civil Appeal No. 206 of 2006) [2015] eKLR, that if instruction fee is arrived at on the wrong principles, it will be set aside.

14. The client further relies on Akhtar Shahid Butt & another v David Kinusu Sifuna t/a Sifuna & Co. Advocates (CA Civil Appeal No. 45 of 2005) [2009] eKLR, a matter involving winding up proceedings, where the Court set aside a ruling of the taxing officer as it was based on an incorrect rule.

15. Finally, the client argues that the taxing officer erred by considering items that constituted disbursements under JR 269 of 2014. The client relies on Ngatia & Associates Advocates v Interactive Gaming & Lutteries Limited (Judicial Review Misc. Application No. 8 & 9 of 2016) [2017] eKLR where the Court held that disbursements should not be subject to VAT.

Response

16. The advocate opposes the application through grounds of opposition and written submissions. The advocate' position is that the application has no merit as the advocate's bill of costs dated 13th August 2020 was drawn to scale; that the client has not shown that the taxing officer committed an error of principle; that the value of the subject matter was more than Kshs. 800,000,000 the investment the client sought to protect when instructing the advocate to act and the value of the subject matter was discernable from; a) the affidavit of Beth Muigai sworn and filed on 15th August 2014 (paragraphs 39, 40 and 41); the affidavit of Sammy M. Makove sworn and filed on 21st July 2015 (paragraph 6 (ii)

17. According to the advocate, the taxing officer was fair in allowing instruction fee at Kshs. 5,000,000, thus the application is an abuse of the court process and is intended to delay and frustrate the advocate's quest for reasonable compensation for the services rendered.

18. The advocate maintains that the client has not shown that the taxing officer committed an error of principle. The advocate relies on Republic v Minister for Agriculture & 2 others Ex parte Samuel Muchiri W'njuguna & 6 others (Misc. Civil Application No. 621 of 2000) [2006] eKLR, that a court will not interfere with a taxing officer's decision merely because it thinks the award somewhat too high or too low, but where there's an error in principle.

19. Although the advocate concedes that the taxing officer erred in holding that the value of the subject matter was not ascertainable, it contends the award of instruction fees of Kshs. 5,000,000 was fair. This is because from the affidavits sworn by Beth Muigai and Sammy M. Makove of 15th August, 2014 and 21st July 2015, the value of the subject matter was more than Kshs. 800,000,000.

20. The advocate asserts that the taxing officer properly assessed the value of the work done; that they represented the client for three years (from 8th August 2013 until 18th April 2016) when she changed advocates. During that period, the advocate received instructions, perused court documents and filed various documents. Due to the complexity of the matter, the advocate spent more than 100 hours in extensive research, prepared and considered various applications made and successfully argued the applications leading to their dismissal and in the end, protected the client's interest.

21. The advocate relies on Unilever PLC v Bidco Refineries Limited, (Milimani HCCC 1447 of 1999) for the assertion that it is prudent for a taxing officer to take into account an affidavit which sheds light on the figures that the plaintiff considers relevant; and Masore Nyang'au & Company Advocates v Kensalt Limited (Misc. App No. 196 of 2015) [2019] eKLR, that it is a fallacy to suppose that in determining the value of the subject matter, the court can only look at pleadings or judgment or settlement.

22. The advocate further cites Ochieng' Onyango Kibet and Ohaga Advocates v Adopt-A-Light Limited (Misc Cause 729 of 2006) [2018] eKLR that the taxing officer must consider among other things, the labour that an advocate needs to expend and the complexity of the dispute while assessing the costs to award.

Second application

23. The second application is brought under section 51(2) of the *Advocates Act* for judgment Kshs. 3,438,146 with interest at court rates from 5th May 2021 until payment in full, and costs of the application.

24. The advocate urges the court to grant the application because it is merited. According to the advocate, the certificate of taxation dated 22nd July 2021 was issued and there is no dispute that the advocate's bill was taxed at Kshs. 3,438,146 but the client has not settled the taxed costs.

25. The client opposes the application contending that the second application is an afterthought since it was filed after the first application. The client also argues that the second application impinges on its right to be heard and the right to pursue an appeal.

