



REPUBLIC OF KENYA



Majanja Luseno & Company Advocates v Jamii Bora Bank (Miscellaneous Civil Application E392 of 2022) [2023] KEHC 3429 (KLR) (Commercial and Tax) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E392 OF 2022**

JWW MONG'ARE, J

APRIL 18, 2023

BETWEEN

MAJANJA LUSENO & COMPANY ADVOCATES APPLICANT

AND

JAMII BORA BANK RESPONDENT

RULING

1. The application before this court is a reference dated May 20, 2022 challenging the taxing master's decision in the advocates-client bill of costs dated October 15, 2021 in miscellaneous application No E759 of 2021. The notice of motion is brought under rule 11(2) of the *Advocates (Remuneration Order, 2009*, section 51 (2) of the *Advocates Act*, cap 16, Laws of Kenya and all enabling provisions of the law seeking the following orders: -
 1. That this honourable court be pleased to set aside the decision respecting the assessment of fees under items 1 and 2 of the advocates /clients bill of costs dated October 15, 2021 and the consequent certificate of taxation dated April 28, 2022.
 2. That this honourable court be pleased to remit the advocate/client bill of costs dated October 15, 2021 to another taxing officer other than Honourable E. M Nyakundi for taxation.
 3. That in the alternative, this honourable court be pleased to exercise inherent jurisdiction and re-tax items number 1 and 2 relating to instructions fees and getting up fees of the applicant's advocate/client bill of costs dated October 15, 2021.



4. That costs of the reference be awarded to the applicant.
 5. That this honourable court do issue such other orders as it may deem fit and just.
2. The application is supported by the grounds set on the face of it and the supporting affidavit of Mercy Musau. The application is opposed and the respondent filed grounds of opposition dated October 7, 2022 and a replying affidavit sworn on the November 2, 2022 by Jackson Kimathi, the head of legal department of the respondent bank.
 3. Both parties have filed written submissions and their respective list of authorities. Both parties appeared before the court to highlight their submissions.
 4. It is the applicant's case that the taxing master erred in principle while taxing items 1 and 2 of the advocates /client's bill of costs. The applicant avers the instructions fees in the impugned bill of costs was based on claim arising out of outstanding loan balance of Kshs 5,795,495.76 and that ought to have been the basis upon which the instruction fees under item were taxed at. Instead, the applicant submitted that, in error of principle, the taxing master based the amount awarded under item 1 on a valuation report that set the forced market value of the land upon subject matter of the suit at Kshs 750,000 and awarded the sum of Kshs 65,000 in place of Kshs. 335,909.90 which had been pleaded under item No 1 on the bill of costs.
 5. Secondly, the plaintiff alleges that under item 2 on getting up fees the taxing master struck off the item. The applicant argues that schedule 6(2) of the *Advocates (Remuneration)(Amendment) Order, 2014* provides for getting up fees in a defended suit where an advocate takes steps to prepare for trial. The applicant argues that this suit was defended by the respondent (chargor) who filed a replying affidavit on the July 9, 2018 and the applicant did indeed take steps to prepare for the hearing of the originating summons and went ahead to obtain the orders for the respondent/client. It is the position taken by the applicant this was a suit like any other and that the same required the advocate to make preparations to put forward its client's case. The applicant submitted that the taxing master made an error of principle in striking off item No 2 on the advocates/client's bill of costs.
 6. To buttress their submissions the applicant referred the court to its list of authorities dated December 7, 2022.
 7. The respondent filed its grounds of opposition and a replying affidavit opposing the application herein. The respondent argues that the taxing master was right and applied the right principles under the *Advocates(Remuneration)(Amendment)Order 2014* in taxing off the item 1 under instructions fees to Kshs 65,000 and striking off the item No 2 under getting up fees.
 8. The respondent argues that the suit subject matter of the advocates/client bill of costs here were for the advocates to seek leave for the respondent to exercise its statutory power of sale over an informal charge on the property known as LR No Magumoini/Ituguru/2423 which he did and for the recovery of the loan amount outstanding at the time at Kshs 5,795,496.76. Therefore, the respondent submits that the assessment of legal fees based against the valuation of the above property was a correct one.
 9. On the issue of getting up fees the respondent argues that this suit having been brought through an originating summons application, was argued by way of affidavit evidence and as such there were no getting up activities by the advocate to warrant charging fees for getting up.
 10. The respondent cited several authorities to buttress its arguments as per its list of authorities dated February 22, 2023.



