



**Mbai Waweru Advocates v Invesco Assurance Co Ltd (Miscellaneous Civil Application E192 of 2021) [2023] KEHC 3736 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3736 (KLR)

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

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E192 OF 2021**

**CW MEOLI, J**

**APRIL 20, 2023**

**BETWEEN**

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

**AND**

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

**RULING**

1. For determination is the chamber summons dated October 22, 2021 by Mbai Waweru Advocates (hereafter the applicant) seeking that the decision of the taxing officer delivered on September 30, 2021 on the bill of costs dated April 23, 2021 be set aside and that the bill of costs be taxed afresh before a different taxing officer or alternatively, that this 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 as amplified in the supporting affidavit sworn by Kairu Timothy Waweru, counsel for the applicant.
2. The gist of counsel's affidavit is that the applicant filed a bill of costs dated April 23, 2021 and urged the court to tax the same in the sum of Kshs 289,547.50/-. That the taxing officer by a decision delivered on September 30, 2021 taxed the bill at Kshs 85,627.50/- and aggrieved by the said ruling, the Applicant filed this reference.
3. It is asserted that the taxing officer misapprehended and misapplied the principles of taxation and the correct principles in Schedule 7 of the [Advocates Remuneration Order](#) 2006, 2009 & 2014, notably 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, 7-9, 11-13, 16, 18-20, 22, 25 & 31-33 in relation to attendances are provided for under Schedule 7 of the [Advocates Remuneration Order](#) 2006, 2009 & 2014. In conclusion, he asserts that taxing officer failed to apply the law when determining the bill of costs and thereby arrived at an improper decision.



4. The chamber summons, like the bill of costs, was unopposed and was canvassed by way of written submissions. The Respondent did not file any response and or participate in the proceedings despite service.
5. The Applicant's submissions essentially reiterated the contents of counsel's affidavit material. Counsel contended that the taxing officer misapplied the principles of taxation and failed to apply the correct principles in schedule VII of the Advocates Remuneration Orders 2006, 2009 & 2014. That the foregoing Schedule prescribes that the Advocate-Client fees shall be increased by one-half. It was further argued that the learned taxing officer further failed to appreciate Items 3, 7-9, 11-13, 16, 18-20, 22, 25 & 31-33 in relation to attendances in line with the Advocates Remuneration Orders 2006, 2009 & 2014 and thereby arrived at an improper decision. In conclusion, the court was urged to allow the chamber summons by setting aside the taxing officer's decision dated September 30, 2021 and to order that the bill of costs be placed before a different taxing officer.
6. The Court has considered the grounds of the reference as well as the affidavit 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, VP 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.”

7. 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;
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- (d) that so far as practicable there should be consistency in the awards made.”

See also Rodgers Mwema Nzioka v The Attorney General & 9 others (2007) eKLR and Rogan Kamper v Grosvenor (1978) eKLR.

8. 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.”

9. Similarly Ringera, J (as he then was) in *First American Bank of Kenya v Shah & others* [2002] 1 EA 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.”

10. With the foregoing principles in mind, the court has reviewed the grounds argued before it. The applicant’s reference is specific to Items 1, 3, 7-9, 11-13, 16, 18-20, 22, 25 & 31-33. Particular attention was drawn to instruction fees, attendances, and drawings in line with the Advocates Remuneration Orders 2006, 2009 & 2014. Regarding Item 1 of the bill of costs, it was contended that the taxing officer failed to increase it by one-half as prescribed under Schedule VII of the *Advocates Remuneration Order* 2006.

11. The Court of Appeal in *Joreth Limited v Kigano and Associates* [2002] 1 EA 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.”



12. The taxing officer while seeking guidance from the dicta in *Joreth Limited* proceeded to award Kshs 30,000/- under Item 1. And in so doing expressed herself in part as follows;-

“I have perused the list of documents and I find that the Applicant only entered appearance and filed a defence. The court has discretion to enhance instructions fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel.

The court must ensure that the advocates instruction fees is to seek and has more and no less than reasonable compensation for professional work done.

.....

I have carefully considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter.

.....

I am fairly convinced that the basic fee applicable is governed by Schedule 7 (2) of the *Advocates Remuneration (Amendment) Order 2006*.

On the question of increase on the aforesaid basic fee and this being an Advocate-Client Bill of Costs, I am of the considered view that Kshs 30,000.00 is reasonable instruction fees under the circumstances (Kshs 137,500.00) is hereby taxed off.” (sic)

13. 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. 11653 of 2004 in June 2007. The taxing officer was correctly cognizant of the applicability of Schedule 7(2) of the Advocates Remuneration Order 2006 in assessing the taxable amount under Item 1. However, the taxing officer erroneously applied herself by taxing the same at Kshs 30,000/-. From the material presented before the taxing officer, the value of the subject matter could not be ascertained, though it appears that the lower court matter proceeded to conclusion by dint of the letter to the Respondent dated August 4, 2014. The bill of costs was in respect of an Advocate-Client relationship. Schedule 7(2) of 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
- (b) the fees ordered by the court, increased by one-half; or
- (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.

14. 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 thus equally affect Item 2 on VAT chargeable.



15. Secondly, in respect of Items 3, 7-9, 11-13, 16, 18-20, 22, 25 & 31-33. relating to drawings and attendances, the taxing officer in her ruling stated 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.

Items No. 4-6, 10, 14, 15, 17, 20, 23, 24, 26-30, 34, 35,37-39,41,44-50

These items relate to service, attendances, drawing the Bill of Costs, making copies and disbursements which are supported by receipts. I tax them as drawn” (sic)

16. Items 3, 13 & 22 relate to drawings of which are not provided under the applicable schedule whereas Item 16 relates to drawing of an affidavit of service which is provided for. Items 7-9, 11, 12, 18-20 & 31-33 relate to various attendance by counsel in chambers in respect of Nairobi Milimani CMCC No. 11653 of 2004. 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, defence, notice of motion, notice of appointment and notice to produce. However, an award in terms of drawings in respect of an affidavit of service is allowed. Concerning attendances to chambers and or hearing, the schedule explicitly provides for the same (See;- Schedule 7 (5), (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. 11653 of 2004.

17. 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:

“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*).



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

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Mr. Kamau

For the Respondent: N/A

**C/A: Carol**