Determination

26. As stated at the beginning of this ruling, there are two applications: one by the client to set aside the taxing officer's decision and the other by the advocate for judgment on the taxed costs. For convenience, the court will deal with the application for setting aside first for the reason that its success or failure will determine the fate of the application for judgment.

Setting aside

27. The client challenges the decision of the taxing officer dated 5th May 2021 on items 1, instruction fee in the Advocate-client bill of costs dated 19th October 2017. The taxing officer allowed item 1 at Kshs 5,000,000 which the client argues was high and erroneous. As it is, the reference challenges the bonafides of the taxing officer's decision on instruction fee only.

28. The principle underlying award of costs was explained in Manindra Chandra Nandi v Aswini Kumar Acharaya ILR [1921] 48 Cal. 427 as follows:

> We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.
>
> (See also Vinod Seth v Devinder Bajaj & another (C. A. No. 481 of 2010)).

29. Quite often, clients instruct advocates to represent them in proceedings in court or other matters. An advocate who acts on the client's instructions is entitled to fair and adequate remuneration for work done on behalf of the client through payment of legal fees, where agreed, or taxation of advocate/client bill of costs if there is disagreement on fee payable. The Advocate Remuneration Orders regulates the fee an advocate is to charge his client based on the subject matter of the dispute or other factors and considerations.

30. The advocate's instruction fee is the amount of party and party costs increased by one half. For that reason, the principle that costs recompense and indemnify a party for what appears to the court to be

the legal expenses incurred by the party in prosecuting the suit or his defence would equally apply to the advocate so that an advocate is fairly and adequately remunerated for the professional work rendered to the client.

31. Taxing bill of costs is an exercise of discretion by the taxing officer. In that regard, the law is settled that this court will not interfere with exercise of that discretion unless the taxing officer has erred in principle. (Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another [1972] EA 162); Rogan-Kemper v Lord Grosvenor (No.3) [1977] KLR 303; [1977] eKLR: Bank of Uganda v Banco Arabe Espaniol, Civil Application No. 29 of 2019)).

Instruction fee

32. The client has blamed the taxing officer for applying wrong principles when determining instruction fee. According to the client, the taxing officer failed to take into account and apply Schedule 6(A) (f) of the Advocates Remuneration Order 2014 which provides a fee of Kshs. 25, 200 for presenting or opposing proceedings under rule 5(1) of the *companies Act* (winding up petitions.

33. The Advocate supports the taxing officer's decision, arguing that instruction fee is charged once; the taxing officer correctly applied the Advocates Remuneration Order and the subject matter being Kshs. 800,000,000 was disclosed in the affidavits by the client.

34. I have perused the impugned decision by the taxing officer and the record. The client instructed the Advocate to act in Misc. Application No.547 of 2012 There is no dispute and none has been raised, that the applicable Advocates Remuneration Order was that of 2014.

35. The taxing officer considered arguments by parties and stated:

> On instruction, I do agree with the respondent that there is no specific document the applicant has made reference to that puts the value of the subject matter at Kshs. 800,000,000.
>
> Even if it was worth that kind of amount, the fact that it was placed and still is under statutory management is a clear indication that it cannot comfortably meet its financial obligations.
>
> I however, wish to acknowledge that the amount of work done and due diligence exercised is saving the company from sale by convincing the court to rule in the company's favour. It is on the basis of the acknowledgement of the work done rather than the basis of the value of the subject matter (sic). I shall exercise discretion and assess instruction fee at Kshs. 5,000,000."

36. The taxing officer reasoned that figure (Kashs. 5,000,000) took into consideration the fact that JR 269 of 2014 was also dealt in Misc. Application No. 547 of 2012.

37. The client argues that since the taxing officer had found that there was no identifiable subject matter, there was no basis for allowing instruction fee at Kshs 5000,000 merely on the basis of the work done. The advocate contends that the value of the subject matter was identifiable in the affidavits filed by the client.

38. I note that the advocate has not challenged the taxing officer's finding that the value of the subject matter was not identifiable. This court cannot, therefore, address an issue that has not been formally raised through a reference.