11. Both parties have identified two issues for determination which I will merge into one, to wit;
- “Whether the taxing master erred in principle in taxing off item 1 and 2 on the advocates/ client bill of costs dated October 15, 2021 and the subsequent certificate of taxation issued on April 28, 2022.”
12. I note that it is not disputed that there was a client-advocate relationship between the parties. I also note that the suit was commenced by way of originating summons and that as pleaded the suit was necessitated because of an outstanding loan balance of Kshs 5,795,495.27 which the client was seeking to recover and hence the need to formalize the charge over the debtors property through the orders sought for enforcement of the respondents statutory power of sale over LR No Magumoni/ Itugururu/2423 and which orders were subsequently obtained.
13. In taxing the bill of costs, the taxing master based the fees under item 1 on instruction fees on the valuation of the said property instead of the loan balance, which factor the applicant takes issue with. As stated by the Court of Appeal case of *Joreth Limited v Kigano & Associates* (2002) 1 EA held that “where the value of the subject of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement”. In the application before this court, the same was discernable from the pleadings. The reason why the respondent was seeking to enforce an informal charge was because there was an outstanding loan balance of Kshs 5,795,495.27. In my view, the taxing master ought to have relied on this figure in computing the item for instruction fees and not be guided by a value that was neither pleaded nor entered in judgment. I therefore concur with the submissions by the applicant that this was an error of principle on the part of the taxing master under item 1.
14. As relates to item 2 of the bill of costs on getting up fees, I note that the taxing master struck off this item. The submissions by the applicant are to the effect that the originating summons was a suit like any other that required the advocate to make the necessary preparations for the same. This was a defended suit and as envisioned by schedule 6(2) fees for getting up or preparation for trial are allowed. The said section states as follows: -
- “In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation: Provided that—
- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
 - ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
 - iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.”
15. The respondent have argued that the suit herein was brought by way of an originating summons and not a plaint and therefore the same did not require as much effort in prosecuting if the same had been brought by plaint. The *Advocates(remuneration)(Amendment) Order, 2014* schedule 6(1)(a) envisions



a suit to include (a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and— That value exceeds but does not exceed

- i. Kshs 500,000 - 45,000
- ii. 500,000 - 750,000 - 65,000
- iii. 750,000 - 1,000,000 - 75,000
- iv. 1,000,000 - 20,000,000 fees as for Kshs 1,000,000 plus an additional 1.75%
- v. Over 20,000,000 fees as for 20,000,000 plus an additional 1.5%.

16. Furthermore, section 2 of the Civil Procedure Act, under definitions, defines pleadings as follows: -

- a. “pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant”

17. The taxing master erred in principle in basing his assessment on the bill of costs on parameters not provided for by the law and this was indeed an error on principle on his part. Similarly, in my view, the suit before the court was a suit like any other in which the advocate needed to prepare and was therefore entitled to getting up fees as provided for under the Advocates (Remuneration)(Amendment) Order, 2014. Flowing from the above analysis, I am satisfied that the application before me has merit and I shall allow it.

18. In conclusion, I direct that the advocates/client bill of costs dated October 25, 2021 be submitted back for taxation taking into consideration the above findings. Costs of this reference to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF APRIL 2023

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J. W. W. MONGARE

JUDGE

In the presence of:

Ms. Musau for the Applicant

Mr. Obam holding brief for Kuria for the Respondent

Sylvia- Court Assistant