39. Turning to instruction fee, the law is settled on how instruction fee should be determined. In Joreth Ltd v Kigano & Associates Advocates [2002] eKLR, the court laid down the principle to be considered in determining instructions fee, thus:

> [T]he 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 and all other relevant circumstances.

40. This decision makes the point that where the value of the subject matter is not so ascertainable, the taxing officer uses his discretion to assess such instruction fee as he considers just. in doing so, the taxing officer takes into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties and the "general conduct of the proceedings."

41. In the absence of ascertainable value of the subject matter, the taxing officer appreciated the amount of work done and due diligence exercised in saving the company from sale by convincing the court to decide in the company's favour. That is, the taxing officer took into account the general conduct of the proceedings in assessing instruction fee he considered just. In this regard, the taxing officer exercised his discretion as allowed by law.

42. The client argues that Schedule 6(A) (f) of the Advocate Remuneration Order 2014 provides for Kshs. 25,200 in prosecuting or defending winding up proceedings under the *Companies Act* which the taxing officer should have applied. It must be clear that the Advocates Remuneration Order gives the minimum and not the maximum fee to be charged. That is why the law allows the taxing officer to use his discretion and increase the amount depending on the factors espoused in the Joreth v Kigano decision.

43. Where the taxing officer exercises his discretion, this court will not readily interfere with that discretion unless it is shown that the discretion was wrongly exercised and occasioned injustice.

44. In Rogan-Kemper v Lord Grosvenor (No.3) [1977] KLR 303; [1977] eKLR, Law, JA stated that a judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.

45. Where the issue is on quantum, the law is that this court is not to interfere with the quantum unless it be shown that the taxing officer wholly went wrong.

46. This position was stated by Buckley, L. J in the Estate of Ogilvie, Ogilvie v Massey [1910] P 243, 245, thus:

> On question of quantum, the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing master is shown to have gone wholly wrong.

(See also De Souza v Ferrao [1960] EA 602)

47. In Arthur v Nyeri Electricity Undertaking [1961] EA 492, it was stated that the court will interfere where there has been an error in principle; but questions solely of quantum are regarded as matters which the taxing officers are particularly fitted to deal with and the court will only interfere in exceptional cases.

48. The client's argument that the taxing officer should have allowed instruction fee at Kshs 25,200 is not proof that the taxing officer was in error because he took into account the general conduct of the matter and allowed instruction fee of Kshs. 5,000,000.

49. I have gone through the record and note that the proceedings in Misc. Application No. 547 of 2012 were not attached to this reference to enable this court determine whether or not instruction fee allowed was commensurate with the work the advocate did. As it is, the court would be speculating were it to adjudge the taxing officer to have erred in principle.

50. As the Supreme Court of Uganda (Mulenga, JSC) stated in Bank of Uganda v Banco Arabe Espaniol, (Civil Application No. 29 of 2019):

> [S]ave in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters which the taxing officer is particularly fitted to deal, and which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by a taxing officer, merely because in his opinion, he should have allowed a higher or lower amount...Even if it is shown that the taxing officer erred in principle, the judge should interfere only if satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. (Emphasis).

51. see also Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another [1972] EA 162 where Spray, Ag VP. stated 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 the taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat so high or so low as to amount to an injustice to one party or the other

52. Having considered the reference, the response and submissions, I am unable to agree with the client that the taxing officer committed an error of principle calling on this court's interference to his discretion. I find no merit in the reference and dismissed it with costs.

53. With the dismissal of the application for setting aside the taxing officer's decision, what remains is the Advocate's application for judgment on the taxed costs. The application seeks judgment for Kshs. 3,438,146 with interest at court rates from 5th May 2021 until payment in full. The Advocate also prays for costs of the application.

54. There is no reason why the application should not be allowed given that the objection against it has been disposed of in the negative.

55. in the premise, the application dated 5th July 2021 is allowed. Judgment is entered in favour of the advocate for Kshs. 3,438,146 with interest at court rates from the date of this judgment. Costs of the application to the Advocate.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023

E C MWITA

JUDGE